Neutral Citation Number: [2015] EWCA Civ 455

Case No: B2/2014/2346

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM BIRMINGHAM CIVIL JUSTICE CENTRE
DEPUTY DISTRICT JUDGE VINEY
3YL01661

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14/05/2015

Before :

LORD JUSTICE ELIAS
LORD JUSTICE TOMLINSON
and
LORD JUSTICE SALES

Between :

(1) Peter James Hartley **(2) Jeremy George Panko** **(3) Stewart Monk**	**Appellants/ Claimants**
- and -	
King Edward VI College	**Defendant/ Respondent**

Oliver Segal QC and Katherine Newton (instructed by **Thompsons LLP**) for the **Appellants**
Jane McNeill QC and Ben Cooper (instructed by **Blake Morgan LLP**) for the **Defendant**

Hearing dates : 19 March 2015

Judgment Approved by the court for handing down (subject to editorial corrections)

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Lord Justice Elias:

1. When teachers go on strike their employer can withhold their pay. But how much can the employer withhold? That is the issue in this case.

2. The three appellants are all employed as teachers at the respondent College. On 30 November 2011 they took strike action. In consequence, the College deducted from their monthly salary what the College considered was the value of the service which the teachers had failed to provide on that day. This was calculated as 1/260 of the annual salary. That fraction was based on the premise that the teachers' working days were Monday to Friday and that all work days should be included, even those which do not have to be worked because of holidays. So the formula is 5 working days a week x 52 weeks a year = 260 working days a year.

3. The appellants accept that they are not entitled to be paid for the strike day but submit that the College has deducted too much. They say that the proper amount referable to the day on strike was 1/365 of the annual salary. They submit that this is the effect of the Apportionment Act 1870 which should have been applied by the College given the nature of the teacher's contract.

4. The sums at stake for the individual teachers are small, but this appeal is important to the sector overall. It has been estimated that the cost to the sector of a finding in the appellants' favour would be about £300,000 per strike day.

5. Unusually, this appeal is from a judgment entered in the College's favour by an order of the County Court following an agreed draft consent order. The parties agreed that the judgment of Jay J in the High Court in *Amey v Peter Symonds College* [2013] EWHC 2788; [2014] IRLR 206 was binding upon the County Court. On very similar facts the judge held that the appropriate deduction was 1/260. The appellants say that he was wrong.

The terms of employment.

6. The appellants' contracts incorporate terms from the relevant collective agreement, entitled the "Conditions of Service Handbook for Teaching Staff at Sixth Form Colleges" (known as The Red Book). This draws a distinction between directed and undirected time. Directed time is the period when teachers are required to be at school. It amounts to 1265 hours per annum, during 195 scheduled days of which 190 are days when the teacher may be required to teach. They cannot be required to work on Sundays or Bank Holidays. But it is recognised that in addition to the tasks performed during directed time, teachers have to work in their own time in order to prepare lessons, mark papers, write reports and carry out a range of other teaching and administrative tasks. This work is termed "undirected time" since it is carried out by the teacher outside of the normal term time hours and is not quantified.

7. There is inevitably a correlation between directed and undirected time; the more directed hours a teacher performs the more this generates preparation, marking, report writing and so forth. However, the amount of undirected time done will vary from teacher to teacher; and there is no control over when that work is done; it may be all or any of the evenings and weekends and during the holidays. The relevant rule simply provides that teachers should work for "such reasonable additional hours as may be needed to discharge their duties effectively."

8. The pay of part-time teachers is referable to directed time. They are required to be available for work for 'the percentage of the maximum 1265 hours of directed time corresponding to the percentage of full time pay they receive'. So if they are paid 50% of a full-time annual salary, they are required to work 632.5 hours of directed time.

9. A teacher may be requested to work additional working days. One of the ways of recompensing them is to pay a daily rate which is fixed at 1/195 of the annual pay.

The basis of deduction.

10. There are two distinct legal routes by which the employer may seek to claim the right to withhold a day's pay from striking workers. First, the employer may be entitled to damages for the employee's breach of the contract of employment in refusing to work and may be entitled to withhold a sum equivalent to his entitlement to damages by way of equitable set-off: *Sim v Rotherham MBC* [1986] ICR 897. Second, the employer may rely upon the principle that the employee is not entitled to be paid if he is not ready and willing to perform the work which he was employed to do: *Miles v Wakefield MBC* [1987] 1 AC 539 HL.

