Calculating Holiday Entitlement for Part-Year and Irregular Hours Workers

Response from the Employment Lawyers Association

9 March 2023

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INTRODUCTION

1. The Employment Lawyers Association ("ELA") is an unaffiliated and non-political group of specialists in the field of employment law. We are made up of about 6,000 lawyers who practice in the field of employment law. We include those who represent Claimants and Respondents/Defendants in the Courts and Employment Tribunals and who advise both employees and employers. ELA's role is not to comment on the political merits or otherwise of proposed legislation or calls for evidence. We make observations from a legal standpoint. ELA's Legislative and Policy Committee is made up of both Barristers and Solicitors who meet regularly for a number of purposes, including to consider and respond to proposed new legislation and regulation or calls for evidence.

2. A Working Party, co-chaired by Stuart Neilson and Stephen Ratcliffe was set up by the Legislative and Policy Committee of ELA to respond to this Consultation. Members of the Working Party are listed at the end of this paper.

3. References in this paper to the views of ELA are intended to be inclusive of the views of the minority as well as the majority of ELA members. Whilst not exhaustive of every possible viewpoint of every ELA member on the matters dealt with in this paper, the members of the Working Party have striven to reflect in a proportionate manner the diverse views of the ELA membership.

EXECUTIVE SUMMARY

4. It is broadly acknowledged that the law on the calculation of holiday entitlement and associated pay has become complex, particularly for those workers with anything other than a once-traditional fixed pattern of working hours. Any attempt to clarify the law so as to assist employees and employers to understand and apply holiday entitlements is to be welcomed in that light.

5. That said, the approach proposed in the consultation paper gives rise to a number of potential anomalies outlined further below, which require further consideration. In particular, the proposed approach of determining holiday entitlement by reference to the previous year may result in an unintended breach of the Working Time Regulations ("WTR") and possibly even the Working Time Directive, for workers whose hours vary significantly from year to year. As the points below illustrate, whilst the paradigm solution would be to achieve a single calculation that can be applied to all workers in all scenarios, the wide variety of different working patterns and existing holiday arrangements currently in place may mean that a suite of alternative calculation mechanisms could be provided for in legislation.

1. **What is your name?**

See above

2. **What is your email address?**

ELA may be contacted via its Head of Operations, James Jeynes, at jamesj@elaweb.org.uk.

3. **What is your organisation?**

See above

4. **Are you happy for your response to be published?**

Yes

5. **Are you (select the appropriate option):**

See above

6. **Are you (select the appropriate option):**

See above

If you are an employer:

7. **How would you classify your organisation?**

N/A

8. **How many people work for your organisation?**

N/A

If you are employed:

9. **What type of organisation do you work for?**

N/A

10. **How many people work for your organisation?**

N/A

If you are an agency worker:

11. **What are your contractual arrangements?**

N/A

12. **How often do you receive holiday pay and entitlement?**

N/A

If you represent employers or employees:

13. **Who do you represent?**

See above

14. **For employers: if you employ workers with irregular hours, how do you calculate their holiday entitlement?**

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

PRELIMINARY COMMENTS

i. The working group has been split for the purposes of this consultation exercise into three different sub-groups, addressing each of the following: (a) *"fixed hours but part year"* workers, (b) *"irregular hours (full year)"* workers and (c) *"irregular hours (part year)"* workers. There is of course a fourth group of *"fixed hours but full year"* workers, although their arrangements are relatively straightforward and are unlikely to be affected by either the decision in *Harpur* or any attempt to reverse its effect. For that reason, this fourth category was not represented by a sub-group of the ELA working group.

ii. The division of this working group into these sub-groups is indicative of the problem with which the consultation is rightly trying to grapple, and most of the comments in this preliminary section are not specific to *"irregular hours (full year) workers"*. It is often difficult enough to establish if someone is even a "worker" or not. Even once that has been achieved there are further layers of categorisation that must be addressed before either the worker or their employer can establish how their holiday pay should be calculated even in theory: that is the result, in particular, of (a) the distinction in ss.221-224 ERA 1996 between workers with *"normal working hours"* and those without, and (b) the recent Supreme Court decision in *Harpur*.

