

THE EMPLOYMENT LAWYERS ASSOCIATION

**RESPONSE TO THE INITIAL CONSULTATION ON INCREASING THE
HOLIDAY ENTITLEMENT**

14 SEPTEMBER 2006

Success at Work

Initial Consultation on increasing the holiday entitlement

Response to consultation by the Employment Lawyers Association

A Introduction

- 1 The Employment Lawyers Association ("ELA") is an unaffiliated group of specialists in employment law that includes those who represent both employers and employees. It is not ELA's role to comment on the political merits or otherwise of proposed legislation, rather to make observations from a legal standpoint. ELA's Legislative & Policy Committee consists of barristers and solicitors who meet regularly for a number of purposes including to consider and respond to proposed new legislation.

- 2 A sub-committee was set up by ELA's Legislative & Policy Committee under the chairmanship of Stephen Levinson of Manches LLP to consider and comment on the initial consultation on the proposed amendment to the law relating to holiday entitlement. Its comments are set out below. A full list of the members of the sub-committee is annexed.

- 3 We have addressed the questions in the consultation document. We considered it inappropriate for ELA to answer questions 1; 2; 4; 5 and 8; however our further general response is to regret that in dealing with a change to holiday entitlement so many difficulties that exist under the law relating to working time have been left in place with the result that an increase in the basic entitlement (on which we make no comment as we regard that as a political issue) will exacerbate these problems.

B Consultation Questions

Question 3

What working practices (such as shift patterns, annualised hours or flexible benefits may face difficulties if the proposed approach of extending the statutory holiday entitlement from 20 to 28 days (4weeks to 5.6 weeks) were implemented?

- 4 We are confident that the increase in entitlement will require changes to be made in a number of working practices some of which may also be contractual and will require amendments to contracts. We think, for example, that it is important that the manner in which the new entitlement is introduced does not inadvertently automatically entitle some employees to 5.6 weeks holiday in addition to the usual Bank Holidays where this is not the intention of the employer.
- 5 To illustrate our view we have identified a number of these difficult working practices the changes will affect. We do not say these examples are a comprehensive list.

Drivers

- 6 This relates to road transport governed by the Road Transport (Working Time) Regulations 2005 (RTR).
- 7 A consequence of the increasing statutory holiday entitlement is that employers of mobile workers will have less flexibility.

Relevant legal framework

- 8 The Road Transport (Working Time) Regulations 2005 ('RTR') contain specific provisions dealing with the majority of 'working time' issues for mobile workers who drive vehicles of over 3.5 tonnes e.g. calculation of working time, length of breaks and rest breaks, what constitutes 'night work' etc. However, one of the issues that the RTR does not deal with is how much statutory holiday entitlement a mobile worker is entitled to receive. This is currently contained in regulation 13 of the Working Time Regulations 1998 (as amended) ('WTR').
- 9 Regulation 4(5) – (7) of the RTR sets out provisions for calculating 'working time' for mobile workers. For ease of reference they read as follows
- 10 *Reg.4(5) A mobile worker's average weekly working time during a reference period shall be determined according to a formula –*

$$(A + B) / C$$

where –

11 *A is the aggregate number of hours comprised in the mobile worker's working time during the course of the reference period*

12 *B is the number of excluded hours during the reference period; and*

13 *C is the number of weeks in the reference period.*

14 *Reg. (6) In paragraph (5), "excluded hours" means hours comprised in –*

any period of annual leave taken by the mobile worker in exercise of entitlement under regulation 13 of the WTR;

any period of sick leave taken by the worker;

any period of maternity, paternity, adoption or parental leave taken by the mobile worker;

15 *Reg. (7) For the purposes of paragraph (5), the number of hours in a whole day shall be eight and the number of hours in a whole week shall be forty-eight.*

The impact of increasing statutory holiday entitlement

16 Put simply when calculating working time for a mobile worker, an employer can decide which day(s)/week(s) to treat as counting towards the statutory holiday entitlement. These day(s)/week(s) must be counted by the employer as eight hours (for each day) or 48 hours (for each whole week) working time respectively for the purposes of the formula set out above. Any holiday the employer treats as being taken in excess of the statutory holiday entitlement counts as zero hours working time.

17 Employers can therefore use any holiday in excess of the statutory holiday entitlement to gain some flexibility in how it employs its mobile workers during the course of a year (obviously the employer must comply with the other provisions of RTR) (see Example 1).

18 With the increase in statutory holiday entitlement the degree of flexibility, which an employer has, regarding the calculation of working time for mobile workers, is significantly reduced (see Example 2).

- 19 The RTR has imposed major restrictions on employers of mobile workers and mobile workers themselves. Employers have used contractual holiday entitlement in excess of statutory holiday entitlement, when calculating 'working time', as a method of partially mitigating these restrictions. However, a consequence of these proposals will be to reduce significantly that flexibility.
- 20 We assume this was not an intended consequence. Accordingly perhaps Government should consider whether the increase to 28 days for statutory holiday entitlement should apply to the calculation of working time for mobile workers and also consider whether this issue is replicated elsewhere in connection with other working practices.