11. In this appeal the employer sought to rely upon the *Miles* basis for deduction. The claimant in *Miles* was not willing to perform the work which he was properly required to perform on a Saturday. He therefore could not recover the 'remuneration attributable to that work' (Lord Oliver, 570D-E).

12. Although that case identifies the principle which justified the withholding of pay, it did not resolve the issue arising here, namely how much can lawfully be withheld.

13. Strictly the withholding of pay is not a deduction, although it is often colloquially so described. A deduction presupposes a withholding of money earned. Here there is no deduction from monies earned, and nor is it a question of setting off a sum by way of damages, as in *Sim*. Rather the pay for the strike day is never earned and cannot be claimed. There is only a deduction in the sense that the employer is withholding - because it has not been earned - pay which would otherwise have been earned had the work been performed. The issue is what that sum should be.

The Apportionment Act 1870

14. The preamble to the Act reveals the purpose of why the Act was passed:

> "Whereas rents and some other periodical payments are not at common law apportionable (like interest on money lent) in respect of time, and for remedy of some of the mischiefs and inconveniences thereby arising divers statutes have been passed:
>
> And whereas it is expedient to make provision for the remedy of all such mischiefs and inconveniences…."

15. A classic example of the application of the Act is where a landlord dies between rent days. The tenant would be under a duty to pay the rent on the next appropriate day.

But for this Act, the payment would all go to the successor in title. The effect of the Act is to apportion the rent between the deceased's estate and the successor.

16. Section 2 of the Act provides that:

> "All rents, annuities, dividends and other periodical payments in the nature of income…shall, like interest on money lent, be considered as accruing from day to day, and shall be apportionable in respect of time accordingly."

This establishes the principle that monies are apportioned on the basis that the payment accrues daily. A further question, critical in this case, is whether the daily accrual necessarily requires that the money must be treated as accruing at a regular and equal rate each day (which I shall call "the principle of equal daily accrual"), or whether the rate of accrual depends upon the terms of the underlying agreement.

17. Section 3 of the Act provides that where a person is entitled to an apportioned part, there is no acceleration of the time of payment:

> "The apportioned part of any such rent, annuity or dividend, or other payment shall be payable or recoverable in the case of a continuing rent, annuity or other such payment when the entire portion of which such apportioned part shall become due and payable, and not before, and in the case of a rent, annuity, or other such payment determined by re-entry, death, or otherwise when the next entire portion of the same would have been payable if the same had not so determined, and not before."

18. Section 5 defines annuities and dividends as follows:

> "The word *"annuities"* includes salaries and pensions.
>
> The word *"dividends"* includes (besides dividends strictly so called) all payments made by the name of dividend, bonus, or otherwise out of the revenue of trading or other public companies, divisible between all or any of the members of such respective companies, whether such payments shall be usually made or declared at any fixed times or otherwise; and all such divisible revenue shall, for the purposes of this Act, be deemed to have accrued by equal daily increment during and within the period for or in respect of which the payment of the same revenue shall be declared or expressed to be made."

19. The inclusion of salaries in the definition of "annuities" makes the Act applicable to at least a class of employment cases where work is provided and the worker is paid periodically.

20. Section 7 allows for contracting out of the Act in certain circumstances:

> "The provisions of this Act shall not extend to any case in which it is or shall be expressly stipulated that no apportionment shall take place."

An important issue is what amounts to an "express stipulation."

21. The appellants' submissions rely on the argument that the Apportionment Act applies and imposes the principle of equal daily accrual thereby requiring pay to be treated as accruing by equal amounts on each day of the year. Although they accept that section 7 allows the parties to contract out of that principle in a sufficiently clear case, they deny that this has occurred here. The College denies that the Act is applicable but submits that if it is, the terms of the agreement constitute a contracting out from the principle of equal daily accrual. The only question is what pay accrues on the strike day, and that is entirely a matter of interpreting the terms of the contract.

