



Unite response to the Department of Transport consultation on proposed amendment to the Civil Aviation (Working Time) Regulations 2004.

1 Introduction

- 1.1. **This response is submitted by Unite the Union, the UK's largest trade union with 2 million members across the private and public sectors. The union's members work in a range of industries including manufacturing, financial services, print, media, construction, transport, local government, education, the health service and not for profit sectors.**
- 1.2. Unite, is the largest trade union in the United Kingdom (UK) civil aviation industry, representing more than 80,000 members.
- 1.3. In this response we will not only focus the just the questions posed, but also areas where we believe there are points which need highlighting and where possible amendment within the existing regulations.

2 Holiday Pay Calculation

- 2.1. The initial problem with any minimum employment provision is to ensure that this minimum will not cause a loss to the individual employee. Logically, if the individual was to loose money every time they had a period of rest they would be far less likely to want to take this time off, especially in times of heightened job insecurity and rising debt.
- 2.2. This is especially true in the case of part-time Cabin Crew who may be on a salary per hour far less than the minimum wage¹. A typical crew members pay consists of various elements including that of commission on goods sold on board. They work to a roster which is never the same, month on month. Consequently when determining the amount of pay a crew member should receive per day, Unite would recommend, for the sake of clarity, wording to be adopted similar to that found in section 221 to 224 of the Employment Rights Act 1996 which includes these additional payments when arriving at an average pay figure, i.e. the daily average remuneration received over the last twelve weeks multiplied by the number of weeks away.
- 2.3. The Court of Appeal ruling in the case of Williams and Others v British Airways² stated, however, that there is no agreed methodology applicable under statute to the calculate payments of holiday pay or payment in lieu of notice set out in legislation.

¹ The general minimum wage regulations do not apply to activities on board aircraft.

² British Airways Plc v Williams & Ors [2009] EWCA Civ 281 (03 April 2009)

Regulation 16 and Section 26A(1)c of the general Working Time (Amendment) Regulations 2007 states that the methodology utilised under sections 221 to 224 of the Employment Rights Act 1996 should be utilised in providing a clear method for determining what would amount to a days pay, if the employee worked on the ground. There is no method or reference set out in the Civil Aviation version however, leading to employers arguing that this methodology does not apply and that they can base calculations on just the crews average basic pay disregarding any bonuses etc.

- 2.4. The purpose of the Working Time Directive (93/104/EC) of 23 November 1993 was to lay down minimum health and safety requirements for the organisation of working time, in respect of periods of daily rest, breaks, weekly rest, maximum weekly working time, annual leave and aspects of night work, shift work and patterns of work. Article 7.1 set out the following:-

"1. Every person taking the holiday envisaged in this Convention shall receive in respect of the full period of that holiday **at least his normal or average remuneration** (including the cash equivalent of any part of that remuneration which is paid in kind and which is not a permanent benefit continuing whether or not the person concerned is on holiday), **calculated in a manner to be determined by the competent authority or through the appropriate machinery in each country.**"

- 2.5. It is not known at this time if BALPA³ intend to continue with this case to the House of Lords and it is not as far as Unite is concerned the end of this argument. Due to the omission by the UK Government to include a methodology the Court of Appeal speculated that it may be possible for the parties to seek a claim against the United Kingdom government for breach of its obligation to properly implement the Aviation Agreement and Directive (cf *Francovich and Bonfazi v. Italy*⁴). Such a process would be very expensive, long and drawn out, however, and may cause embarrassment to the government's position in this issue.

3 Question 1

- 3.1. **Proposed new regulation 4A(1) envisages increasing the current minimum annual leave entitlement to 28 days for mobile workers in civil aviation in a single step, rather than in two separate stages as was the case with the Working Time (Amendment) Regulations 2007.**

Do you agree with our suggested approach of implementing the full increase on a single introduction date? If not, to what timetable should the proposed increase in the minimum statutory annual leave entitlement be introduced?

- 3.2. Unite believes that a single date approach would be the most effective way of implementing the change. The only caveats to this would be the need to ensure that the employer is left in no doubt as to how and when this additional leave entitlement should be applied and what is meant by a day.

4 Question 2

- 4.1. **Proposed regulations 4B and 4D(2) would not allow the new, additional annual leave entitlement to be replaced by payment in lieu, although any further leave**

³ BALPA provided the funding for the case of Williams and others against British Airways.

⁴ *Francovich and Bonfazi v. Italy* [1991] ECR I-5357; [1993] 2 CMLR 66

over and above the new 28 day statutory minimum would be capable of being replaced by agreement. Do you agree? If not, please state why.