iii. Ss. 221-224 of the ERA replicate earlier legislation going back some decades which were drafted in order to determine *"a week's pay"* for the purposes (in particular) of unfair dismissal awards and redundancy payments. Even by the time of their adoption into the ERA in 1996 the concept of *"a week's pay"* was becoming more complex in the light of changes to working arrangements. However, these sections were then adopted (by reference) in Regulation 16 of the WTR when they were introduced in 1998, and used for the purposes of calculating holiday pay. It is the view of the Working Party that, in order for any provisions relating to holiday pay to work effectively, in the sense both of ensuring workers receive their correct entitlements and ensuring that the administration of those entitlements does not present a significant burden to business, they must be sufficiently clear to be capable of interpretation without the benefit of specialist advice and complex mathematical calculations. Regrettably, at present, that is not the case, in large part

due to the complexity of applying ss..221-224 ERA to the wide variety of working patterns now in existence.

iv. The position is further complicated by the drafting of the WTR. The Government may wish to consider replacing the legislation (including ss.221-224 ERA) wholesale, as a means of addressing the challenges posed by the legislation. Most obviously, the WTR unnecessarily and confusingly separates the right to annual leave from the right to be paid for it.

v. For the purposes of this consultation, the most relevant defect in the WTR is its approach to calculating holiday pay. Reg. 16 WTR adopts the concept of a week's pay in the ERA, where it is used primarily to calculate payments due to employees on termination, and calculated by reference to whole weeks. It then tries to apply it to the very different circumstances of the WTR, where it is deployed to calculate payments due to workers, during the currency of the employment relationship, and where the periods to which it relates are more likely to be reckoned in days than weeks.

vi. The result is a confusing mess. Even conscientious and well-resourced employers find it difficult to work out what their staff should be paid for their leave. Unscrupulous employers can use the sheer complexity of the law to underpay (and thus gain a competitive advantage). Most workers with remotely irregular work patterns will find it almost impossible to establish what holiday pay they should be paid and what their entitlement to leave means in practical terms.

vii. Any solution will need to balance (i) ensuring that account is taken of the many different forms of working arrangement that exist with (ii) putting in place a test that can be applied to all workers to produce a clear answer, without the need for difficult categorisation decisions, enormous amounts of data or complicated maths. The ideal outcome would be to find a single, flexible calculation that can be applied to all workers and removes the need to establish (as the ERA requires) whether or not a worker has "normal" working hours.

viii. The questions raised by *Harpur* cannot be considered in isolation. The approach that is taken to calculating holiday pay and entitlement should be sensitive to all the many variables that may be involved. These include not just whether there are normal working hours or whether the workers work on a part-year basis, but also (for example) whether bonuses, overtime, commission and/or other allowances should be included, the incidence of maternity / parental leave, and sickness absence. Whilst many of these issues have been considered by the courts, employers and employees are faced with a complex process of statutory interpretation and application of case law to each particular working pattern and pay structure, in determining what should logically be a simple and clear statutory holiday pay entitlement.

ix. Any system should aim to achieve the following objectives (in no particular order), which apply to both employers and workers. This list does not include the central question at the heart of the consultation, i.e. whether two workers who work a similar number of hours per annum should be entitled to similar amounts of paid annual leave each year.

a. Clarity of entitlement: ensuring that employers and workers know how much leave each worker can take at any given point in the leave year.
b. Certainty of remuneration: ensuring that that employers and workers know how much the worker should be paid for their leave at the point when they take it.
c. Facility of calculation: ensuring that the system in place for calculating pay for leave is straightforward enough to be understood by workers and applied by SMEs.
d. Balancing incentives: ensuring that the way leave is remunerated avoids creating financial incentives for either the worker or the employer for leave to be taken at particular times.
e. Incentivising rest and recuperation: ensuring so far as possible that the entitlement to paid annual leave means that workers actually take their leave rather than get a pay increase.
f. Reflecting current arrangements: any system should so far as possible reflect working arrangements at the time the leave is taken, not long before.

