

Pay and contract FAQs during strike action of junior doctors.

Updated 7 July 2023

Q.1 How will a day's pay be calculated?

The 2016 Terms and Conditions of Service for Doctors and Dentists in Training (2016 TCS) deal with payment of annual salaries in terms of calendar days rather than working days. It refers to the apportionment of annual salaries for full time employees for each calendar month as one-twelfth of the annual salary and for each odd day as the monthly sum divided by the number of days in the particular month. ESR calculates a day's pay on this calendar day basis and in accordance with the contract.

Most organisations appear to be approaching pay deductions for industrial action on an hourly basis, even where they have the ability to deduct a whole day's pay under the contract of employment. Consequently, ESR has been reconfigured to facilitate pay deductions on an hourly basis when staff have not taken strike action for an entire day. This approach is effectively a good will gesture by organisations that allows them to be more generous than the contractual terms regarding apportionment of salary – it encourages striking staff to attend work on a day of action (as they are paid for hours worked) and assists organisations to maintain safe service levels.

However, organisations making pay deductions by the hour, for a day of action via ESR, should ensure that this more generous approach does not inadvertently lead to a pay deduction that exceeds the employee's contractual entitlement to a calendar day's pay, that is, where staff work condensed hours and shifts which are longer than the standard eight hours. If this occurs, the risk would be that the organisation faces breach of contract claims. It should be noted that the standard eight hours per day averaged out over calendar days equates to approximately 5.699 hours per day (2080 (WTE annual hours = 40hours x 52) / 365).

Organisations should be aware that under section 8 of the Employment Rights Act 1996, they are required to provide employees with an itemised pay statement at or before any time at which any payment of salary is made. Section 8(2) states that particulars should be contained of any fixed or variable deductions from the gross amount and the purposes for which the deductions are made. As such, deductions made from an employee's wages for a day of action or partial performance should be clearly set out on the payslip and we understand that ESR provides a function whereby a statement can be included on a payslip that a deduction has been made for industrial action.

Q.2 Can we deduct enhancements as well as a calendar day's pay for industrial action.

Schedule 2 of the 2016 TCS deals with payments for on-call and hours that attract a payment enhancement.

For on-call payments, paragraph 14 of Schedule 2 states that doctors shall be paid for their average hours of work and the hours paid will be calculated prospectively across the rota cycle. For the purposes of pay, these average estimates are converted into equal weekly

amounts which will then be turned into an annual figure and the doctor is paid 1/12th of the annual figure for each complete month. To the extent that on-call hours worked are in excess of the average, doctors are paid per hour worked or given time off in lieu. Paragraphs 16 to 19 deal with hours worked that attract a pay enhancement. Such hours are treated in the same way as on-call time in that they are converted into equal weekly amounts which is then turned into an annual figure and the doctor is paid 1/12th of the annual figure for each complete month.

As we understand it, on-call and out of hours payments are therefore already accounted for in the annual salary of junior doctors and a deduction of a calendar day where ESR also includes on-call and out of hours payments to calculate a calendar day will account for these so that no separate deduction for the enhancement will need to be made.

However, where payments are made by the hour (for example on-call payments in excess of the average) which are not averaged out and included in annual salary, organisations could choose to deduct these payments specifically in addition to a calendar day on the basis that they are paid by reference to actual hours worked during specific days and times and during industrial action the individual has not worked those days/times and so should not receive the payment. Where specific payments are made under a local contract for resident on-call time which a doctor refuses to work, an organisation should consider how these payments are usually made.

Where they are rolled up into a prospective payment across the year, an organisation would need to work out what element of the salary relates to that activity and make a deduction accordingly. Where the payment is made separately in addition to annual salary and paid on an hourly basis, it could be deducted for the hours the individual took industrial action. We recommend that further advice is sought on this subject as the approach will be dependent on the specific facts in each case.

It will be vital that organisations consider any local terms and conditions regarding the payment of enhancements and apportionment which may vary the national terms and conditions.

Q.3 Do we approach apportionment in the same way for less than full time (LTFT) staff?

Yes. The 2016 TCS at Schedule 2 sets out the apportionment provisions at paragraphs 81-83. Paragraph 81 refers to full time employees and sets out the calendar day approach. Section 82 states that for less than full time employees, salary should be apportioned as per paragraph 81 except in the months in which employment commences or terminates when they should be paid for the hours worked. Therefore, unless an organisation has varied paragraph 82 at a local level so that calendar days are pro-rated for apportionment purposes for LTFT doctors, we consider that the full calendar day approach (rather than a pro-rated calendar day approach) should be followed.

Q.4 Is it right to pay doctors who will be striking who will be on annual leave or zero day?

During a zero day where a doctor is not rostered to work, an individual will not be withdrawing labour and therefore no pay should be deducted. Where someone has booked

annual leave, they should receive pay for annual leave even if this coincides with a day of industrial action unless an employer has evidence that the individual is associating with strike action, which could justify a deduction.

