Easter Term
[2017] UKSC 39
On appeal from: [2015] EWCA Civ 455

JUDGMENT

Hartley and others (Appellants) *v* King Edward VI College (Respondent)

before

Lady Hale, Deputy President
Lord Clarke
Lord Wilson
Lord Hughes
Lord Gill (Scotland)

JUDGMENT GIVEN ON

24 May 2017

Heard on 1 February 2017

Appellants	*Respondent*
Oliver Segal QC	Thomas Linden QC
Katharine Newton	Ben Cooper
(Instructed by Thompsons Solicitors)	(Instructed by Blake Morgan LLP)

LORD CLARKE: (with whom Lady Hale, Lord Wilson, Lord Hughes and Lord Gill agree)

Introduction

1. I can take the underlying facts from the agreed statement of facts and issues. The appellants are employed as teachers at the respondent's sixth form college. They have brought this action and pursued this appeal supported by their union, the NASUWT. Their contracts of employment incorporate terms relating to working time from a collective agreement entitled *Conditions of Service Handbook for Teaching Staff in Sixth Form Colleges.* It is known as the Red Book. When sixth form teachers whose contracts of employment incorporate the Red Book go on strike their employer can withhold their pay. The issue in these proceedings and in this appeal is how much the employer can deduct for each day of strike action.

2. On 30 November 2011 the appellants participated in a full day of lawful strike action. On or about 31 January 2012, the respondent made deductions from their pay at the rate of 1/260 of their annual pay. The figure of 260 was arrived at by taking 365 days, less weekends, that is by taking the total number of weekdays in the calendar year. The appellants say that the appropriate deduction was 1/365 of their annual pay, pursuant to section 2 of the Apportionment Act 1870 ("the Act"). The contracts of employment in secondary education, that is at schools rather than sixth form colleges, include an express term contained in the relevant agreement, which is known as the Burgundy Book, that when teachers are on strike their employers are entitled to deduct salary at the rate of 1/365 of their annual pay.

The Act

3. The Act is entitled "An Act for the better apportionment of rents and other periodical payments". Section 2 is entitled "Rents, &c to accrue from day to day and be apportionable in respect of time" and provides as follows:

> "All rents, annuities, dividends, and other periodical payments in the nature of income (whether reserved or made payable under an instrument in 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."

4. Section 5 is entitled "Interpretation of terms" and includes the following:

> "In the construction of this Act -
>
> …
>
> The word 'annuities' includes salaries and pensions."

Section 7 states in the heading that the Act is not to apply where stipulation is made to the contrary and provides:

> "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."

The proceedings

5. On 24 April 2013, the appellants commenced proceedings in the Birmingham County Court alleging that the respondent was in breach of contract and claiming monies owed pursuant to section 2 of the Act to the extent that the deductions from their pay exceeded 1/365 of their annual wage entitlement in respect of each strike day. On 17 June 2013, between the issue of proceedings and the trial of this action Jay J handed down judgment in the High Court in *Amey v Peter Symonds College* [2013] EWHC 2788 (QB); [2014] IRLR 206, which determined the same issue in favour of the defendant, which was another sixth form college, by reference to the same generic contractual terms and on the basis of very similar, if not identical, facts. Jay J held that while "accruing from day to day" in section 2 must be construed as referring to calendar days, section 7 applied to disapply section 2 because the claimant's contract necessarily implied that his pay was tied to his directed time work. [For the definition of "directed time" see paras 14 and 16 below.] The claimant, who was not a member of NASUWT, did not appeal to the Court of Appeal.

6. The respondent in the present case applied for summary judgment on the basis that the County Court would be bound by the *Amey* judgment. The appellants agreed that that was so but resisted summary judgment on the basis that they wanted to seek determination of the point of principle by the Court of Appeal and could only do so if a "final" determination were entered in favour of the respondent, from which it could apply to the Court of Appeal for permission to appeal pursuant to CPR Part 52 and Practice Direction 52A. As a result, the parties agreed a consent order which

was approved by DDJ Viney and referred to in para 2 of the consent order dated 27 February 2014. Pursuant to that order the respondent withdrew its application for summary judgment and, the parties having agreed the material facts, the appellants consented to final judgment being entered in favour of the respondent on the basis that the *Amey* judgment was binding, but without prejudice to the appellants' right to argue on appeal that *Amey* was wrongly decided and/or that their case should be decided differently on the basis of the agreed facts.