x. We observe that it may not be possible to achieve a system that perfectly achieves all these objectives. It may, therefore, be preferable to put in place an imperfect system which is clear and easily understood rather than one which attempts to cater for every possible different system of work, provided of course that any unfairness is not directly or indirectly discriminatory on the basis of any protected characteristic.

xi. We also make two general observations. First, given the high turnover of "irregular hours workers" (whether full or part-year), any system that takes at least 12 months to become fully functional is undesirable. Secondly, many "workers" (particularly in the gig economy) will have more than one employer and will be working for one when not working for the other. This makes the very concept of "leave" problematic and difficult to police.

xii. Below, we turn to the calculation of holiday entitlement for each of the three categories of worker referred to above.

PART-YEAR WORKERS WITH FIXED HOURS OF WORK

(a) This is a common arrangement for those employed on term time only contracts in particular, who will potentially be impacted by any change to the mechanism for calculating statutory holiday pay. Many workers with these kinds of arrangements will not be paid or be deemed to accrue/take annual leave in the 'normal' way. Rather the annual pay of term-time only workers with regular hours is usually calculated by reference to the number of weeks worked, e.g. for a state sector term-time only worker in schools, 39 weeks per year plus the weeks of paid annual leave to which they are entitled divided by 52.14 (the number of working weeks in a year, calculated as 365 divided by 7) multiplied by the annual FTE salary: this is then divided by 12 and the worker is paid in 12 equal instalments throughout the year.

(b) Taking the annual accrual mechanism set out in the guidance section of the National Joint Council (NJC) terms and conditions for local government employees by way of an example, there is an accrual calculation method

which ensures that the holiday entitlement is accrued commensurate with the days worked.

(c) The minimum leave entitlement for permanent full-time, full-year workers under these terms is 32 days comprising 22 days' annual leave, 8 days' bank holidays and 2 additional non-statutory days. On this basis a full-time, full-year worker would be expected to work 228.71 days (out of a possible 260.71 days, which equates to 52.14 weeks x 5) and accrues leave at the rate of 0.140 days per day worked using the formula 32 divided by 228.71 (13.99%). Accordingly, a full-time part-year worker with regular hours would accrue annual leave commensurate with the 195 working days that a 39 week period comprises.

(d) This gives rise to an annual leave entitlement of 195 x 0.140 days which amounts to 27.3 days or 5.46 weeks' paid leave. Since the decision in *Harpur*, the associated guidance has recommended rounding this up to 5.6 weeks in order to comply with the interpretation of the present statutory entitlement in that case, as the judgment in that case requires that a person is entitled to 5.6 weeks of annual leave with no pro-rata reduction.

(e) The NJC terms are only one example of how holiday entitlement is calculated. Other part-year fixed hours workers are subject to simpler mechanisms for calculating holiday. It is common, for example, for a calculation to be undertaken based on weeks worked plus holiday divided by 52 or 52.14. Those calculations are, of course, now potentially open to challenge as a result of the decision in *Harpur*.

FULL-YEAR WORKERS WITH IRREGULAR HOURS OF WORK

(f) This category of workers encompasses typical "gig economy" workers, as well as others whose working hours may vary from week to week, or even from day to day. The nature of their working patterns typically means that forward-looking calculation of holiday entitlement is not possible. Rather, they will most commonly be credited with an amount of holiday calculated by reference to their working hours. Assuming they are credited only with the statutory minimum holiday entitlement of 5.6 weeks, this would typically result in a calculation of 5.6 divided by 46.4 (52 weeks in a year minus 5.6 weeks of holiday), resulting in a holiday entitlement of 12.07% of hours worked. This is arguably an over-simplification, with some employers applying a similar calculation of 5.6 divided by 46.54 (being a full year of 52.14 weeks minus 5.6 weeks of holiday), resulting in a holiday entitlement of 12.03% of hours worked (or 11.99% in a leap year of 52.29 weeks).