22. Before considering the strength of these arguments, it is necessary to analyse the true effect of the Apportionment Act and its implication for this appeal. In my judgment there are four issues which arise for consideration. First, does the Apportionment Act apply at all to employment relationships of this nature? Second, if it does, and pay accrues daily as section 2 provides, does section 2 also import the principle of equal daily accrual? Third, if section 2 does have that effect, can this principle be excluded pursuant to section 7 of the Act? Fourth, what constitutes an "express stipulation" within the meaning of section 7?

Does the Act apply to employment relationships?

23. The potential significance of the Act in employment cases arises for the following reason. Typically employees or office holders will be paid at periodic intervals. At common law, unless the contract was held to be infinitely severable, the period between pay dates would be treated as an entire contract and no pay could be claimed unless the employee provided his services for the whole period. (The development of this principle, with many authorities cited, is recounted in a famous article by Glanville Williams: "*Partial Performance of Entire Contracts*" (1941) 57 LQR 373.) An exception would be where there is substantial performance in which case the employer would have to pay the remuneration but have a claim in damages for the breach.

24. An infinitely divisible contract will be one where the terms of the agreement are that the payment is to be pro rata. This will typically be the case where the pay is fixed at an hourly rate. The Act will not apply to such cases because the mischief at which it is directed does not arise. Pay is directly related to work done and accrues as it is done. The fact that for administrative convenience wages are paid periodically does not affect that conclusion.

25. The difficulties and unfairness which could arise absent the application of the Act in an employment context can be illustrated from the position which would be likely to arise in this case, if analysed purely by reference to the contract terms and these principles. The relevant employment agreements provided for salary to be paid monthly in arrears. Therefore, if the employees provided substantial performance in respect of the month, for example striking for one day only, they would be entitled to payment of the salary for that month, subject only to a cross-claim for damages (in line with *Sim*), in relation to which difficulties of quantification might arise. The employer might end up having to pay for the day not worked. On the other hand, if the employees provided their services for a significant part of the month but not

amounting to substantial performance for the whole month, for example striking two days per week, they would be entitled to no pay for the days on which they did work.

26. However, there was some doubt as to whether the Act applied to all kinds of employment contracts or whether its effect was more limited. An article by an academic, Paul Matthews, entitled "Salaries in the Apportionment Act" (2 Legal Studies, p.302) suggested that the Act was intended only to cover a situation, akin to what I have described as the paradigm case, where a public office holder changes in the course of the year and the original holder of the office is entitled to a proportion of the salary referable to his period of service: see e.g. the Irish case of *Treacy v Corcoran* (1874) IR 8 CL 40. There is certainly a question of whether the language of "salaries" used in section 5 would have been thought in 1870 to be appropriate to describe the wages paid by private employers, and as I indicate below, there are numerous employment cases where it seems that the general assumption was that the Act was not relevant.

27. However, the Act was held potentially to cover a wide class of employees by the Divisional Court (Lush and McCardie JJ), on an appeal from the county court, in *Moriarty v Regent's Garage Co Ltd.* [1921] 1 KB 423. In that case a director was entitled to an annual fee of £150. He resigned after six months and the question was whether he was entitled to any part of that sum. The Court held that he was, notwithstanding that a director was not employed by the company. McCardie J expressly agreed with the observation of an Australian judge who said:

> "The term 'salary' is ordinarily used to signify the periodical remuneration paid to professional men, clerks, or persons whose duty it is to superintend, and who have in every case an appointment of some permanency. It is never ordinarily used as signifying the remuneration of manual labour or of any labour when the element of permanency is absent."

28. The exclusion of labourers would not in practice be of significance because they would be paid pro rata in any event.

29. The decision in *Moriarty* was appealed to the Court of Appeal ([1921] 2 KB 766) who reversed the decision on the grounds that the applicability of the Apportionment Act had not been raised in the county court and could not be advanced for the first time on appeal. No views were expressed about the scope of the Act.