7. On 1 July 2014 HHJ McKenna gave the appellants permission to appeal directly to the Court of Appeal pursuant to CPR Part 52.14, in circumstances in which Aikens LJ had indicated that the Court of Appeal was minded to accept jurisdiction to hear the proposed appeal on that basis because it raised an important point of principle. The appeal was heard by Elias, Tomlinson and Sales LJJ on 19 March 2015. By a judgment handed down on 14 May 2015 given by Elias LJ, with which Tomlinson and Sales LJJ agreed, the Court of Appeal dismissed the appeal [2015] ICR 1143. The Court of Appeal refused permission to appeal to this Court but permission was granted by Lady Hale, Lord Wilson and Lord Reed on 25 February 2016.

The issues

8. The central question in this appeal is how much the respondent as the appellants' employer can withhold from their pay for each day of strike action. In order to answer that question, a number of further questions potentially arise in order to decide whether the Act applies to the facts of this case. As stated in the statement of facts and issues (albeit in a different order), they are (a) whether the appellants' contracts of employment provide expressly or by necessary implication for their salary to be paid to them pro rata in respect of divisible obligations to perform work on each day of directed time so that the Act has no application to this case; (b) what is meant by "accruing from day to day" in section 2 of the Act; and (c) what is the correct construction of section 7 of the Act.

Discussion

9. Question (a) seems to me to reflect a new point which the respondent sought to raise in this appeal which was not taken in the courts below. As formulated (so far as I can see correctly) by the appellants, the argument that the Act does not apply in this case has three steps as follows. (1) The Act was made to address mischiefs which arise in the context of periodic payments which are entire indivisible payments. (2) The contracts in this case provide impliedly for the appellants to be paid periodically in respect only of the work they do in directed time. (3) Therefore the periodic payments were impliedly divisible.

10. The appellant objected to the new point being taken for the first time in this Court. We heard argument on the point without ruling on the objection. Having heard argument and considered the point I would hold that it fails. Although the point was not argued in the Court of Appeal, that point or a very similar one was considered in the judgment of Elias LJ between paras 23 and 32. In particular he considered the decision of the Court of Appeal in *Item Software (UK) Ltd v Fassihi* [2004] EWCA Civ 1244; [2005] ICR 450, where an employee who was also a director of a company was paid a salary monthly in arrears. His contract was terminated on 26 June for misconduct. One of the issues was whether he was entitled to his salary for the period during which he worked in June before termination. The Court of Appeal accepted that at common law the employee could not recover anything because his salary did not accrue until the end of the month, but held that the Act applied. It held, as Elias LJ put it in para 31 in this case, that since, by virtue of the Act, salary accrued day by day the employee was entitled to his salary until his dismissal, even where it was for misconduct. 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. Elias LJ concluded that "this would suggest that [the Act] will now be readily applied to all employment contracts where the common law principles pertaining to entire contracts and substantial performance would operate". Elias LJ further concluded in para 32 that it followed that the Act does, in principle, apply to the contracts of these teachers. As he put it, their pay is deemed to accrue daily. He added that that was also the view of Scott J in *Sim v Rotherham Metropolitan Borough Council* [1986] ICR 897, although the point was not directly argued in that case (see further para 22 below). Elias LJ also noted that none of the parties sought to contend otherwise in the Court of Appeal.

11. Thus the first of the three steps in para 9 above was satisfied because the Act was indeed intended to address mischiefs which arise in the context of periodic payments which are entire indivisible payments. However, for the reasons given below, steps (2) and (3), namely that the contracts in this case provide impliedly for the appellants to be paid periodically in respect only of the work they do in directed time and that it follows that the periodic payments were impliedly divisible, were not satisfied. For these reasons I would reject the new point sought to be advanced for the first time in this Court. I would accordingly answer question (a) in the negative. I do not think that the contracts of employment provide expressly or by necessary implication for their salaries to be paid to staff pro rata in respect of divisible obligations to perform work on each day of directed time.

12. To my mind the correct approach to this case depends essentially upon the application of section 2 of the Act to the contracts of employment, all of which are upon more or less the same terms. I return below to the meaning and effect of section 7 of the Act, which in my opinion does not apply to the facts of this case.

13. Clause 1.1 of the contract is entitled "DUTIES" and provides for the duties to be carried out under the reasonable direction of the Principal. Clause 1.2 provides that the employee may be called upon to perform any of the duties set out in Appendix 4 of the Red Book which might reasonably be assigned to him.