(g) As will be noted from the calculation above, this results in a figure calculated not in weeks or days, but in hours. In some cases, where working hours vary from day to day, this may assist workers to take their entitlement in a way that most benefits them (e.g. by selecting a day with a shorter shift on which to take holiday, so as to ensure a full day off). In others, it may represent a more complicated approach to taking holiday than being credited with a certain number of days off, or result in workers being left with a residual entitlement of a small number of hours off at the end of the year which do not equate to a full day or a half day of leave, and so may not result in a meaningful period of rest.

PART-YEAR WORKERS WITH IRREGULAR HOURS OF WORK

(h) Commonly, this category of workers have had their entitlement calculated in the same way as for full-year irregular hours workers, i.e. in hours as a percentage of their working time. The decision in *Harpur* of course means that this approach to calculation is likely to be unlawful in many cases. Accordingly, employers in such cases are required to adopt an approach which entitles part-year workers to 5.6 weeks of holiday regardless of the number of weeks worked. In practice, employers and workers may have difficulty in understanding how that entitlement is to be applied, particularly in cases where the number of days or hours worked in one week may differ substantially from the number of days or hours worked in another.

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?**

i. This depends on the category of worker in respect of whom the reference period is intended to apply.

ii. In one sense, almost all employees work "irregular" hours. Even the office worker who is contracted to work from 9am to 5pm, Monday to Friday will, on occasion, work additional time (as either paid or unpaid overtime) when the demands of work require it. That additional time is recorded where necessary to calculate pay (or for minimum wage compliance purposes) but, for workers whose pay is well above minimum wage and whose additional working time is unpaid, it is relatively rare for employers to record that additional working time with precision, notwithstanding the technical obligation to do so. It is assumed that is, in any case, not the category of worker on whom the consultation paper is focused, since such workers are generally able to calculate holiday entitlement with ease. It is important, therefore, that any change in the law does not inadvertently capture such workers by the use of the broad term "irregular hours", if that is not the Government's intention.

iii. Conversely, the information employers currently collect to calculate holiday pay for workers whose hours vary from day to day or week to week and who are paid on an hourly rate basis would be sufficient to calculate holiday entitlement using a reference period. However, we would note that any change in approach to the method of calculation of holiday entitlement will require amendment to payroll systems to accommodate that change. That typically requires a significant lead time, and in some cases substantial investment on the part of employers and/or their payroll providers.

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?

i. We accept that in principle a system in which weeks without work are included in any reference period for holiday pay would be easier to operate than the current system and should lead to fewer anomalous results and inconsistencies.

ii. Including weeks when the worker is on family-related leave or on sick leave could be indirectly discriminatory, due to the higher incidence of such leave

amongst women and disabled people respectively. From a policy perspective the Government may wish to consider whether including these weeks is appropriate.

iii. We note the question refers to "weeks without work" as being included in the holiday entitlement reference period. In our view this should refer instead to "weeks without pay". The two concepts are different. Depending on individual pay arrangements it is not always easy to identify unworked weeks retrospectively. However, it should be possible to identify unpaid weeks. It is also worth noting that the current holiday pay reference period refers to weeks in respect of which pay is due rather than worked weeks. In order to minimise confusion in respect of the way the two reference periods will operate, we consider they should both refer to weeks without pay

iv. Points in favour of this proposal include that it:

- Addresses the discrepancy arising out of *Harpur* – there is no obvious policy rationale for part-year workers to be treated more favourably in respect of holiday entitlement or pay than irregular full-year workers (subject to the observation that we make below regarding workers on low pay). We observe that the questions raised by the outcome in the *Harpur* decision arises less from the entitlement to leave than from the way that it requires the pay for that leave to be calculated (i.e. excluding weeks in which no work was done).
- Involves a link between hours worked and leave entitlement – although if our comments above are taken on board this link is expressed in terms of pay rather than entitlement.
- Is relatively easy to administer – the employer is only required to look back 52 weeks, irrespective of when and how much work was done during that time (subject to the comment above re 'family leave' etc).

