

## Department for Business and Trade

# Calculating holiday entitlement for part-year and irregular-hours workers consultation

A response from the British Retail Consortium  
March 2022

### About the British Retail Consortium

The British Retail Consortium (BRC)'s purpose is to make a positive difference to the retail industry and the customers it serves, today and in the future.

Retail is an exciting, dynamic, and diverse industry that is going through a period of profound change, accelerated by the pandemic. Consumer expectations continue to evolve, and technology is enabling retailers to respond, changing how people shop. Costs are increasing, and growth in consumer spending is slowing.

The BRC is committed to ensuring the industry thrives through this period of transformation. We tell the story of retail, work with our members to drive positive change, and use our expertise and influence to create an economic and policy environment that enables retail businesses to thrive and consumers to benefit.

Our membership comprises over 5,000 businesses, including physical retailers, online only and multichannel retailers operating across both channels, delivering £180bn of retail sales and employing over one and half million employees.

The UK retail industry generated £430bn (excluding fuel sales, and current prices) in sales in 2021, contributing 5% to the UK's output in the same year. Retail is the largest UK private employer: through nearly 315,000 separate enterprises, it provides about 3 million jobs amounting to 9.3% of the total number of jobs in the UK. Retail is the largest employer in the UK, often providing the first step into the world of work. As an industry, retail welcomes those who may experience high levels of economic exclusion or who need flexibility in hours and location of their work.

### OVERVIEW

The BRC welcomes the Government's consultation on the calculation of holiday entitlement received by part-year and irregular hours workers, following the recent Supreme Court judgment in Harpur Trust v Brazel. **We understand and support the stated objectives that lie behind the consultation document to ensure that part-year and irregular-hours workers' holiday pay is directly proportionate to the time they spend working.**

Our detailed comments responding to the questions in the consultation document are set out below. The key points which we have made include:

- Compared to the total number in the retail workforce, there is **only a small proportion of workers with irregular atypical hours in retail**, mainly occurring at the worker's request, with some use of seasonal colleagues and students who might want to work during holiday periods.
- Informal work arrangements such as seasonal work, fixed-term contracts, agency temping, and casual type of work (including zero-hour contracts), together, account for only 5.6% of the retail workforce.
- Since Harpur Trust v Brazel, **concerns have been raised over the huge inequalities and challenges in explaining calculations to workers**. Currently, the calculation of holiday entitlement for part-year workers and those in irregular atypical hours isn't only unfair (when compared to part-time workers), but overly bureaucratic and costly.
- There are **concerns about the use of the reference period**, including the uncertainty, high cost and time constraints to make system changes.

- Retailers **welcome the proposal of including weeks without work in the calculations**, ensuring that holiday entitlement is based on the number of hours worked. It would also be much easier for retailers to manage and would be consistent with the holiday entitlement for part-time workers.
- Despite being sensible from a simplification point of view, **retailers are skeptical about a fixed holiday entitlement reference period from a fairness and financial perspective**, including fears that this would not be reflective of an over-busy or unusually quiet previous year, for example, with the workers having fewer or too many holidays as a consequence, it would be burdensome to budget for and might not accurately reflect changes, raising questions from employees.
- Retailers feel that **accruing holiday entitlement at the end of each month based on the hours worked during that month could be the fairest way to calculate holiday entitlement for workers on irregular hours**. It was also pointed out that this could potentially work beyond the first year better than the proposed fixed reference period.
- However, **retailers would welcome a broader approach to this**, moving away from “one size fits all” which could work well for more standardised sectors such as education.
- As retailers have a number of different types of agreements with workers, the **sector would welcome a suite of options to choose from based on different business models**.
- Retailers aren't supportive of the use of a flat average working day to calculate how much holiday a worker with irregular hours uses when they take a day off. The preferred option for the industry is the **use of expected contractual hours**.

## RESPONSE TO CONSULTATION QUESTIONS

### 14) If you employ workers with irregular hours, how do you calculate their holiday entitlement?

Overall, only a small proportion of retailers employ irregular hour workers, in the form of zero hours contracts, with a significant number of those that do reporting that they do it at the employee's request.

Some members have moved away from zero-hours contracts following the judgment in Harpur Trust v Brazel, reporting that the calculations are too confusing for employees to understand. Pre-judgment, retailers reported doing calculations by using the rolled-up holiday pay method, an accrual method or based on hours worked (rather than contractual hours).

Now the feeling is that there are huge inequalities and challenges explaining calculations to workers and that working a consistent pattern should not equate to more time off.

The general sense is that currently calculating holiday pay is becoming a disproportionate administrative burden, that HR systems and payroll providers aren't prepared to deal with it effectively either.