14. Clause 2 provides:

> "2 **WORKING TIME**
>
> 2.1 Subject to the provisions in the other paragraphs of this section, you may be required to work for 195 days in any year of which 190 will be days on which you may be required to teach in addition to carrying out other duties. Within these 195 days, up to 1,265 hours a year will be allocated reasonably to you by the Principal. Details of this directed time will be provided by the Principal.
>
> 2.2 Within the 1,265 hours you may be required to teach for up to six hours over two evenings per week. Any teaching in the evening beyond this level would be undertaken only on a voluntary basis.
>
> 2.3 In addition to the requirements in 2.1 above, you will work such additional hours as may be needed to enable you to discharge your duties effectively including, in particular, the marking of students' work, the writing of reports on students and the preparation of lessons, teaching material and teaching programmes.
>
> 2.4 In this section, 'year' means a period of 12 months commencing on 1st September.
>
> 2.5 Details of your holiday periods will be made available to you by the Principal. You will be paid full salary during these holiday periods unless you are receiving less than full salary arising from the application of the sick pay scheme, maternity scheme etc."

15. Clause 4 is entitled "SALARY" and provides (in Mr Monk's case), so far as relevant, that his salary for the relevant year was £38,421 per annum (including PSP) and that it would be paid monthly by credit transfer on the last working day of the month, except in December when payment would reach his bank account on or before 24 December. The other contracts were in the same form, although the figures varied.

16. The Red Book contains a provision almost identical to clause 2.1 above, except that it is para 20 and is entitled "**Standard Working Time"**, which is thus the same as "directed time". Paragraph 21 provides for **"Evening Teaching"**. Paragraph 22 is entitled **"Undirected Time"** and reads

> "In addition to the requirements in paragraphs 20 and 21 above, a teacher will work such reasonable additional hours as may be needed to enable them to discharge their duties effectively including, in particular, the marking of students' work, the writing of reports on students and the preparation of lessons, teaching material and teaching programmes and such other duties as may reasonably be required. The amount of time required for this work and the times outside the 1,265 specified hours at which duties shall be performed shall not be defined by the college, but shall depend upon the work needed to discharge the teacher's duties."

17. In addition, para 18 provides for payment for additional days of directed time, which were remunerated in addition to salary, as for example by an additional payment at a daily rate of 1/195 of the "rate for the job". There is also para 26, which provides that no teacher may be required to work on a Sunday, Bank or public holiday.

18. Finally, Appendix 4 in the Red Book describes the teachers' "**Professional Duties**". Under that heading it states:

> "The following duties shall be deemed to be included in the professional duties which a teacher employed by a Sixth Form College may be required to perform.
>
> **<u>Teaching</u>**
>
> 1(a) planning and preparing courses and lessons;

(b) teaching, according to their educational needs, the students assigned to you including the setting and marking of work to be carried out by the student in college and elsewhere;

(c) assessing, recording and reporting on the development, progress and attainment of students in each case having regard to the curriculum for the college.

Other Activities

2(a) promoting the general progress and well-being of individual students and of any class or group of students assigned to you;

(b) providing guidance and advice to students on educational and social matters and on their further education and future careers, including information about sources of more expert advice on specific questions; making relevant records and reports;

(c) making records of and reports on the personal and social needs of students;

(d) communicating and consulting with the parents of students;

(e) communicating and co-operating with persons or bodies outside the college;

(f) participating in meetings arranged for any of the purposes described above.

Assessments and Reports

3 Providing or contributing to oral and written assessments, reports and references relating to individual students and groups of students."

19. Appendix 4 includes a number of further activities involved in the work of a teacher, which it is not necessary to particularise in any detail. The topics are educational methods, discipline, health and safety, staff meetings, cover, public examinations, management and administration.

20. The appellants regularly performed their undirected duties outside of the normal term-time hours, ie during weekends, evenings and/or days of annual leave, because there was insufficient time to perform all of those duties during such of the normal term-time hours as were not allocated to directed time. The statement of facts and issues refers to material relevant to each of the appellants as follows. Mr Hartley says that the volume of work was so great that he was required to work every weekend of the year on both Saturdays and Sundays, typically spending two to three hours carrying out undirected time duties during a weekend. The nature of the job meant that he had no choice but regularly to perform work in undirected time outside of the normal college day, in the evenings, at weekends and during the holidays. Mr Panko had over 11 hours' remission time (ie time during directed hours allocated to reflect his additional responsibilities) but was unable to complete all of his work in that time and regularly carried out work during evenings, weekends and holidays. Mr Monk was similarly unable to complete all of his work during his remission and non-contact time. If he did not do evening and weekend work he would not be able to deliver lessons because he would not have the material, schedules and tasks prepared. He estimates that he would do work on "somewhere between 25 and 52 weekends a year". The amount depends on his priorities and his state of health.

