

Calculating holiday entitlement for part-year and irregular hours workers

Response of the Association of School and College Leaders

A. Introduction

1. The Association of School and College Leaders (ASCL) represents over 24,000 education system leaders, heads, principals, deputies, vice-principals, assistant heads, business managers and other senior staff of state-funded and independent schools and colleges throughout the UK. ASCL members are responsible for the education of more than four million children and young people across primary, secondary, post-16 and specialist education. This places the association in a strong position to consider this issue from the viewpoint of the leaders of schools and colleges of all types.
2. ASCL welcomes the opportunity to contribute to this consultation.

B. Key points

3. In the Supreme Court's ruling on the *Harpur Trust v Brazel* case, it was acknowledged that the Working Time Regulations 1998 take a more generous approach to holiday entitlement for part-year workers than European Union Law would have required, and that in some situations this could result in a part-year worker being entitled to a more generous holiday entitlement than a full-time worker. It was also acknowledged that there was no obligation for full-time workers to be treated more (or indeed, less) favourably than part-year workers. However, the prospect of a part-year worker being disproportionately advantaged was viewed as unusual and therefore unlikely to impact many employers.
4. Following the ruling, employers have been amending their holiday pay arrangements for their part-year workers, and in some cases this has included making contractual changes to reflect the current legal requirements.
5. The unexpected launch of the consultation by the Department for Business, Energy and Industrial Strategy (DBEIS) into a review of Working Time Regulations so that part-year workers' holiday entitlement is set using a reference period has caused a high degree of uncertainty. DBEIS is deliberating what steps to take in light of the *Harpur Trust v Brazel* decision, such as whether to backpay affected staff, settle Employment Tribunal claims which have been entered, or not do anything which could lead to a larger liability. This is having a particularly negative impact on employers in the education sector, who already have tight budgets and are facing financial challenges. Employers need clear legal guidance urgently, and our members who may be seeking to settle pay claims need closure.
6. We are concerned that the proposals set out in the consultation are misguided in that they aim to find a methodology which will be 'fair'. This is, of course, a laudable principle. However, the notion of fairness is subjective, and it is not clear who this is

trying to be 'fair' to. The proposed methodology ignores the unique circumstances and contexts that exist between different types of part-year workers and therefore the impact is not equitable across the group of workers as a whole.

7. We are also concerned that the implementation of the proposals has not been fully considered and that there are some significant issues that will arise should they be adopted, which include a number of equality concerns.

C. Answers to specific questions

About You

Question 1: What is your name?

8. The Association of School and College Leaders

Question 2: What is your email address?

9. info@ascl.org.uk

Question 3: What is your organisation?

10. Trade Union and Professional Association

Question 4: Are you happy for your response to be published?

11. Yes.

Question 5: Are you (select the appropriate option):

- **An individual**
- **An employer**
- **Representing employers' or employees' interests**
- **Other (please specify)**

12. Representing employers' or employees' interests.

Question 6: Are you (select the appropriate option):

- **An employer or someone who is responding on behalf of an employer**
- **Employed (you are an employee or a worker)**
- **Self-employed**
- **Unemployed – Looking for work**
- **Unemployed – Not looking for work**
- **Retired**
- **Not looking for work – Other (please specify)**

13. As indicated in question five, we represent employees.

If you are an employer:

Question 7: How would you classify your organisation?

- **Private sector organisation**
- **Public sector organisation**
- **Charity or voluntary sector organisation**
- **Other (please specify)**

14. Not applicable.

Question 8: How many people work for your organisation?

- **Micro business (<10 people)**
- **Small (10-49 people)**
- **Medium business (50-249 people)**
- **Large business (250+ people)**
- **Don't know**

15. Not applicable.

If you are employed:

Question 9: What type of organisation do you work for?

- **Private sector organisation**
- **Public sector organisation**
- **Charity or voluntary sector organisation**
- **Other (please specify)**

16. Not applicable.

Question 10: How many people work for your organisation?

- **Micro business (<10 people)**
- **Small (10-49 people)**
- **Medium business (50-249 people)**
- **Large business (250+ people)**
- **Don't know**

17. Not applicable.

If you are an agency worker:

Question 11: What are your contractual arrangements?

- **Contract for services with employment business**
- **Contract of service (employment) with employment business**
- **Contract for services with umbrella company**
- **Contract of service (employment) with umbrella company**
- **Limited company contractor / personal service company**
- **Other (please specify)**
- **Don't know**

18. Not applicable.

Question 12: How often do you receive holiday pay and entitlement?