30. However, uncertainties about the scope of the Act have now been resolved by this court in *Item Software (UK) Ltd v Fassihi* [2004] EWCA Civ 1244; [2005] I.C.R.450. That case concerned an alleged breach of fiduciary duty by an employee who was also a director of the company. He received a salary paid monthly in arrears. His contract was terminated on 26 June for misconduct. One of the issues before the Court of Appeal was whether he was entitled to his salary for the period in June for which he worked. Mr Nicholas Strauss QC, sitting as a Deputy High Court Judge, had held that he was not: [2003] EWHC 3116 (Ch); [2003] IRLR 769. He considered that he was bound by the earlier decision of the Court of Appeal in *Boston Deep Sea Fishing v Ansell* (1888) LR 39 Ch D 339 in which the court held that an employee dismissed for misconduct could not recover any salary which had not accrued by the date of dismissal. The judge noted that there was no mention of the Apportionment Act in the case, but he did not believe that he could properly treat the decision as having been taken *per incuriam*. In that context he

noted that this was not an isolated case; later cases had followed it, including *Re Central de Kaap Goldmines* (1899) LJ Ch 18; *Re London & Northern Bank; McConnell's Claim* [1901] Ch 728 and *Healey v SA Francais Rubastic* [1917] 1 KB 947, and in none of them had the Apportionment Act been thought to provide an answer to the claim.

31. The Court of Appeal disagreed. It accepted that at common law the employee could not recover anything because his salary did not accrue until the end of the month. But the court considered that the Apportionment Act did apply and that the decision in *Boston Deep Sea Fishing* was indeed *per incuriam*. Accordingly, since salary accrued day by day the employee was entitled to his salary until his dismissal, even where it was for misconduct. The court expressly rejected the views expressed by Paul Matthews as to the limited application of the Act. Holman J, with whose judgment Arden LJ expressly agreed, said that since the Act is a remedial Act, and since the common law rule works an injustice, the Act should not be restrictively interpreted. This would suggest that it will now be readily applied to all employment contracts where the common law principles pertaining to entire contracts and substantial performance would operate.

32. It follows that the Act does, in principle, apply to the contracts of these teachers. Their pay is deemed to accrue daily. That was also the view of Scott J, as he was, in the *Sim* case, although the point was not directly argued in that case. None of the parties has sought to contend otherwise.

What is the effect of section 2?

33. It is a critical element in the appellants' case that the effect of section 2 is that pay does not merely accrue daily but does so at an even rate. This is the justification for treating the pay referable to the strike day at 1/365.

34. No doubt for most periodic payments that will typically be the case. There will be no reason to assume that the payment should accrue other than by regular and equal increments. But I do not think that section 2 dictates this result. In my view there are strong arguments which suggest that this is neither the purpose nor the effect of the Act. It is concerned with providing a remedy for the unfairness which results from the fact that the common law would recognise no rights in a party who had provided service to the employer but not for the whole of the relevant pay period. The Act ensured an entitlement to such portion of the payment as was referable to the period of service. To achieve that objective it is not necessary to provide that payment accrues at an equal daily rate. Moreover, to construe section 2 as having that effect would create a new source of unfairness, where the rigid application of a daily rate of 1/365 would create an injustice in the context of the particular arrangement between the relevant parties, which it is difficult to suppose Parliament intended. The present case illustrates the sort of problem which could arise, if the College's argument about the unfairness and inappropriateness of deductions being made at a rigid daily rate of 1/365 are accepted (see below).

35. There are two further features of the Act which support this analysis. The first is that in section 5 there is a definition of "dividend" by reference to various forms of payments, including payments "out of the revenue of trading or other public companies, divisible between all or any of the members of such respective companies shall be usually made or declared at any fixed times or otherwise"; and the provision then goes on to provide expressly that "all such divisible revenue shall, for the purposes of this Act, be deemed to have accrued by equal daily increment during and within the period for, or in respect of which, the payment of the same revenue shall be

declared or expressed to be made". If section 2 automatically envisaged that payments caught by the Act would be deemed to accrue by equal daily increments, these words would not have been required.

36. The second lies in the way in which the exclusion principle in section 7 is drafted. That section envisages that the parties might displace the Act by providing in sufficiently clear terms that no apportionment shall take place. But if there is no such exclusion and section 2 establishes a principle of equal daily accrual, that principle will apply. Section 7 does not provide that the parties might agree to exclude that principle, or might otherwise draft the contract in a manner which is at odds with that principle. Yet Parliament would surely have allowed this had it understood that the principle was imported by section 2. The parties have assumed that it is possible to read section 7 as allowing for that exclusion, but as I indicate below I am very doubtful whether it can.