21. The parties agree that the amount of undirected time duties broadly correlates with the amount of directed time duties in that the more directed time, in particular teaching time, the more undirected time is likely to be required.

22. Some assistance in this type of case can I think be found in the judgment of Scott J in *Sim* at 928G-929C, which is relied upon by the appellants as follows:

> "In considering the scope of a teacher's professional obligations as a teacher, it is convenient to start with those matters that are common ground. It is accepted that the teachers have an obligation to teach their classes in accordance with the timetable from time to time in force. It is accepted that they have obligations properly to prepare for their classes and to mark the schoolwork done by their pupils either in class or as homework. It is accepted that these latter obligations may require work to be done outside normal school hours. To put the point another way, a teacher could not excuse a failure to be properly prepared for a class or a failure to mark schoolwork within a reasonable time after it had been done by pointing out,

> correct though the observation might be, that he or she had not had time within school hours to do the work. It is, perhaps, one of the hallmarks of professional employment, as opposed to employment in non-professional capacities, that professionals are employed to provide a particular service and have a contractual obligation to do so properly. A worker in a car factory or shop may clock off at 5.30 pm or, perhaps, work late on an overtime basis. An employed professional does not usually have an overtime option. He is employed to provide a particular service to proper professional standards. His contract may require his attendance in an office or other place of work for particular hours but his contractual obligations are not necessarily limited to work done within those hours. So, too, teachers' duties are not necessarily confined to their obligation to be on school premises during school hours and to take their classes during those hours.
>
> The professional obligations of a teacher cannot, in my opinion, be confined to the imparting of academic knowledge to the pupils."

That passage gives a picture of the wide scope of responsibilities of teachers such as the appellants, all of which must be reflected in their overall salaries.

23. So too does the speech of Lord Templeman in *Miles v Wakefield Metropolitan District Council* [1987] AC 539 at 556F-H, which was relied upon by the appellants. Lord Templeman did not refer to the Act, although section 2 had been relied upon by the successful employers. He said this:

> "It is unusual for the holder of an office to take industrial action and the consequences will depend on the rights and obligations conferred and imposed on the office-holder by the terms of his appointment. But if an ambassador and the embassy porter were both on strike then I would expect both to be liable to lose or both to be entitled to claim their apportioned remuneration attributable to the period of the strike. A judge and an usher on strike should arguably be treated in the same manner. The ambassador might be required to decode a declaration of war on Sunday, and a judge might devote his Christmas holidays to the elucidation of legal problems arising from industrial action, so that it would be necessary to divide their annual salaries by 365 to define a daily rate applicable to the period of strike,

> whereas the weekly, daily or hourly wages of the porter and the usher provide a different basis for apportionment, …"

24. Section 2 of the Act must be read so that it provides in effect that "all … salaries … shall, like interest on monies lent, be considered as accruing from day to day, and shall be apportionable in respect of time accordingly". In *Sim* Scott J considered section 2 at pp 935G-936A, where he rejected a submission that teachers' salaries accrued minute by minute and added:

> "Under the contracts, the salaries are based on a yearly scale but are paid by monthly payments. Each month a contractual right to a salary payment vests in the teacher. By reason of section 2 of the Apportionment Act 1870, the salaries are deemed to accrue day by day. If a teacher's contract were, in the middle of a month, to come to an end, by death, dismissal or some other event, section 2 would entitle the teacher, or his estate, to an apportioned part of the month's salary payment. So the salaries may be regarded as accruing day by day. But they do not accrue minute by minute. And for as long as the contract is continuing, the only payment that can be claimed by a teacher is a monthly payment and the only obligation to make a payment of salary that rests on the education authority is an obligation to make a monthly payment."

This approach to section 2 appears to me to be correct, although on the facts Scott J held that the employer was entitled to reduce the amount paid by way of equitable set off. The approach is not however that set out in the judgment of Elias LJ in the Court of Appeal, to which I return below. The use of the word "considered" in section 2 seems to me to show that the section is a deeming provision.

25. The appellants' case was summarised in para 32 of their written case in this way. In the case of unvarying, annualised periodic payments (whether made once a month, or otherwise), such as the salaries of the appellants, section 2 of the Act has the effect of deeming accrual at the rate of 1/365 each day; but only because they are unvarying annualised periodic payments. The appellants do not and did not suggest that a periodic payment made over a period different from (and in particular a period of less than) a calendar year should accrue at the rate of 1/365, or should be aggregated with other periodic payments so that the total of such payments over a calendar year should be added up and divided so as to accrue at the rate of 1/365. Thus the application of section 2 depends upon the terms of the particular contract. In this case we are concerned only with an annual contract.