v. The position becomes complicated for workers (particularly those who may not realise they are workers) who are not entitled (or do not realise they are entitled) to these forms of leave. A gig economy worker, for example, may not know if they are entitled to SSP from their employer. If they are sick and cannot work they may take a week off. But there may be no way of telling if this is a week off sick, or on holiday, or working for another employer, or when no work is available, or something else. There is a policy decision to be made as to whether some or all weeks like this should be excluded from any holiday pay calculation. But collecting the necessary data (particularly for limb (b) workers) may be difficult if not impossible.

vi. With regard to policy rationale for part year workers, we would highlight that part-year workers will include many individuals who either earn national minimum wage or are low paid (for example teaching assistants, cleaners and catering staff in schools across a range of employers including local authorities, academies, voluntary aided schools and private companies). A large proportion of these workers will be female. This group have benefitted from the *Harpur* decision. Moving away from the decision in *Harpur* will have a disproportionate impact on what is, in some areas, a predominantly low paid and female workforce.

vii. The Government may also wish to give consideration to whether it is necessary to introduce a retrospective fixed holiday entitlement reference period for part year workers with fixed hours. These workers are paid a salary that includes pay for their working weeks plus their holiday

entitlement. Their salary is averaged out over 12 equal monthly payments. This is an administrative convenience that often suits both workers and employers.

viii. For these workers, calculating holiday entitlement with reference to a retrospective fixed 12 month reference period would significantly complicate the position. In particular, if these workers increase or decrease their hours from one year to the next, their holiday entitlement would be distorted, as further discussed below.

ix. For these workers their holiday entitlement could be calculated based on their working weeks in the current holiday year based on the 12.07 percentage (assuming they are entitled to statutory minimum holiday only, and subject to our comments above regarding the simplification represented by the 12.07% calculation), as shown in the following example:

39 working weeks x 12.07% = 4.7 weeks pro-rated statutory holiday.

x. Using this example, the worker's salary would be based on 39 + 4.7 paid weeks per year (43.7 paid weeks). The salary would then be averaged out over 12 equal monthly instalments.

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

i. We note that this question relates to workers with irregular hours. As set out above in our answer to Question 17 we raise the issue of a different approach for those with fixed hours.

ii. In relation to those with irregular hours our view is that, on the one hand, the ability to calculate a fixed pot of leave at the beginning of a leave year by reference to the hours worked in the previous leave year would be simple and certain for some categories of worker. This would work well for workers whose hours do not vary significantly from year to year and whose engagement is likely to have significant longevity.

iii. On the other hand, the proposed methodology has some drawbacks:

a. In order for the worker to have a complete holiday year to look back on, employers could potentially be operating the proposed “first year of employment” calculation method for almost 2 years. This assumes a significant degree of longevity before a worker even moves onto the “standard” method of calculation. It could also be administratively burdensome for employers to operate two calculation methods within the same group of workers depending on length of service. It is to be noted that a significant number of those people working irregular hours are likely to be in casual employment where individuals are less likely to reach two years of service, and this system potentially provides less certainty for them.

b. The proposed lookback model assumes that workers with irregular hours never know their working time in advance. This is not the case. Some employees working irregular hours will already know the total number of hours they will be working for each holiday year, even if their working pattern is less predictable. For example, some irregular hours workers might be operating under an annualised hours contract where they know their hours commitment for the year. For these

workers, it does not make sense to base their current year's holiday entitlement on last year's hours.

c. At the other end of the spectrum, workers whose hours vary significantly from year to year, whether by their choice or their employer's choice, could face a significant disparity between the amount of work they are doing in the current holiday year and the amount of holiday they are able to take. For example, suppose that an individual worked very few hours in the last holiday year but has significantly upped their hours in the current holiday year. They will end up with a relatively small pot of holiday (based on last year's hours) but are working a lot of hours. If there is a significant mismatch between hours being worked and holiday entitlement, it would be at odds with the underlying health and safety aim of annual leave to provide a proportionate amount of rest, and potentially breach the Working Time Directive minimum holiday entitlement, as well as the existing requirements of the WTR. And the converse is potentially true for anyone who worked a lot of hours last year and only a few hours this year. Holiday entitlement should bear some relation to individuals' recent / current pattern of working, particularly if the objective of ensuring adequate rest and health and safety in the workplace is to be achieved.

