

## **Guidance note on the calculation of annual leave**

Section 1 of the Employment Rights Act 1996 (ERA) states that certain particulars must be included in a statement of terms provided to workers and employees by or on their first day of employment. One of the requirements of section 1 is that the particulars are sufficiently clear to enable an employee's entitlement to accrued holiday pay on termination to be calculated precisely.

The [model contract templates](#) for staff employed under the Terms and Conditions of Service for NHS Doctors and Dentists in Training (England) 2016 have been updated so as to comply with the changes made to section 1 of the ERA in April 2020 and at section 16, a clause has been inserted regarding pay for annual leave on termination. Organisations will note that they are required to insert details regarding the method of calculation.

In this guidance note we set out below the current case law on this issue to consider before completing the model contract.

### **Statutory provisions**

Section 1 of the ERA does not dictate how annual leave should be calculated on termination but the Working Time Regulations 1998 (WTR) provide that accrued leave should be calculated by establishing the “proportion of the worker’s leave year which expired before the termination date” and then establishing if there is any excess leave.

The WTR refer to section 221 – 224 of the ERA in terms of determining a week’s pay and there is conflicting case law regarding the most appropriate method of calculating a week’s and a day’s pay.

In essence, two different approaches are being used: a rate of 1/260<sup>th</sup> for a day’s pay, being the number of working days in a year on the basis of five working days per week, or a rate of 1/365<sup>th</sup>, being calendar days.

Section 2 of the Apportionment Act 1870 provides that "All rents, annuities, dividends and other periodical payments in the nature of income...shall...be considered as accruing from day to day, and shall be apportionable in respect of time accordingly". The word "annuities" includes salaries and pensions. This Act has been relied upon to justify payments at 1/365<sup>th</sup> per day for employees and a recent Supreme Court decision helped to reinforce this position.

### **Summary: relevant case law to reference and consider**

Working days - Maconnachie and Yarrow

The Employment Appeal Tribunal (EAT) in *Leisure Leagues UK Ltd v Maconnachie* [2002]<sup>1</sup> and in *Yarrow v Edwards Chartered Accountants* [2007]<sup>2</sup> found the WTR and the ERA take

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<sup>1</sup> [2002] I.R.L.R. 600

<sup>2</sup> 6 WLUK 190

as their working assumption the hours actually required to be done, not the number of hours in a 24-hour day or a seven-day week. On this basis, the EAT found that the concept of day-to-day accrual for the purposes of calculating payment for accrued holiday entitlement must be by reference to the number of working days in the year and not the number of calendar days in the year. However, it is important to bear in mind that the individuals in these cases worked a standard five-day week.

#### Calendar days – Reynolds, Taylor and Hartley

In *Thames Water Utilities v Reynolds* [1996]<sup>3</sup> and *Taylor v East Midlands Offender Employment* [2000]<sup>4</sup>, the EAT found that the correct method of calculation for holiday pay on termination of employment was 1/365<sup>th</sup>. However, it should be noted that the Reynolds decision predates the WTR and an additional finding in Taylor was that it was necessary for the employer to 'gross up' pay so that 10 days' holiday equated to 14 days' pay at 1/365ths, effectively, that a week's pay is 7/365<sup>th</sup>.

In the most recent Supreme Court case on apportionment of salary (which is binding on all other Courts and Tribunals), *Hartley & Ors v King Edward VI College* [2017]<sup>5</sup>, the deduction in question was for payment in respect of a day's pay during industrial action. In Hartley, the claimants were working on annual contracts and the work done by them was not limited to Monday to Friday (in the same way as doctors in training). The Supreme Court found that it did not make sense to calculate a day's pay based on 1/260<sup>th</sup> of annual salary and that the most sensible approach to apportioning the claimants' annual salary on a day-to-day basis was by treating each day as 1/365<sup>th</sup> of annual salary.

The Court acknowledged that the provisions of the Apportionment Act can be excluded in "any case in which it is or shall be expressly stipulated that no apportionment shall take place". The decision in Hartley makes clear that, under the Act, contracts of employment can set out the days for which salary accrues and that such a clause will override the default position of 1/365<sup>th</sup>. However, there are no provisions in the TCS which override the average pay calculation and nothing which makes reference to 1/260<sup>th</sup>. In fact, the only reference to apportionment is at paragraph 83 of the TCS (see below).

*Maconnachie and Yarrow* were expressly referred to and, in effect, not approved by the Supreme Court. Based on the decision of the Supreme Court, there is a strong argument that the 1/260<sup>th</sup> method should not apply those who work across seven days per week (not five), however, there is a risk of a claim based on whether Hartley can apply to calculations under the WTR.

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<sup>3</sup> IRLR. 186

<sup>4</sup> IRLR 760

<sup>5</sup> UKSC 39

the WTR, the method of calculation for outstanding annual leave set out in the regulations can be overridden by a “relevant agreement”, which includes “any provision of a collective agreement which forms part of a contract between him and his employer, or any other agreement in writing which is legally enforceable as between the worker and his employer” and this is likely to include the TCS.

The TCS provide for apportionment generally in paragraph 83 of Schedule 2 (“Arrangements for Pay”). It states that “*The salaries of full-time employees will be apportioned as followed: (a) for each calendar month, one-twelfth of the annual salary, (b) for each odd day, the monthly sum divided by the number of days in the particular month*”. This reflects the 1/365<sup>th</sup> method: there is no mention of using working days rather than calendar days. Any “relevant agreement” in this case is therefore consistent with Hartley.

### **Contractual provisions**

The statutory provisions only cover annual leave under the WTR and doctors in training are entitled to greater leave under the contract. It is, therefore, important to consider how that “excess” leave should be treated although it is unlikely that employers will want to use differing methods of calculation for statutory and contractual leave entitlements.

As set out above, the TCS use a 1/365<sup>th</sup> approach to apportioning pay generally and there is nothing in the TCS which suggests strongly that at this time this method should not be used to calculate accrued contractual annual leave on termination.

August 2020