Example 1

- 21 Employer X employs driver A. He is a mobile worker for the purposes of the RTR. He is contractually entitled to four weeks and two days holiday plus eight Bank Holidays per annum i.e. 30 days.
- 22 Under the RTR 20 days cannot be discounted for the purposes of calculating an employee's average working time during a reference period. However, 10 days of Driver A holiday can be discounted.
- 23 Employer X has a 26 weeks reference period for calculating working time i.e. from September to February ('the winter period'); and March to August ('the summer period').
- 24 Driver A takes two weeks and two days holiday plus five Bank Holidays during the summer period i.e. 17 days. He then takes two weeks holiday in the winter period plus three Bank Holidays i.e. 13 days.
- 25 Currently Employer X can inform Driver A that the 17 days holiday taken during the 'summer period' to be treated as part of his statutory holiday entitlement for the purposes of calculating his working time. Employer X then only needs to use 3 days from the 'winter period' as statutory holiday entitlement. If the winter period is particularly busy for Employer X then it has benefit from 10 days where Driver A's working time will be deemed to be zero.

Note: 4 weeks statutory holiday (which includes Bank Holiday) cannot be carried over to the next 'holiday year'.

Example 2

- 26 Employer Y employs driver B. The contractual entitlement of Driver B is the same as Driver A in example 1. But statutory holiday entitlement has now increased from 20 days to 28 days.
- 27 Driver B takes 17 days holiday during summer period and 13 days holiday during the winter period. Employer Y tells Driver B that 17 days holiday is to be treated as statutory holiday during the summer period. However, with the increase in statutory holiday entitlement, Employer Y now must treat a further 11 days out of the 13 days holiday taken by Driver B during the winter period as counting towards statutory holiday entitlement.
- 28 This means that Employer Y has less flexibility than Employer X as it can only treat 2 days of Driver B's as not counting towards the calculation of working time.

A week's pay

- 29 In many annualised hours contracts work is not done consistently throughout the year. In such circumstances it is difficult to establish exactly what constitutes a week's work. There is DTI guidance which is not reflective of specific provisions in the WTR. Whilst the statutory definition of a week's pay may work for one-off payments such as a redundancy payment or a basic award it is not sufficiently robust to deal with regular payments such as holiday pay. These problems exist now but will be exacerbated when holiday entitlement is increased.

Issues relating to normal working hours

- 30 In a contract where there are normal working hours an employer can reduce holiday pay if it is willing to rely on employees working voluntary overtime.

Example

31 Compare:

(a) A contract providing for 10 fixed hours a week with 30 hours overtime normally available but not guaranteed with (b) a contract providing for 40 fixed hours a week.

32 If the wage rate is £10 per hour, in (a) holiday pay is £100 per week and in (b) holiday pay is £400 per week. The work done by the employee and the pay received for work will be identical.

Issues in contracts with no normal working hours

33 If there are no normal working hours a "week's pay" is averaged over the last 12 weeks, omitting weeks in which the employee does not work. This can distort what is normally understood by a week's pay. This is particularly critical in the context of freelancers and other casual workers but it also raises issues with employees.

Example

34 Take a worker who works for one week a month without there being any normal working hours. Assume that pay is roughly £400 a month. To calculate a week's pay, one is required to aggregate pay over the year omitting weeks in which there was no work. If pay was £400 a month, annual pay is £4800 and a week's pay is £400 (£4800/12).

35 If the employee was entitled to 5.6 weeks' pay, holiday pay would amount to almost 50% of annual aggregate pay. The employee would be entitled to aggregate holiday pay of $5.6 \times £400$ or £2240 per year. The position is less extreme if the employee works for 2 weeks a month, but the employee still receives excessive holiday pay.

Short Service

36 If after an employee starts work there are not 12 weeks previous pay the averaging formula does not work. This issue is analogous to that dealt with in section 228 ERA 1996 – but section 228 is made inapplicable by regulation 16(3)(d) WTR.

- 37 Further problems arise under casual bank arrangements (for example for nurses) where there is no umbrella contract: each episode of work is a discrete period of employment with no duty on the employer to offer further work and no right on the part of the employee to have further work offered. Typical assignments might range from 2 or 3 days to 10 days. At the end of each assignment, employment ends. The provisions of reg 15A WTR apply because each period of employment is separate. Under reg 15A(3), leave is rounded up to a half-day or whole day. Applying the default formula in regulation 14 gives a calculation of holiday pay on termination which, because of the very short assignment and rounding up, is excessive. Although parties can contract out of the calculation in regulation 14 by a relevant agreement, one questions whether it is reasonable to put the onus on the employer to enter specific contractual arrangements to avoid the unfair result that statute provides.
- 38 Government may wish to consider creating provisions akin to sections 228(1) and 229(2) ERA relating to atypical circumstances so that in such cases there is scope to allow an employer to pay an amount which "fairly represents a week's pay" or provides for a result which is "just". Clearly views about the desirability of such a change will vary depending on whether the views sought are from those representing employees or employers but ELA considers that the issue deserves to be reviewed by Government as both lack of certainty and inequity are undesirable and bring the law into disrepute.