- 4.2. Unite agrees that the minimum period of annual leave should be taken by the employee in their respective leave year. If an employee has not been able to take their entitlement within their final year of service due to the actions of the employer, then we believe that there should be this possibility of a payment in lieu but only where the contract is coming to an end. This would enable employees to maximise their severance payment in the event of a compulsory redundancy situation, providing that employee with further financial resources when they are needed the most.
- 4.3. In an industry which receives a considerable amount of its revenue from the tourist industry, aviation is often one of the first industries to be hit by a down turn in disposable capital amongst its indigenous population. The industry is also very exposed to the fluctuations in the price of a barrel of oil given that only a very small percentage of a barrel can be turned into aviation fuel and that on some flights over fifty percent of the aircrafts weight could comprise of the weight of the fuel needed for the journey. British Airways for example has gone to the step of removing foot rests from seats as the combined weight reduction can amount to over 100 kgs from a flight. At Virgin Atlantic they are even experimenting with plastic teapots to save weight. With there being a direct relationship between gross landing weights, fuel burn and hence cost, even this minimal reduction can have a significant impact.
- 4.4. The civil aviation industry is a multi million pound concern were the running costs of flights are very high. Consequently penalties for non compliance with legislation need to be sufficiently high so as to ensure that it would not make fiscal sense to ignore minimum requirements. Unite believes therefore believes that if there is no entitlement to a payment in lieu, there needs to be stiffer an enhanced penalty on employers to ensure that every employee has the opportunity to take their full contractual and legal holiday entitlement.

5 Question 3

- 5.1. **Proposed new regulation 4C(1) would allow some or all of the new additional annual leave entitlement to be carried over into the following leave year (only). This would be in addition to the following year's leave entitlement and would have to be taken during that second leave year. Do you agree with this approach? If not, please state why.**
- 5.2. As with any entitlement, there need to be an amount of flexibility for the employee to carry over unused leave entitlement where they have not chosen to utilise it in a given period. There should not be the potential for unscrupulous employers to be able to bring pressure to bear on employees to defer their leave entitlement, however, and hence an absolute ban on an employee having less than 28 days absence from work on leave⁵ is welcomed.
- 5.3. Regulation 4C(1) states that some or all of the additional 8 day entitlement, can be carried over into the next leave year but that if carried over it must be utilised in that following year. Enforcement of this requirement to use leave in the following year is however very difficult to enforce as although the employee may use the 8 days of last years leave in the current year there is nothing to stop them rolling over 8 days

⁵ Provided he works a standard 5 day week.

of the current years entitlement into the following year etc. A “by agreement” stipulation in the legislation which allows the employee the freedom to refuse to agree to leave being carried over would be no deterrent to a determined employer, especially in today’s climate of high job insecurity.

- 5.4. Unite would in general terms wish to see the minimum leave in a calendar year being just that. For the ground based employee, bank holidays are additional days which cannot be carried over, If the employee works that bank holiday they generally get a day off at some point in that year. Cabin and flight crew work bank holidays as standard but currently do not get this leave. If this legislation is set to provide harmonise leave then it should do just that.
- 5.5. However, it is the practice of several ethnic groups to deliberately bank leave, in order to take extended periods in their family’s home nations in order to visit friends and relatives. The flexibility to carry over the additional leave provided by 4A would in these circumstances enable this practice to continue without increasing contractual leave entitlement.
- 5.6. Unite therefore concludes that whilst every effort should be made to ensure the employee is not badgered into postponing leave indefinitely, we understand the need for this flexibility over this additional eight day period. Unite recommends that the need for enhanced protection from such pressure being brought to bear by the employer.

6 Question 4

- 6.1. **The proposed amendment to regulation 4(1) seeks to change references to leave entitlement in the Civil Aviation (Working Time) Regulations 2004 from units of “weeks” to units of “days” in order to reflect more accurately rostering practice in the civil aviation sector.**

Do you agree with this approach? If not, please explain why

Will this create difficulties for you, your company/organisation or your employees? If so, please provide details.