37. If that is right, the failure to allow departure from the principle of equal daily accrual can be explained either on the basis that the principle is not part of the Act and therefore does not need excluding; or it is part of the Act which Parliament intends to be mandatory in all circumstances where the Act applies. However, if there is a principle of equal daily accrual, and especially if the parties cannot contract out of it, that would lead to curious and potentially unjust consequences. Take a case outside the area of employment law. Assume that a party takes a lease and agrees to pay the landlord at the end of twelve months at a rent which increases after six months. Suppose that the landlord sells the freehold after six months. He would be entitled under the Act to the rent for that period. Under the terms of the lease, that would be a smaller sum than could be claimed by his successor because the rent has increased. But if section 2 imposes a principle of regular and equal daily accrual, the successor would have to account for half the full rent paid over the twelve months to the original landlord, even though the rent for the first half of the year was smaller.

Can the principle of accrual at an equal rate be excluded?

38. If, contrary to my view, the principle of equal daily accrual is implicit in section 2 Parliament must surely have intended to allow contracting out from that principle. However, I confess that I can find no satisfactory way of construing section 7 so as to achieve that result.

What is an express stipulation?

39. Notwithstanding what seem to me to be these insurmountable difficulties as to the scope of section 7, the parties have assumed that the principle of equal daily accrual can be excluded under that section by a suitably drafted agreement. Assuming that the premise is right, how can this be achieved?

40. Read literally, section 7 seems to suggest that the apportionment principle will apply unless the contract in clear terms addresses it and says that it should not. This is not, however, how the courts have approached the matter. It is enough that there is a clear term which is in fact inconsistent with apportioning the payment in issue. So in *Re Lysaght* [1898] 1 Ch 115, a testator bequeathed certain shares and declared that they "shall carry the interest accruing thereon at my death." The Court held that but for this clause the Apportionment Act would have allowed the residuary legatees to take the benefit of the dividends up to the date of death. As Lord Lindley MR put it, the clause

amounted to
take place."

41. In reaching this conclusion Lord Lindley referred to the interpretation put on a predecessor clause in similar terms considered in *Tyrell v Clark* (1854) 2 Drewry 86; 61 ER 651. In that case the Vice Chancellor (Sir R T Kindersley) considered the meaning of an "express stipulation" and how those words should be construed. He said this:

> "In my judgment these authorities show that where the language of the contract is plainly inconsistent with an apportionment of income, no apportionment is permissible. But there is a presumption that the Act will apply, and if the contract is ambiguous or lacks clarity on that question, it cannot displace the operation of the Act."

42. Assuming that section 2 requires pay to accrue at an equal rate daily, and that section 7 permits contracting out of that principle, it seems to me that the concept of an "express stipulation" would have to be similarly construed. There would have to be a clear intention derived from the contract that the principle should not apply.

43. A question which then arises is this: is it enough that the contract makes it clear that the principle of equal daily accrual should not apply even though the contract itself is opaque as to precisely how the money should be deemed to have accrued? Or does that principle operate as a default option which necessarily applies unless a clear alternative accrual principle is identified in the contract? By analogy with the exclusion of the apportionment principle itself, I prefer the former analysis. It seems to me that provided it is plain from the terms of the contract that the principle of equal daily accrual is not intended to apply, that should be sufficient to exclude the principle even though there may be difficulty in resolving precisely how the pay is related to the work performed. That is the gateway condition which, when satisfied, allows the court to engage in the usual process of construing and giving an appropriate interpretation to contractual provisions in circumstances where, at first glance, it may be difficult to work out precisely what the parties mean.

44. To summarise: contrary to the assumptions of the parties, I do not think that the Act has anything to say about the rate at which, or the manner in which, salary accrues daily. No doubt absent any indication to the contrary, the principle of equal daily accrual will be the obvious principle to adopt. But ultimately it is a matter of what the appropriate rate of accrual is to be taken to be, having regard to the terms of the contract between the parties and the mandatory requirement imposed by section 2 of the Act: the payment obligations should be treated as allowing for apportionment at an appropriate daily rate (albeit the contract does not itself provide for that). In order to determine how much of the salary is referable to a particular day, the starting point must be the terms of the contract with the modification required by the Act that the pay must be deemed to be accruing daily. If the better construction under these conditions is that the salary accrues by 1/260 in respect of a working day rather than 1/365, then that is the amount to be deducted in respect of a failure to work on that day even if it could not be said that the contract provides sufficient clarity so as to amount to an express stipulation for the purposes of section 7.

