Department for Business, Energy and Industrial Strategy/
Department for Business and Trade
1 Victoria Street
London
SW1H 0ET

9 March 2023

Dear Sirs/Madams,

Re: CIPD submission to the Department for Business, Energy and Industrial Strategy and Department for Business and Trade 'Calculating holiday entitlement for part-year and irregular hours workers'

We agree that holiday pay and entitlement legislation has become more complex over time, particularly in relation to some case law and the Harpur Trust v Brazel Supreme Court judgment. This judgment also shows how, in practice, legislation and case law rulings can have unintended consequences when applied in workplaces.

Of course, terms and conditions for different groups of workers can vary, but these should be underpinned by workplace equity and fairness. In practice, in ruling that holiday entitlement for part-year workers should not be pro-rated so that it reflects the amount of work/hours worked that they actually carry out each year, this means:

- that part-year workers could receive considerably more holiday entitlement/pay than part-time workers working the same or more hours; and
- results, in effect, in treating part-year workers more favourably than full-time workers.

Although there's no prohibition on treating part-time workers more favourably than full-time workers, this doesn't mean that such an approach promotes equity and fairness in the workplace. We, therefore, welcome the Government's intention to address this disparity to ensure that holiday pay and entitlement received by part-year workers is proportionate to the time they spend working.

Introducing a 52-week holiday entitlement reference period

We agree with the proposed principle, that part-year workers and workers with irregular hours should receive the holiday entitlement and pay that reflects the hours that they have worked.

We also fully understand the Government's intention to provide clarity for workers at the beginning of a 'leave year' about their amount of holiday entitlement. In theory, having a 'fixed pot' of annual leave would achieve this aim, but it may not be feasible where employers employ a seasonal and/or casual workforce on, for example, zero-hours contracts and where the number of hours worked vary considerably and are not predictable.

Indeed, the consultation states: '*this entitlement would be based in part on their working pattern almost two years prior'* – which simply may not be workable in many situations as workers may not have been in a post that long.

For these workers, i.e. those with irregular hours, we agree with the Government's proposal that holiday entitlement should be calculated at the end of each month based on the actual hours worked in that month to be proportionate to the time worked (i.e. using the 12.07% method) and that this approach continues for their contract.

We don't believe that it's wise to introduce a 52-week holiday entitlement reference period for part-year workers with irregular hours, because many part-year workers, such as those in seasonal work, are taken on to meet fluctuating demand and are not even necessarily hired for a whole year and the core rationale for many of these contracts is to afford both employer and worker flexibility.

Introducing a 52-work holiday entitlement reference period could undermine this flexibility and may not be workable for many employers, because it assumes that the employment contract is ongoing.

Such a reference period could also have unintended consequences. For example, in practice, a worker may work more or fewer hours in one year than the amount calculated based on the previous year's hours worked. This could result in either too much or too little holiday entitlement being awarded.

Because of this, we advocate a return to the approach of accruing holiday entitlement 'as you go' on a rolling monthly basis, as was the case before the judgment and set out in previous Acas guidance. Many employers, that are not aware of the ruling, have probably continued with this approach using the 12.07% calculation, and it also reflects the more flexible working patterns and variable hours of many part-year workers. We also think the holiday entitlement that workers receive will more accurately reflect a genuine pro-rata amount based on actual hours worked in a very recent period (e.g. the past month).

Where part-year workers do have regular, stipulated part-year hours for a full year such as term-time working, the aim should be parity with part-time workers employed for a full year and so employers should pro-rate holiday entitlement based on their contractual hours.

From an employee perspective, people on these working arrangements (part-year or irregular hours workers) won't necessarily know whether they are being given the correct leave entitlement or the correct holiday pay unless they regularly check and understand their payslips, most of which are now electronic. Even then, a 52-week holiday reference period could make it hard for some of them to work out their holiday entitlement and to calculate their holiday pay based on what happened to them over the previous year. This could be especially true for low-waged workers, many of whom are women or from ethnic minorities. Also, many of these staff could be in receipt of universal credit, so receiving an unexpected and significant amount of holiday arrears could affect their benefit eligibility.

Holiday pay calculation

It would be sensible, and the most straightforward approach for employers, if the same methodology as proposed above was also applied to holiday pay calculations, and for the same reasons. This approach would more closely reflect the flexible and fluctuating patterns of working hours for many casual and zero-hours workers.

This would also mean calculating holiday pay based on the same 12.07 calculation for holiday entitlement, but based on basic pay and actual hours worked from the past month.

We are not confident that, despite compliance requirements, all payroll services are likely to hold average pay data to be able to base holiday pay on average pay over a 12-month period.

As our member Jill Bottomley FCIPD and Director of HR Dept, a HR consultancy working with many SMEs, points out in her response to this consultation:

> *"This is the reality of what is currently happening in practice. To expect SMEs to calculate holiday entitlement on a fixed 52 weeks and for holiday pay on a rolling 52 weeks, one including no hours worked in the week and the other calculation to exclude no hours worked is just too complex, overly burdensome, and unlikely to happen."*

Calculation of how much holiday is used by taking a particular day off

We understand the rationale for the Government's proposal to use the reference period to calculate a flat average working day to calculate how much holiday a worker with irregular hours should take for each day off.

However, it's not at all straightforward to calculate what constitutes a 'flat average working day' for many workers who can work widely differing hours on an ongoing basis. To reinforce the flexibility that is inherent in these working arrangements it would be better to base calculations on hours worked.

From an employer perspective, if the proposals set out in the consultation document are to come into force, then it's important that the Government runs a well-resourced communication campaign informing micro, small, and medium-sized employers, as well as their intermediaries, of these new rules as they won't necessarily know about the new changes until they make a mistake, which could be costly.

I hope this response is helpful. We have also encouraged our members, who will often deal with these matters within their organisations, to respond to the survey to inform your consultation.

If there is anything more we can do to assist you then please do not hesitate to contact us.

Yours sincerely,

Ben Willmott

CIPD Head of Public Policy