- 6.2. In an environment where employees work on a five day rolling shift pattern which includes weekend working, it may appear to make perfect sense to move from “weeks” to “days” as the standard unit within the legislation. If, however, an employee is expected to spread the working weeks hours over a smaller or larger number of days, as is often the case within civil aviation, may prove problematic.
- 6.3. At a number of long haul operations the working week is far from standard and a single employee may not end up working with the same routes for months. By way of example a full time employee may be on a seven hour flying day on a return flight to New York one week then on an eighteen hour flight one way to Australia the next week where the crew member has to rest before taking another eighteen hour flight back. Prior to departure the crew have to be at the airport for a briefing session and also remain for a de-briefing session on arrival. For a full- time staff member and part-time staff member the same 900 flying hours rule applies and hence part-time staff may be rostered to fly on predominantly longer haul flights to reduce the number of days worked while full-time staff are rostered on shorter haul durations. As a consequence part-time workers may be on a 70 percent part-time contract but end up working the same number of hours than a full time staff year receive only 70

percent of the pay. The key difference would be that the 70 percent crew member would do these hours over a shorter number of days. Indeed the rate paid may well in some cases fall below the normal minimum wage provisions for a ground based worker.

- 6.4. This position varies considerably across airlines, however. On predominantly short haul operations crew may be confined to a series of forty five minute flights between destinations and hence their working day could be very standard in terms of duration.
- 6.5. In the case of *Taylor v East Midlands Offender Employment*⁶, the EAT accepted that the Apportionment Act applied but that 10 days' holiday equated to 2 working weeks and therefore there was an entitlement to 14 days' holiday pay. The EAT pointed out that this calculation was consistent with the definition of a week's pay set out in sections 221-224 of the Employment Rights Act 1996 which is used for the purposes of calculating paid annual leave under Regulation 16 of the general Working Time Regulations. It is noted however that there is no equivalent method to calculate leave payments under for civil aviation workers.
- 6.6. In regulation 9 of the current Civil Aviation (Working Time) Regulations 2004, it provides a methodology for calculating leave entitlement based on worked hours per annum. Mobile aviation workers may not have a straight forward working week as the rostering of crew may require alteration to ensure that there is enough staff available to cover minimum safety requirements.
- 6.7. At one of the major airlines operating from the UK, where Unite has a considerable membership density, a crew member to be guaranteed a fourteen day period, free from being rostered to be on duty, they would need to utilise twelve days leave, despite having an annualised average working week of less than five days. At this same airline to take a consecutive four week leave period, free from being rostered to be on duty, the crew member would need to book twenty-six days leave.
- 6.8. As a consequence of the above there needs to be clarification within regulation 9 of whether the twenty eight days holiday entitlement will equate to forty days absence from work⁷ or twenty eight days free from being rostered to fly or to be on standby, if there is a move away from weeks as the standard measure of leave entitlement. If not members would be better off with the definition of time remaining at 5.6 weeks.
- 6.9. At another major airline provision is made for what would normally be weekends in the normal 9 to 5 working week allowing a straight translation of days off into weeks. With this clarification Unite would welcome the move from weeks to days.
- 6.10. The definition of a day in the draft legislation is "*for the purposes of entitlement to annual leave or additional leave, a on which a crew member would otherwise have been working or acting as a standby, but does not include any rest day to which the crew member may be entitled under regulation 10*". Unite therefore believe that there is a need to clarify the position more firmly especially over when the day commences.
- 6.11. In the case of a crew member who has arrived after working on an eighteen hour flight, they are required by law to have adequate rest to enable them to be in a fit

⁶ *Taylor v East Midlands Offender Employment* [2000] IRLR 760

⁷ i.e. 1.4 days leave for every days holiday entitlement, rounded up.

state to carry out their duties on the next flight. Consequently there is considerable debate over when the leave period commences. Is it on arrival at the UK airport or after the rest period has been completed. Equally given their roll involves the crossing of international time zones when would this period of leave effectively commence.

- 6.12. If day's leave was simply be defined as "a continuous period of 24 hours on which a crew member would otherwise have been working or acting as a standby, but does not include any rest day to which the crew member may be entitled under regulation 10; (which would be consistent with regulation 71.2(b) of the Civil Aviation Air Navigation Order 2000⁸)" it would not matter when the leave day started with respect to local time considerations.
- 6.13. Unite therefore believe that there should be either a clearly defined definition of a day and to how the respective periods in relation to leave is calculated before there is any move from weeks to days.

7 Question 5

- 7.1. **In order to clarify what should constitute a day's leave the amendment to regulation 3 inserts a definition of a day which makes it clear that "rest days" are to be expressly excluded. Do you agree with this definition/approach? If not, please explain why.**
- 7.2. Unite welcomes the clarification of leave within regulation 3 between rest days and annual leave. The problems now lie between recovery periods, the holiday periods and leave entitlement as stated earlier. Under the circumstances, the definition of a day would benefit from a definition of what would constitute a working day in terms of hours for a crew member. As stated previously we would recommend a day being defined as a period of 24 hours.
- 7.3. Unite welcome the calculation methodology proposed therefore under 4A (6) as it will address to a very large degree the problems faced by part-time cabin crew in particular.