Some retailers mentioned specific situations where they engage with irregular-hour workers, usually at the worker's request:

- Some have seasonal colleagues rather than zero-hour contracts. These employees agree to work at certain times of the year and holiday pay is calculated on expected hours, for example a colleague who works 20 hours per week for 10 weeks in a holiday year would receive 21.5 hours in that holiday year.
- Another situation where retailers reported engaging with irregular-hour workers is with students, who might want to work closer to their university or only during holidays. In this case, typically, they work two weeks at Easter, six weeks over the summer, and two weeks at Christmas. Currently, anyone who has this arrangement has a weekly contract of 7.5 hours per week, and when they come back for those ten weeks a year, they work 7.5 hours with any additional hours being paid as overtime. The holiday entitlement is calculated by taking the weekly contracted hours and multiplying it by the number of weeks they're entitled to (based on length of service), which gives the annual holiday hours.

Following up on the above, it would be more helpful if retailers were able to offer a ten-week contract and

calculate the entitlement based on those ten weeks rather than a full year. The introduction of these may also encourage the business to consider introducing holiday time contracts and term time-only contracts as additional flexible working options.

**16) Would you agree that the information you currently collect to calculate holiday pay would be sufficient to calculate holiday entitlement using a reference period?**

***Disagree.***

This question generated divided opinions among retailers, with the majority leaning towards disagreeing. While some have systems in place, some reported the need to build on the current system, which means extra time would be needed.

Those who disagreed mentioned that, while the data might be available, the current software would need enhancements, which can become costly and administratively onerous. Retailers have already invested significant time and effort in the development of current systems and we don't believe that further iterations are desirable.

Other concerns raised are in terms of employees confidence in trusting employers to hold a year's worth of data or to keep the information themselves. Additionally, zero-hour contract workers are likely to move between jobs – crossing between multiple employers would make it much more difficult to calculate.

**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?**

***Agree.***

The majority of retailers agree with the proposal. The feeling is that taking out weeks without work is unfair or creates inequalities with part-timers. Including weeks without work would give a more reasonable level of holiday entitlement based on the number of hours worked. It would also be much easier for retailers to manage and would be consistent with the holiday entitlement for part-time workers.

However, retailers would welcome clarity on the hours worked being used in the calculations, with some suggesting that where contracted hours are known these should be used to calculate the entitlement (as opposed to hours worked), but where there are zero-hour contracts, entitlements could be based on hours worked in the previous year.

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

***Neither agree nor disagree.***

The overall view is that, although this makes sense from a simplicity aspect, it raises serious concerns from a fairness and financial perspective, with suggestions that the approach of Question 17 would be fairer.

In terms of positives for this approach, it could encourage organisations to introduce term time, or school holiday-only, contracts, thereby supporting a more flexible and agile workforce and also helping women into the workplace, who traditionally may not work due to childcare needs during school holidays.

Where possible, it would be ideal to look at the number of weeks a colleague is expected to work during the year and agree on this up front and the holiday entitlement should be proportionally based on that.

However, important downsides were pointed out in this approach:

- How would finance colleagues' budget for holidays this year based on last year?
- Welfare/fairness issue: If someone has worked a lot in the previous year but then does not work much the next year, they should not require as much holiday in the latter or, on the other hand, if they're working more hours this year so need more rest time, they could have less entitlement if the previous year was quiet.
- This approach wouldn't capture changes and would create a lot of questions from employees. It might be easier for employees to understand the allowance they have is based on what they worked rather than if it's based on a fixed period at some point.

**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?**

**Agree.**

The overall sense is that this is fairer and could potentially work beyond the first year better than the proposed fixed reference period. This could be logical and easy to explain to workers: the more you work, the more you accrue and easier to administer.

However, there's skepticism about a "one size fits all" approach, with a view that some suggestions could suit sectors with clear patterns, such as education, but could be unreliable to implement in sectors with so many concomitant different agreements such as retail.

With that in mind, the preference would be for a suite of options to choose from based on business models. This could include:

- Use actual contracted hours (what you would expect to work) to forecast forward.
- Use of rolled-up approach and quarterly holiday payments for zero-hours – this was used by a retailer and it's deemed popular, logical for employees to understand, and simple to use.
- Use of expected hours to calculate holiday allowance.
- Our preference for the first year would be to consider how many contracted weeks the colleague would work in that first holiday year.

Some retailers mentioned the need to make system changes as a potential downside.

**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?**

**Disagree.**

Retailers are concerned about the challenges to calculate average hours for specific days or a flat average as irregular workers in retail could have wide ranging day lengths, with some retailers pointing that entitlement in hours would be a lot easier, and a large number suggesting the use of expected contractual hours.

Others reason for concern are that this type of calculation could be manipulated by workers, as pointed out in the consultation papers; high costs; and the fact that this can be confusing for employees.



The overall preferred route here would be to use contracted hours instead of actual hours, and would also enable clarity on the hours expected to be included to arrive at the flat average, which should be based only on contractual hours not actual hours worked (which would include overtime).

**For queries related to this response, please contact:**

**Luiza Gomes**  
**Policy Advisor - HR**  
**[Luiza.gomes@brc.org.uk](mailto:Luiza.gomes@brc.org.uk)**