d. It is unclear how the fixed reference period would cater for periods of absence such as family leave or sickness absence. Without clarity on this, as noted above, issues of indirect discrimination may arise from how leave has been calculated.

e. What would be the "truing-up" mechanism for workers who leave during a holiday year? Would the holiday entitlement on termination be adjusted, either up or down, to reflect the hours actually worked in that holiday year or would it still be based on hours worked last year, potentially risking non-compliance with the WTD and the current requirements under the WTR?

f. The introduction of a holiday entitlement reference period to sit alongside a separate holiday pay reference period (whether the existing one or a new form of reference period proposed in the consultation paper) is likely to increase the administrative burden on employers.

iv. Our view is that there are downsides to the fixed reference period being the only way of calculating holiday entitlement for irregular hours workers. A rolling reference period might address some of these concerns but would provide far less certainty as before any worker wants to take a day's leave, some major data analysis will need to be done into their recent hours, and the entitlement is likely to vary from day to day, which will be confusing for workers and difficult for employers to administer.

v. We would instead propose that the legislation allows for alternative lawful calculation methods in addition to the one proposed. Depending on business needs and the nature of their working population, employers could determine

their preferred method, or this could be discussed and agreed between employers and worker representatives. Additional calculation methods that could be considered are:

a. For irregular hours workers who know the total number of hours they will be working for each holiday year (even if their working pattern is less predictable): holiday allowance could be calculated by pro-rating 5.6 weeks downwards to reflect the worker's agreed hours commitment for the coming holiday year. A look back mechanism would not be required.
b. For workers whose hours vary significantly from year-to-year holiday could accrue as they work, building up holiday entitlement for that current year at a rate of 12.07% of every hour worked.
c. For casual workers who are not obliged to work any particular hours or days, some members of the Working Party consider that employers could be permitted to make a rolled-up holiday payment (e.g. based on 12.07% of earnings) rather than having to earmark any particular hours as holidays, although this would conflict with existing European case law on the issue of rolled-up holiday pay.

vi. The Government may also wish to consider asking or requiring employers to provide information about accrued holiday entitlement to workers with their pay statements, which may go some way towards addressing the issue of workers not understanding how much holiday they have or can take.

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?

i. A system of accruing leave monthly does achieve clarity and certainty:

a. Clarity for workers will maximise the likelihood of them taking the leave to which they are entitled (and will reduce the risk of employers taking advantage of lack of knowledge to prevent workers taking their holidays)

b. Clarity for employers will reduce the administrative burden and will likely reduce queries/disputes regarding holiday entitlement

ii. We therefore agree that accruing leave from month to month during the first year of employment (which is what WTR 15A currently provides) is sensible. There are downsides to this arrangement, but they already exist at the moment and it is difficult to see how they can be avoided. For example, neither employers nor workers will know what holiday entitlement is available until after this has been accrued, which is unlikely to encourage workers to take holidays (problematic given how people tend to book/plan leave – e.g. parents looking to take time for school holidays / longer break in the summer etc.)

iii. The system can be administratively difficult for employers – as they are required to continually revisit calculations during the first year of employment.

This could lead to difficulties with both calculation / record-keeping and also communications with staff.

iv. Overall, however, we agree that it is logical for leave to accrue from month to month. However, opinions differed within the Working Party as to whether the leave entitlement should accrue and/or be expressed in terms of hours when the basic right to leave is expressed in a different time unit i.e. weeks. Some members considered it would be more logical for the leave to accumulate in days (2.3 per month) or weeks (0.47 per month). But what a "day" or "week" actually means in terms of holiday pay will obviously depend on the hours worked, addressed in the next question. Conversely, particular employers may find it easier to manage these questions by using calculations in terms of hours.