For further information on the treatment of annual leave and sick leave during strike action please see Capsticks FAQs.

Q.5 Will doctors on locally employed contracts be able to participate in industrial action?

Yes, as indicated in the BMA's notification of ballot, BMA members who are employed either under the 2016 TCS (including GP trainees), locally employed junior doctors and locum junior doctors are being balloted. Doctors on a variety of contracts appear to have been balloted (the notice of ballot and results which organisations have received should indicate which categories of doctors have been balloted) and it will therefore be lawful for the BMA to call out these members and for them to strike and be protected, regardless of the contracts under which they are employed. We understand that agency locum doctors have not been balloted. It should be noted that just because an employee has not been balloted does not mean they cannot take industrial action. Employees who are not members of any union, and so will not have been balloted, can take official action where they go out with junior doctors.

Q.6 For doctors wishing to take part in strike action who don't come in during 9-5 as per their rostered shift, are they able to cover a locum shift in the evening / night shift?

The legislation does not prohibit a doctor who has withdrawn labour during his/her rostered shift from undertaking bank shifts as a locum at other times where he/she isn't rostered to work. Organisations may not want to offer bank work to striking doctors as a point of principle but use of doctors in this way is likely to be determined by an organisation's requirement to provide safe services.

Using the definitions contained within the Working Time Regulations 1998, time spent on strike can be considered a rest period. Time on strike does not count as "working time" (unless there is a collective agreement stating otherwise) as the individual is not working, not carrying out their duties and not at the employer's disposal during that period (all requirements for "working time"). A rest period is a period which is not working time, other than a rest break (the uninterrupted period of not less than 20 minutes if the worker's working time is more than six hours) or annual leave. Accordingly, if individuals are rostered on days and strike during those periods, it is not working time (and is therefore a rest period) so the individual could then work the night shift.

Q.7 Can we insist that a doctor attends their rostered shift which falls outside the period of strike action i.e. where strike action finishes at 6:59am, could we require doctors to attend one hour of their rostered night shift from 7am until 8am?

During contingency planning, organisations can certainly communicate that they expect doctors to attend any part of their shift which falls outside the specific times which are referred to by the BMA but it is important to note that the union only has to provide notice to employers of the days of the action, not the specific times. Staff and unions are therefore likely to argue that strike action can be taken up until 11:59pm on the last day of action and

indeed the BMA indicated that anyone whose shift started prior to 6:59am on 16th March would not be required to attend that shift.

Q.8 Will unpaid leave as a result of industrial action affect those working under a visa?

The guidance for sponsors makes clear that they are under a duty to report to UKVI where a sponsored worker is absent from work for more than 10 consecutive working days without permission. This report must be made within 10 working days of the tenth day of absence and we consider it applies to industrial action. However, at this point, it seems unlikely that industrial action will be called for 10 consecutive working days or that if it were to be, a sponsored worker's rostered hours would coincide with a period of industrial action for 10 consecutive days.

Sponsors must report to UKVI a reduction in salary from the level stated on the Certificate of Sponsorship within 10 working days of the relevant event occurring. There does not appear to be an exception to these reporting duties where the deduction is for taking part in industrial action and so we recommend that deductions for industrial action are reported by sponsors.

Organisations must normally stop sponsoring a worker who is absent from work without pay for more than four weeks in total in any calendar year (1 January to 31 December). This applies whether the worker is absent from work for a single period of more than four weeks, or if they have a number of absences which cumulatively total more than four weeks. However, there are specific exceptions to this rule and absence for industrial action is one of those exceptions (along with sick leave and maternity leave). In addition, taking industrial action will not have an impact on any application for indefinite leave to remain that an individual may make.

Q.9 How will pay be deducted if a junior doctor rotates in August.

Some trusts have approached their payroll department and agreed to delay running payroll until the completion of July's junior doctors' industrial action to allow for attendance reports to be submitted and then deductions for industrial action will be made from July's pay.

Where remaining deductions would come from August's pay, doctors who have rotated may be paid less than the deduction amount and therefore these payments will need to be reclaimed as an overpayment. Employers should write to employees to request repayment of the money owed due to industrial action deductions and could, ultimately, take legal action to recover the monies where they are not repaid voluntarily.

Q.10 Can junior doctors work on rest days immediately following industrial action?

If a doctor strikes over the weekend and is recorded as not attending work, they may not require the rest safeguards set out in schedule 3 and it may be possible for them to take on additional activity without breaching the rest safeguards in schedule 3. This is because time spent on strike is not "working time" for the purposes of the Working Time Regulations and the Schedule 3 rest provisions take into whether shifts have been rostered or worked (and the rostered shifts will not have been worked when a doctor has taken industrial action). Some doctors may wish to take on extra working hours on their non-working days following

their strike days in order to make up for deducted pay. This would be additional work outside of contracted hours and would have to be agreed by the employer.

If the doctor and employer mutually agree to swap the hours of work from a weekend to midweek this is not recorded as strike action and would follow your standard process for swapping shifts.