The Amey case.

45. The *Amey* case was considered to be binding by the parties; hence the agreed order. The arguments in this appeal have in large part mirrored those advanced in *Amey*. In that case, as here, the claimant was a full time teacher at a sixth form college who went on strike. He participated in two days of industrial action. He argued that the College acted unlawfully in deducting 1/260 of his salary rather than 1/365 for each day on strike. As here, the college based their calculation on the premise that the pay was earned during the working week but did not accrue over weekends.

46. It was common ground that the contract was subject to the Apportionment Act, and it was assumed that if section 2 applied so that the teacher's salary accrued day by day, this would also imply the principle of equal daily accrual.

47. Jay J referred to a number of first instance decisions where the court had held that section 2 of the Apportionment Act required pay to be treated as accruing by equal amounts each day: *Re BCCI SA* [1994] IRLR 282, *Thames Water Utilities v Reynolds* [1996] IRLR 186, and *Taylor v East Midlands Offender Employment* [2000] IRLR 760, but he suggested that this line of authority had fallen into disfavour. He noted that two more recent authorities from the Employment Appeal Tribunal, *Leisure Leagues UK Ltd v Maconnachie* [2002] IRLR 600, followed in *Yarrow v Edwards Chartered Accountants* (unreported, 8 June 2007), had concluded that these cases should not be followed because they were out of touch with modern industrial relations practice as reflected, for example, in such provisions as the Working Time Regulations. Those cases held that the reference in section 2 to "accruing from day to day" must mean the working day. Jay J held that in so far as these cases seek to give a different meaning to section 2 because of current employment practice, they could not be supported. I would respectfully agree. The section cannot change its meaning as a consequence of changes in industrial practice, not least because it is concerned for the most part with periodic payments which are wholly removed from the employment field. If industrial relations practice has any potential significance, it would have to be that it has changed the common law rules applicable to entire contracts in this context rather than the meaning of the Act. But no such argument has been advanced to that effect.

48. The judge therefore accepted that section 2 would require a deduction of 1/365 unless there was an express stipulation to the contrary under section 7. The judge accepted (para. 29):

> "that section 2 would be overridden by section 7 only if this contract by necessary implication established a relationship between work time and pay which was inconsistent with accrual over each and every calendar day. Necessary implication was to be determined objectively on standard contractual principles."

49. The claimant in *Amey* accepted that if the contract in sufficiently clear terms related pay to particular periods of work so that it was possible to discern precisely how pay was referable to the work performed, this would amount to a contracting out of the effect of the Act under section 7. However, he contended that this was not the case with teachers. A critical feature of the contract was the obligation to carry out work in undirected time. Such work could be undertaken during any day of the week including weekends and school holidays. As a matter of construction, since the teacher could carry out the undirected time at any day in the year, pay must accrue daily. This was consistent

with an observation of Lord Templeman in the *Miles* case (pp.386H-387D) when he said that since judges and ambassadors may work any day of the year, their salary would have to be treated as accruing day by day. Alternatively, even if there was uncertainty about how the contract should be construed, it was not possible to relate pay and work in any clear cut way. There was no "necessary implication" excluding the effect of section 2.

50. Jay J rejected these arguments. He held that the starting point was the contract. It was a necessary implication from the terms of the contract that the parties did not intend the Act to apply. There was the necessary degree of nexus between working time and pay to show that pay was not intended to accrue daily. The judge described the undirected time as being "... ancillary or adjunctive to directed time, which is carried out solely to ensure that directed time is as effective, instructive, and pedagogic as possible. It has no life of its own, still less a quality as a core activity" (para. 39). He concluded that "one may discern a link between remuneration on the one hand and "working days" on the other, with working days being a synonym for directed time". There was no link between pay and undirected time. Accordingly, his analysis was that the contract provided for a five day working week in term time, notwithstanding that teachers might work on other days.