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?**

i. We agree that it is useful to have a specific mechanism for calculating a day's holiday as this currently poses a significant challenge to employers. It is assumed for these purposes that such a calculation will simply divide total working hours over a reference period by the number of calendar days in which any work is performed in that period, so as to address the situation of workers who may work on any day of a calendar week. However:

ii. As noted under Q16 above, it is important to be clear about the circumstances in which employers would be required to resort to the flat average calculation method. The definition of an irregular hours worker is key. Additionally, would this apply whenever an irregular hours worker sought to take time off, or would it only apply if the worker did not know what hours they were scheduled to work that day at the point the holiday was booked?

iii. Noting that the entitlement reference period must be forward-looking and the calculation reference period backward-looking, we would repeat the comment noted above that the minimum holiday entitlement required by the Working Time Directive may not be satisfied by this proposal where a worker's working hours increase from one year to the next, and conversely may receive more than the necessary entitlement if hours reduce from one year to the next.

iv. The consultation notes the risk of abuse if a worker seeks to take holiday on a particular day in order to maximise holiday pay while minimising time off. In these circumstances, would an employer be justified in refusing to authorise the leave?

v. The two systems for holiday entitlement and pay could cause some problematic outcomes. For example, in the situation that a Saturday shift was longer than a weekday shift but also attracted a premium rate of pay. Under the proposed system, taking a Saturday off would reduce a worker's holiday

entitlement by an average working day, but the average pay received would not reflect the higher rate that would have been received had the worker been in for that shift. The Government should consider taking steps to ensure that as far as possible, a worker's decision on whether or not to take holiday is uncoupled from any economic incentive. This is particularly with a view to meeting underlying health and safety objectives: it is problematic if individuals decide to work (particularly if in safety critical roles) only because they would earn less if they take the time off.

vi. The consultation tends to assume that all workers need to book specific days off. In reality, however, there are many types of casual worker relationships where the individual is under no obligation to work on a particular day and there is nothing to distinguish a day of holiday from a day of choosing not to work apart from the holiday pay. In those situations, it may be far simpler (and in line with common practice, albeit technically unlawful under EU case law) to allow employers to make a rolled-up holiday payment (e.g. based on 12.07% of earnings) rather than having to earmark any particular hours as holidays.

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?

i. The Working Party notes that this calculation would result in a worker in the *Harpur* situation receiving less holiday annual leave entitlement than at present if that decision were to be complied with. That is a policy decision and, as such, not a matter on which ELA provides any comment.

ii. We note that this question assumes that agency workers are generally working in a "classic" agency arrangement whereby the agency worker undertakes numerous short-term engagements. That is certainly true for some agency workers. In such a scenario, the use of a simple percentage calculation not only reflects typical practice pre-*Harpur*, but also the reality that the agency worker may often seek to be paid out for accrued holiday between assignments. However, we would also note that sometimes agency workers work in a manner more akin to full-time fixed hours workers (albeit on a less secure basis), undertaking longer-term assignments than the question assumes. In such cases, it is unclear why agency workers in particular should have their holiday calculated in a different way from a directly-hired worker undertaking employment of broadly the same duration. This would also require an amendment to the Agency Workers Regulations 2010, insofar as those regulations remain in effect following the anticipated revocation of EU laws.

iii. As noted above, this percentage is arguably an over-simplification of the correct mathematical calculation, albeit a widely-adopted one.

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

(i) As noted above, it is unclear why agency workers should be dealt with as a separate category from other workers for the purposes of the calculation of holiday entitlement or pay. That is doubly so when the term "agency worker"

is not a term of art, but (adopting the definition from the Agency Workers Regulations 2010) potentially encompasses a wide variety of working arrangements via intermediaries of various kinds.

Members of ELA Working Party

Stephen	Ratcliffe	Baker & McKenzie LLP	Co-Chair
Stuart	Neilson	Pinsent Masons	Co-Chair
Carla	Bennett	Unison	
Ryan	Bradshaw	Leigh Day	
Amy	Douthwaite	Deloitte	
Colin	Leckey	Lewis Silkin	
Ken	Morrison	SGUK	
Brona	Reeves	Barclays	
Jessica	Scott-Dye	VWV	
Catriona	Weir	Mitie	
Phillippa	Williams	NEU	
James	Williams	Henderson Chambers	