- **During assignments**
- **At the end of assignments only**
- **Other (please specify)**
- **Don't know**

19. Not applicable

If you represent employers or employees:

Question13: Who do you represent?

- **A trade union**
- **An industry or employers' association**
- **Other (please specify)**

20. A trade union.

Current position on calculating holiday entitlement

Question 14: For employers: If you employ workers with irregular hours, how do you calculate their holiday entitlement?

21. Not applicable.

Question 15: For workers: If you work irregular hours, how is your holiday entitlement calculated?

22. Not applicable.

Introducing a 52-week holiday entitlement reference period

Question 16: For employers: Would you agree that the information you currently collect to calculate holiday pay would be sufficient to calculate holiday entitlement using a reference period?

- **Strongly agree**
- **Agree**
- **Neither agree nor disagree**
- **Disagree**
- **Strongly disagree**
- **Don't know**

23. We have responded to this question as our members are school leaders, many of whom are responsible for data collection and the calculation of holiday pay.

24. Before answering this question in principle, we must point out that there are details missing in the proposals that make this, in part, a theoretical response. In order to be able to answer fully, we would need a clear definition of those in scope of the new proposals.

25. Notwithstanding the point above, schools *should* have enough information to calculate holiday entitlement using a reference period, particularly for term-time only staff such as teaching assistants. It should be noted, however, that they will be currently collating this

data, and calculating it, based on contractual holiday entitlements. These arrangements are in excess of the minimum statutory requirements and are as set out at Part 4.12 of the Green Book.

26. However, there are a number of variables which will make this complicated even for those staff:

- Teaching assistants may cover lunch duties or do extra hours to cover absent colleagues which can attract overtime payments
- Support staff may work extra hours in school closure periods, again attracting additional or overtime payments
- The calculations only apply to statutory leave, and many part-year workers will also have contractual holiday pay

27. We are less confident that the current data collection is specific enough for part-year staff, such as exam invigilators. New, more onerous processes may need to be developed and implemented within many schools and trusts for the proposed model to work for these staff. In practice, employers will face difficulties in having differing systems in place to calculate entitlements for staff.

28. Linked to this, a significant number of employers will already have new, more beneficial, contractual arrangements that they have agreed with staff following the Supreme Court ruling or be in the process of agreeing. We, and other trade unions, will want to support our members in securing their rights to these terms. This is likely to make transition to any changes to the Working Time Regulations more problematic.

29. We are concerned that, whilst the methodology proposed appears to be simple to apply, not enough thought has gone into the practicalities and that this will cause significant additional workload for our members as agents of the employer.

Question 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

Don't know

30. Disagree

31. Defining 'fairness' here is difficult as there are too many variables. When calculating the holiday pay entitlement and comparing the current methodology, the consultation paper highlighted that part-year workers will sometimes receive a higher percentage than full- or part-time staff. The Supreme Court addressed this issue in their ruling and did not find it to be a material issue.

32. We are concerned that, in seeking to 'normalise' the reference period for this atypical group of staff, there is a high risk of unintended consequences. We are concerned, for instance, that not enough consideration was given within the consultation to the fact that many of these workers will hold more than one contract, and this may be with the same or multiple employers. We are also concerned that including non-working weeks may

be discriminatory to staff with a disability, who may not have worked due to ill health but who do not get sick pay. (We have noted with disappointment that you have not included an equality impact assessment as part of the consultation.)

33. We have noted that the consultation paper is silent on the accrual of holiday for those on family-friendly leave, e.g. maternity leave. Surely any weeks of family-friendly leave, in which no work is done, will not result in a loss of holiday entitlement or pay, as this would be discriminatory?
34. We are also concerned that the 'remedy' does not fully appreciate the wide variety of roles that will be covered. For example, in the education sector no consideration has been given to the nuances of part-year staff in boarding schools, and insufficient consideration has been given to peripatetic staff.
35. In our view, what this consultation is seeking to do is to be 'fair' (without defining what is meant by that) to staff who have 'typical' contractual arrangements by creating an artificial construct for part-year staff. Whilst this may seem laudable, there is a serious danger that employers and school leaders will find themselves lumbered with an unworkable 'solution' that increases their workload and makes it harder for them to recruit and retain staff, and, more importantly, part-year staff will be treated 'unfairly'.
36. What is needed is a much wider discussion about whether the system following the Supreme Court ruling is genuinely problematic and, if so, sectors and their professional associations should consider the options for change through working groups, before considering what sector wide changes might be needed and then going out to public consultation.