51. In applying the principle that section 2 (or, more accurately, that the principle of equal daily accrual) would be excluded where this was a "necessary implication" of the contract, the judge followed the decision of Blake J in *Cooper v Isle of Wight College* [2007] EWHC 2831 (QB); [2008] IRLR 124. In that case the claimant employees were support staff working in the college who took strike action. They were required to work a 37 hour week and had paid holidays specified as 32 working days (including bank holidays). The college withheld 1/228 of their salary, this being calculated on the basis that the staff worked for only 228 days in the year, and this reflected the true loss to the employer. The paid holidays were therefore discounted. It was accepted that this was more than the claimants could sue for if the employer were to withhold their salary for the day; the parties agreed that that would be 1/260 of the annual salary. The basis of the argument was that "since one earns holiday pay by working the hours contracted, non-performance of the contracted hours entitles the employer to reduce holiday pay pro rata and make a deduction for that as well as the wages for the hours not worked." The claimants alleged that the employer could only withhold the salary to which they were entitled, i.e. 1/260. Blake J analysed the speeches in Miles and preferred the claimants' submission on the point; the employers could only withhold the wages referable to that day.

52. In the course of giving judgment Blake J said that he had been troubled that section 2 of the Apportionment Act might require a calculation based on 1/365 but he was persuaded that the provision of section 7 was satisfied. This was because:

> "where there is a definition of a normal working week in the contract and a contractual entitlement to holiday pay then the salary payable whether expressed annually or otherwise or whenever paid should be apportioned over the days of the normal working week throughout the year" (para.6).

Jay J considered that this principle was equally applicable to the claimants in *Amey*.

The submissions on appeal

53. As I have said, the parties agree that in principle the Apportionment Act applies to the teacher's contract, although the College does not accept that it is relevant to this situation. They also have all assumed that section 2, if applicable, would require pay to accrue by equal amounts daily.

54. The appellants essentially run the argument which was rejected by Jay J in *Amey*. Mr Segal QC accepts that an agreement may exclude the application of the principle of equal daily accrual provided there is an express stipulation to that effect in accordance with section 7. He gives as an example the decision in *Cooper*, which he accepts was rightly decided, where the employee only worked during working hours and it was possible to relate pay directly to work. But that is not the position here. Because of the undirected hours, there is no precise or clear relationship between work and pay. The judge was wrong to treat undirected hours as having significance only in relation to directed hours and to treat pay as referable to the latter. Moreover, the test of "necessary implication" is an unwarranted gloss on the language of section 7 which requires an express stipulation; but even if it is an appropriate test, the inability to link pay to work done on particular days precludes any such implication here.

55. Mr Segal relies on the comments of Lord Templeman in *Miles* referred to above, which were unsuccessfully relied upon in *Amey*, and on an observation of Scott J in the *Sim* case (pp.935-936). In the course of rejecting an argument that salaries accrued minute by minute, he expressed the view, obiter, that they are deemed to accrue day by day by reason of the Apportionment Act. Mr Segal submits that Jay J was wrong in *Amey* not to follow this approach and falsely treated that case as consistent with the reasoning in *Cooper*. On the contrary, the difference in working patterns of the two sets of employees compelled a different answer. Section 7 only excluded the application of section 2 where the contract clearly stipulated otherwise. It is impossible to say that the contracts here manifest any clear principle relating work to pay, and in such cases the default principle in section 2 should apply.

56. Ms McNeill QC, counsel for the College, submits that the Apportionment Act simply has no application. It is concerned with apportioning pay in circumstances where the employee fails to provide service for the complete period of employment and would have no entitlement to any salary with respect to that period, as in *Fassihi*. That is not this case. Nothing is being apportioned and in any event there is no right to any payment for the day on strike.

57. Even if the Act is applicable and includes the principle of equal daily accrual, the approach adopted in *Amey* is correct. The terms of the contract cannot be reconciled with the principle of equal daily accrual and amount to an express stipulation, within the meaning of section 7 that the principle should not apply. The reasoning of Jay J was plainly right. The undirected duties are subsidiary and directed towards the directed duties. As a matter of common sense it is obvious that pay is, as Jay J expressed it, 'tied to the measurable part of a teacher's work': para. 42. This is further supported by the fact that part time workers are paid as a proportion of the full time teaching hours that they work; that a teacher who agrees to teach an additional day is paid 1/195 of the annual salary; and that sick pay is calculated on the basis of working days.

58. The College also relies upon what they describe as the absurd consequences if the appellants are correct. They take as an example teachers who strike three days in the week. On the appellants' case they would receive almost 70% of their salary whilst

completing only 40% of the work. Mr Segal responds by saying that the application of a default rule will sometimes have arbitrary effects but that is no reason not to apply it.