8 Question 6

- 8.1. **Proposed new regulation 4E seeks to provide a framework for determining when leave may or may not be requested/taken. This follows similar provisions in the Working Time (Amendment) Regulations 2007. Do you agree with this approach? If not, please explain why.**
- 8.2. Unite agree that it is desirable to have a single methodology, wherever possible, to encourage clarity and familiarity between two almost identical working situations, than two methods which may face confusion further down the line between employment situations. In practice, however, this may cause there to be false expectations that this leave could be provided.
- 8.3. At most of the vast majority of airlines operating out of the UK, the rostering of crew is only commenced after the deadline for leave booking has passed. The airline then schedules crew to their assigned flights for that month and publishes the roster six weeks before the beginning of that month. This results in a situation where due to

⁸ SI 2000 No. 1562

the necessity to have a minimum compliment of crew on board for health and safety reasons, no crew member can be granted leave unless an alternative person can be found to take there place. As a result leave booked after these deadlines cannot be guaranteed.

- 8.4. This results in crew booking leave to guarantee that they are not flying or on standby duty at the airport and using up leave days on dates when they would in any event be at home. In an emergency crew can then be de-rostered from a flight to take leave which may result in flights departing short handed although above the statutory minimum crew levels.
- 8.5. Unite has not had any complains from crew over the duration of notice required for booking leave but has a serious concern about leave being used to cover days when the crew would not have been rostered to be at work.

9 **Question 7**

- 9.1. **An Impact Assessment accompanies this consultation paper. If you disagree with the analysis of costs and benefits or any of the assumptions set out in the Assessment, please feel free to suggest alternative methods for reaching the identified objective and highlight any possible unintended consequences of the policy, including wherever possible supporting evidence.**
- 9.2. Unite agrees that given the three options available, option three would appear to be the only workable alternative, given it would create major logistical problems over the Christmas period if no crew would be able to fly on bank holidays.
- 9.3. Unite believe that the financial assessments based on national statistics are inappropriate when dealing with such a small group of the UK workforce. Unite has carried out its own survey of the contractual arrangements among the airlines where it has members. The vast majority of airlines already provide annual leave entitlement far in excess of the minimum prescribed. Unite discovered at that among the airlines where it has any significant membership, just two airlines provided the bare minimum 20 days leave and only two provided just 28 days leave. As a result the current proposals are likely to have far less of a financial impact than has been assessed.

10 **Rest Breaks**

- 10.1. Within the assessment it claims that the amendments to the Civil Aviation (Working Time) Regulations may assist in the reduction of stress and reduce sick leave periods. The amendments do not, however, resolve the currently faced issue of adequate rest breaks for cabin crew on flights. Currently it is perfectly legal for flights to operate with less than the scheduled crew numbers, removing any potential for crew to take a rest.
- 10.2. In the past cabin crew working on short haul routes were able to take breaks while the aircraft was cleaned, restocked with food etc and refuelled. In a drive to cut costs airlines now require cabin crew to clean the aircraft themselves and restock the reading material between the disembarkation of one group of passengers and the embarkation of the next. This has resulted in crew working very long periods without a rest.

- 10.3. In order to save weight and hence fuel, some airlines are now asking crew to forgo any food carried on board and accept a reduction in the volumes of water they consume.
- 10.4. On long haul flights some crew do not have the opportunity to have rest periods, especially where they are working short handed. Crew often cannot take these rest periods away from their place of work resulting in them being effectively working and responding to passenger needs during the full duration of the flight.
- 10.5. Unite believes that crew should be allowed to take rest during flights in areas away from the passengers, especially if they are spending a significant proportion of their time on their feet. On short Haul flights this could be taken during the turn around periods. On longer haul flights an area below decks or a segregated away from passengers should be provided.

11 In conclusion

- 11.1. Unite believe this is a prime opportunity to correct and amend real life problems faced by the industry with regard to a group of workers who due to their professions are out side of the scope of a number of employment law provisions.
- 11.2. Their dedication ensures that flying remains one of the safest modes of transport available to the travelling public. This mode ensures that the UK is a major player on the world stage and an industry leader within Europe contributing billions to the UK economy.
- 11.3. The very least this government can do is ensure that the workers involved in this industry receive the same benefits as those in other industries and to ensure that the conditions within which crew operate are at or above a minimum standard expected for employees from the UK.

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