Strike pay deductions: the consequences of Hartley

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How does Victorian legislation about apportioning rent determine how some employers should deduct pay during a strike? It needed the Supreme Court in Hartley to work out that striking teachers lose 1/365th of their annual pay for each day of industrial action.

Background

If an employee strikes or takes other industrial action, he or she will normally be in breach of contract. It is permissible to deduct pay for the strike (*Miles*). To do so is not a trade union detriment because striking is not a trade union activity at an appropriate time under s.146 TULR(C)A.

Employers often choose to deduct part of employees' salaries as a disincentive to strike, but deducting too much could amount to a breach of contract. Although where a day's pay is contractually defined and the strike lasts one day the situation is straightforward, there may be complications. First, unions may employ tactics to try to maximise the adverse consequences of the strikes, such as organising strike periods that cut across multiple working shifts or striking for only some hours of a longer shift. Second, where the contract of employment does not specify the amount of a day's pay but only gives an annual salary, by how many days should the salary be divided to find out what is a day's pay?

Victorian heritage

The starting point is Victorian legislation about how periodic payments should be apportioned over a period of time. S.2 of the Apportionment Act 1870 provides that: 'All rents, annuities, dividends, and other periodical payments in the nature of income (whether reserved or made payable under an instrument of writing or otherwise) shall, like interest on money lent, be considered as accruing from day to day, and shall be apportionable in respect of time accordingly.'

S.7 provides that the application of s.2 is subject to any contrary stipulation such as any contractual apportionment of pay. So, where the contract provides for normal contractual working hours or a working week and wages are calculated by reference to those hours/days/weeks, s.2 has no application and pay must be apportioned according to the terms of the contract.

The amount of pay contractually referable to the period of non-performance should be deducted for a strike. The period of non-performance will be either the duration of the strike or perhaps some longer period (such as a shift or tour of duty) where the employer has previously indicated that it would not accept part-performance of a longer period (see *Wiluszynski* and *Ticehurst*). In those latter circumstances, the employee cannot claim part of his or her wages on a *quantum meruit* basis (*Spackman*).

Where the worker has no regular working hours and earns an annual salary, s.2 of the Apportionment Act 1870 steps in to divide up or apportion the salary as 'accruing from day to day' because pay is a 'periodical payment in the nature of income'. Where there are no regular working hours across the year, the deduction would be 1/365th for each day not worked as s.2 refers to calendar days and not working days (*Thames Water*).

Hartley and Cooper

The Supreme Court in *Hartley* distinguished *Cooper*, where claimants who were paid for a defined 37-hour week took part in a one-day strike. The employers deducted 'the value of the claimants' services' provided on working days and discounted paid holidays to calculate one day as 1/228th of annual salary. The employees' union contended that the 32 days of statutory and contractual holidays were part of working time, and that a day's pay for deduction purposes

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should be the day's pay that would otherwise be payable and thus calculated on the basis of 1/260th of annual salary.

The *Cooper* contracts of employment provided that employees were 'entitled to receive your normal remuneration for all bank and public holidays normally observed in England and Wales and to a further 25 working days in each holiday year'. Annual salary had to be apportioned between the working hours as defined in the contract spread over the 52 weeks of the year. This produced the formula for calculation of a day's pay of 1/260th, achieved by deducting the 104 weekend and non-working days from the 365 days in the normal calendar year and discounting the odd day.

Blake J held that 'the correct test is to determine whether the employee could sue for the withheld wages rather than focusing on what the overall losses to the employer were by reason of the partial non-performance'. He commented that he was initially troubled by whether the daily wage should be calculated as 1/365th under the Apportionment Act 1870. However, he held that the wage that was payable per day was 1/260th rather than 1/228th of the annual wage.

Hartley and the Apportionment Act 1870

In *Hartley*, the question was whether a deduction of a day's pay from a striking teacher should be 1/365th based on s.2 or 1/260th based on the number of their working days. The teachers disputed the deduction by their school of 1/260th for each strike day and contended that the correct deduction was 1/365th.

The Court of Appeal's analysis was based on the 195 days of 'directed time' that the teachers worked each year. Those were the days on which teachers were required to be at school. Although acknowledging that teachers did work additional 'undirected time' (on marking, preparation and administration), this could be undertaken on any day. The Court of Appeal found it significant that supply teachers and teachers who agreed to work an additional day were paid at the rate of 1/195th.

The Supreme Court swept away the idea that teachers were only paid to work 'directed time'. Under the terms of their contracts of employment, teachers' work was not limited to directed time but included undirected time which was spread throughout the year, so 1/260th was wrong. The teachers' contracts of employment did not contain any express formulation or scheme that disapplied the s.2 apportionment formula. They provided for annualised periodic payments of salary. The correct rate of deduction was 1/365th, which was the only alternative before the court. This, however, was considered to be arithmetically sensible based on the 'day to day' formula in s.2 of the Act. It was also considered to be broadly fair in the circumstances given the nature of undirected work.

Conclusions

The Supreme Court's conclusions were based on the fact that these contracts of employment provided for an annual salary for annual work. It said that the result would 'no doubt' be different if the contracts at issue were not annual. *Hartley* is therefore only binding on the question of the correct rate of deduction in an annual salary case and should not be applied where someone is paid hourly or daily.

When determining the correct rate of deduction in an annual salary case, the employer must consider whether the employee carries out additional work beyond any stated core contractual hours when he or she is required to attend their place of work. If they are, this suggests that the correct rate of deduction is 1/365th, unless there is some express contractual provision to the contrary that takes precedence under s.7 of the Act.

KEY:

Hartley	*Hartley and ors v King Edward VI College* [2017] ICR 774
Miles	*Miles v Wakefield Metropolitan District Council* [1987] ICR 368
TULR(C)A	Trade Union and Labour Relations (Consolidation) Act 1992
Wiluszynski	*Wiluszynski v London Borough of Tower Hamlets* [1989] ICR 493
Ticehurst	*Ticehurst and anor v British Telecommunications plc* [1992] ICR 383
Spackman	*Spackman v London Metropolitan University* [2007] IRLR 744
Thames Water	*Thames Water Utilities Ltd v Reynolds* [1996] IRLR 186
Cooper	*Cooper v Isle of Wight College* [2008] IRLR 124