Question 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**
- Don't know**

37. Neither agree nor disagree
38. We note that you have not asked whether having a fixed reference period would be 'fair', and our answer to that would be to disagree, because it cannot be right that part-year workers' holiday entitlement '*would be based in part on their working pattern almost two years prior*'.
39. The proposed method of calculation means that, after the first year of employment, the entitlement is based on work done in the previous leave year. This could have the consequence that workers whose hours increase in the subsequent year are receiving less than 12.07% of the hours they are working in that particular leave year.
40. Whilst some part-year workers will have fairly stable working patterns, predominantly (in the education sector) term-time only workers, many will not. They may therefore be having their holiday entitlement calculated on a working pattern that bears little to no reflection on their current reality. That is bad for the employee and bad for the employer, as you could end up with someone who worked very little in the reference

year who is now working much more but is not getting enough holidays, so is not recharging, feels overworked and underperforms.

41. Given the very different predictability between term-time only workers and those with irregular working patterns, it might be tempting to develop different arrangements for each group. We would not favour such an approach and would have concerns about unintended consequences and the further marginalisation of this important group of workers.
42. We are also concerned about the equality impact of this approach, particularly on women and those with disabilities. We would like to see the Department for Business, Energy and Industrial Strategy's equality impact assessment of this proposal, particularly for those staff who do not get paid sick leave.
43. To address the question directly, it would, of course, be easier for employers to calculate holiday pay if there were a fixed holiday entitlement reference period, but that should not be a priority or driver for change.

Question 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
Don't know

44. Strongly disagree
45. The proposed method of calculation for the first year is likely to lead to confusion and complication. For example, quite often a staff member joins during a leave year, in which case there could be an overlap between two different calculations.
46. In addition, we are concerned about how the variable nature of many part-year workers' employment would be accommodated in the first year. For example, with exam invigilators, their employment will depend on the timing of exams, which can lead to one invigilator not being available and another having to cover more days.
47. We are concerned that there are a number of unintended consequences that will flow as a result of this methodology, and that it doesn't work for either the employee or the employer.

Question 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
Don't know

48. Neither agree nor disagree.

49. We note that the need to adopt a principle for calculating pay for taking a day off in this way only arises because of the adoption of a holiday entitlement reference period.

Question 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

Don't know

50. Neither agree nor disagree

51. The intention should not be what is 'easiest' but what is most appropriate. We would want any calculation to ensure that agency workers were not disadvantaged, and that the holiday pay did not deter people from taking up work as teaching supply staff.

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

52. We would like to understand better how DBEIS intends to ensure that agency workers who acquire the same holiday benefits as if they were employed directly by the hirer (by virtue of the fact they have completed the twelve-week qualifying period as set out in the Agency Workers Regulations 2010) will have this reflected in any calculations.

D. Conclusion

53. This consultation attempts to achieve 'fairness' as though that is a clearly quantifiable thing. It is not. What the proposal is seeking to do is to change who is being treated 'fairly'. We are concerned that this is being done without a thorough analysis of what the consequences of the changes will be for all parties and what the unintended consequences may be, including around equality, recruitment and retention and the workload of school staff who will have to administer this.

54. Specifically, we have significant concerns around the equality impact of these proposals, particularly, though not exclusively, for those with disabilities and pregnancy- and maternity-related issues. We would need to be reassured that a thorough equality impact assessment has been completed before we were able to comment any further.

55. We are also concerned that no consideration has been given to the impact these proposals might have on recruitment and retention. This is an issue across many sectors but particularly education, where the use of part-year workers is prevalent. We were disappointed, therefore that the consultation was silent on the impact of the proposals on recruitment and retention.

56. Finally, there have been many years of uncertainty already around this issue, and employers had thought the matter was settled followed the Supreme Court ruling. The unexpected launch of this consultation has created another potentially unhelpful twist, and our members need clear legal guidance as a matter of urgency.

57. I hope that this response is of value to your consultation. ASCL is willing to be further consulted and to assist in any way that it can.

Sara Tanton
Deputy Director of Policy
Association of School and College Leaders
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