Question 6

The Government proposes to phase in the introduction of the additional holiday with the statutory entitlement increasing from 20 days to 24 days (4 weeks to 4.8 weeks) from 1 October 2007. Do you have any comments on this proposal?

- 39 We agree that keeping administrative burdens and creating certainty are highly desirable objectives. In this regard we draw attention to the fact that it is unclear from the paper whether the change is to be brought into effect immediately from 1 October 2007 or from the next leave year of each employee commencing after 1 October 2007. There will be many contracts specifying leave years other than those beginning on 1 October.

Question 7

Should the remaining increase in the annual holiday entitlement from 24 to 28 days (from 4.8 weeks to 5.6 weeks) be introduced:

- **In one go one year after the increase from 20 days to 24 days (from 1 October 2008)**
- **In one go two years after the increase from 20 days to 24 days (from 1 October 2009)**
- **In two phases, increasing to 26 days on 1 October 2008 and 28 days from 1 October 2009**
- **The timing of the second increase should be reviewed after the implementation of the first increase from 1 October 1 October 2007**

40 We repeat what we have said about administrative burdens and certainty before. Whatever approach is adopted it will be important to ensure that changes of this nature receive adequate publicity and that appropriate funds be earmarked to ensure this happens.

Question 9

How should any particular carrying over (paragraph 24) or buying out of the additional holiday entitlement (paragraph 26) work in practice? For example should it be subject to mutual agreement between employer and members of staff?

41 Generally we see no reason why this should not be left to individual contractual arrangements. However we suggest that any buy-out permitted should be on a similar basis to the provisions for Sunday workers where employees have the right to give notice that they wish to opt out from the ability of the employer to require them to work on Sundays. This seems to work smoothly for Sunday workers and would give employees an additional measure of protection.

Question 10

Do you have any other comments on the proposal to increase the holiday entitlement, as outlined above?

42 We set out below some of the complicated holiday entitlement issues that continue to give rise to difficulties and expense and require changes to the law.

Again all of these problems of interpretation tend to bring the law dealing with very basic rights into disrepute will be exacerbated by an increase in holiday entitlement.

Accrual of Statutory Holiday Entitlement and Maternity/Paternity/Adoption Leave

- 43 Under the Working Time Regulations 1998, the 20 days' statutory holiday entitlement cannot be carried forward into the next holiday year nor can payment be made in lieu except when the employment terminates.
- 44 However when an employee goes on maternity leave that lasts for a year (if both OML and AML are taken) but has outstanding holiday entitlement at the time of going on maternity leave during which period her leave period ends, does she lose her entitlement to the accrued statutory holiday?
- 45 This issue was considered in *Merino Gomez v. Continental Industrias del Caucho SA* [2004] IRLR 407. The ECJ held that a worker must be able to take her annual leave during a period other than the period of her maternity leave, including in the case in which the period of maternity leave coincides with a general period of annual leave, fixed by collective agreement, for the entire workforce.
- 46 Does this mean it is incumbent on employers to ensure that holiday leave is taken before maternity leave? Or can employers have the discretion to allow statutory holiday entitlement to accrue into the next leave year or make a payment in lieu? Amending the Regulations to resolve this issue rather than the uncertainty of waiting for the outcome of future litigation is highly desirable.

Bank Holidays and Maternity/Paternity/Adoption Leave

- 47 Is an employee on maternity leave, entitled to take time off in lieu or be paid in lieu for bank holidays that may fall during her maternity leave?
- 48 The main case on this is *Edwards v. Derby City Council* [1999] ICR 114. There is (and will be) no statutory entitlement to take holiday on a bank holiday, which is a matter of contract. Normally bank holidays are fixed holidays which must be taken on a particular day and not at any other time. On the basis that these days are fixed and that there is no contractual entitlement to take them at a different

time, it appears that an employee on maternity leave is not entitled to carry these days forward. It appears also that an employee on maternity leave would not be entitled to be paid in lieu of these holidays as an employee is not entitled to receive wages or remuneration during maternity leave. However, in the case of employees who can be made to work on a bank holiday and are then entitled to a day off in lieu, then is it possible that these employees could carry their entitlement forward after their period of ordinary maternity leave?

Holiday entitlement and sick leave

- 49 What should an employee's entitlement be to receive pay for untaken holidays accruing whilst on sick leave? This subject is due to be reviewed when the case of *Commissioners of Inland Revenue v Ainsworth and Others* [2005] EWCA Civ 441 is heard by the House of Lords. The Court of Appeal have held that an employee who was absent from work for a year by reason of sickness cannot not claim four weeks' annual leave during that year when he has been unable to work at all. The case did not deal with absence covering only part of the statutory entitlement so the issue of pro rata entitlement remains unresolved. The Court of Appeal also pointed to the absence of a definition of "leave" in the Working Time Regulations. It seems wrong in principle that such uncertainty should surround relatively low payments such as these and ELA believes that the situation calls for some decisions to be made and some simple drafting changes to remove these uncertainties.

Members of Sub-Committee

Stephen Levinson (Chairman)	Manches LLP
Maxine Cox	Manches LLP
Steven Lorber	Lewis Silkin
Paul McFarlane	Royal Mail
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