Discussion.

59. It will be clear from my discussion of the effect of the Act that I believe that the arguments have been advanced on a false premise. It is a fundamental feature of the appellants' case that section 2 implies the principle of equal daily accrual unless excluded by a clear inconsistent clause. If that is the wrong analysis of section 2, and there is no such principle which needs to be excluded, the question of what pay would have been earned on the strike day has to be gleaned purely from the construction of the contract, modified by the assumption that pay accrues daily at a rate which is appropriate in the context of that contract to the particular day in question.

60. Applying that modified principle of construction, I do not think that the appellants can be right. The natural interpretation of the contract (as modified by that assumption) would not in my view be that pay accrues at an equal rate day by day, and I do not accept that the fact that work may be carried out on any day of the year would justify that conclusion. There is plainly a close link between the directed hours and pay, and in my judgment Jay J was right to say the undirected work is essentially ancillary to the directed work. There is little point, and no value to the employer, in a teacher preparing for lessons which are not given. The judge also held that pay is tied to the measurable part of the teacher's work. Although Mr Segal did not accept that analysis, it seems to me justified by the way in which part time teachers are paid. They receive that proportion of the full time directed hours which they perform. It is also supported by the fact that if a teacher voluntarily agrees to work an extra day, the amount paid is 1/195 of the annual salary. No doubt that extra day will generate undirected working time, but this is taken into account by treating it as a contributory part of the value provided by the teaching day.

61. Taken to its logical conclusion that would tend to justify the principle that the pay referable to a strike day is 1/195 of the annual salary. But the College does not seek to follow the logic that far, perhaps with good reason. Some of the undirected work, such as writing references, preparing materials and so forth will not necessarily be directly and inextricably linked to the directed time, in the sense that a failure to work for a day will lead to a proportionate reduction in the work done in the undirected hours. So relating the work to the total number of annual working days, including days which are paid holidays, provides a sensible and acceptable principle which possibly errs in the employee's favour.

62. Moreover, there would be curious consequences if the appellants were right. The College has provided one example. Another was suggested in the course of argument. Suppose there are two part time teachers, perhaps sharing a post. A works the first two weeks of the months, B the second two weeks. Let us assume that they leave in the middle of the month. On the appellants' case they each would receive the same pay referable to that month. The value of their services would be deemed to be the same yet A would have provided work and B not.

63. However, I accept that notwithstanding these consequences, the issue is more problematic if, contrary to my view, section 2 does encompass the principle of equal

daily accrual. First there is an issue, it seems to me at least, in whether section 7 allows for any modification of that principle at all, although Mr Segal accepts that it does. But even if it does, section 7 requires an express stipulation to the contrary As I have pointed out above (paras 40-42) the authorities show that it is enough that the contract makes it clear that the section is not to apply. In my view, contrary to the submissions of Mr Segal, Jay J fairly characterised this as requiring exclusion either expressly or by necessary implication. The teacher's contract in this case does not, of course, seek to remove the basic principle of apportionment itself, but the question is whether it has excluded the principle of equal daily accrual, assuming that this is a principle inherent in section 2.

64. Mr Segal puts forward a forceful argument that it is far from clear precisely how the contract envisages that the pay will accrue. I accept that is so, but for reasons I have given I think that the principle of equal daily accrual will be excluded if it is clear that the contract is inconsistent with that principle, even if it is not obvious precisely how the pay is deemed to accrue. For reasons I have given, in my view the contract plainly does not envisage that pay will accrue by equal amounts per day.

65. I should add that I do not accept Ms McNeill's submission that the Act has no relevance to an assessment of the pay referable to the strike day. But for the Act, it may well be that the appellants would have been entitled to full pay on the principle that there has been substantial performance, in which case the employers would have had to justify withholding pay relying on the principle of equitable set off. It is the Act which makes it possible to look at the position from day to day. But that does not mean that same amount is necessarily being earned each day.

Conclusion.

66. For the reasons I have set out, it follows that in my view the appeal fails. That is so, whether the principle of equal daily accrual must be implied into section 2 or not.

Lord Justice Tomlinson:

67. I agree.

Lord Justice Sales:

68. I also agree.