26. It is I think helpful to consider the arguments advanced by the parties and the reasoning of the Court of Appeal in order to understand both the position in the Court of Appeal and the present position. It is striking that the argument in the Court of Appeal proceeded on the express basis (which was not challenged by the Court of Appeal at the hearing) that, if section 2 applied and section 7 did not, the effect was that Mr Monk's salary had to be apportioned at the rate of 1/365 per calendar day. By contrast the respondent put forward 1/260. It was common ground in the Court of Appeal that section 2, if applicable, would require pay to accrue by equal amounts daily: see per Elias LJ at para 53.

27. It was submitted on behalf of the respondent that, if the Act applied, the terms of the contract could not be reconciled with the principle of equal daily accrual and amounted to an express stipulation within the meaning of section 7 that the principle in section 2 should not apply. The respondent adopted the reasoning of Jay J in *Amey* and its submissions were recorded by Elias LJ in para 57 as follows:

> "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 at para 42, 'tied to the measurable part of a teacher's work'. 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."

28. So in the Court of Appeal the appellants argued for 1/365 per calendar day in reliance upon section 2 and, if section 2 did not apply, upon section 7, whereas the respondent argued for 1/260 in reliance upon section 7. In this Court the case for the appellants was the same, whereas the respondent relied upon section 2 on the basis of the conclusion of the Court of Appeal that section 2 does not imply the principle of equal daily accrual but at a rate which is appropriate in the context of that contract to the particular day in question: per Elias LJ at para 59. It appears that he would have chosen 1/195 by analogy with the pay of part time workers, but adopted the respondent's figure of 1/260 on the basis that it related to the total number of annual working days. Both these approaches assume that the working days are limited to days on which directed duties were carried out.

29. I have reached the conclusion that the appellants' case is to be preferred to that of the respondent. As I see it, the difficulty with 1/260 is that, given that the work done by the teachers described above was not limited to work during week days, it makes no sense to choose a calculation of 1/260 of the annual salary, which assumes only week day working. I would therefore reject the 1/260 figure. What then should the figure be? Although, as stated above, a case might perhaps be made

for some other figure, the only alternative figure put forward during the argument was 1/365.

30. It might be said that the difficulty with the figure of 365 is that it cannot be justified arithmetically. However, this is where, as it seems to me, the statutory formula in the Act comes in. On the basis of the statutory formula, namely that salary "shall … be considered as accruing from day to day, and shall be apportionable in respect of time accordingly", the most sensible approach in order to apportion the annual salary on a day to day basis is by treating each day as 1/365 of the annual salary. As I see it, this achieves an overall approach which is broadly fair. The reason why it is broadly fair is that the monthly payments are made every month, including periods when the teacher is on holiday, and the work carried out is spread throughout the year as explained both by Scott J and by the appellants' evidence in this case. In particular, it is not limited to periods when the teacher is carrying out directed work, but includes preparatory work and the like which involves working in the evenings and weekends.

31. I recognise that it can be said that this can give rise to surprising results but that is almost always true of deeming provisions. They are chosen in order to have a simple rule which can be applied in every case. Moreover, this approach seems to me largely to adopt the approach in the cases in which the court construed the expression "day by day" to mean daily or each calendar day: see eg *Taylor v East Midlands Offender Employment* [2000] IRLR 760, EAT, per Maurice Kay J at para 5 and *Thames Water Utilities v Reynolds* [1996] IRLR 186, para 22, EAT. In the latter case HH Judge Clark said this by reference to the expression "from day to day" in section 2:

> "Accordingly the real question is what is meant by the expression 'from day to day' in section 2 of the Act. In our view it can only be calendar days and not working days."

32. In that case the EAT expressly agreed with the view of Evans-Lombe J in *In re BCCI SA* [1994] IRLR 282. See also, to similar effect *Smith v Kent County Council* [2004] EWHC 412 (QB), where Mackay J concluded that 1/365 was appropriate, distinguishing *Sim v Rotherham* and *Miles v Wakefield Metropolitan District Council* [1987] AC 539 on the facts. In *Amey* Jay J said at para 17 that that line of authority had fallen into disfavour, although he recognised that it had not been overruled by the Court of Appeal. He expressed that view on the basis that in *Leisure Leagues UK Ltd v Maconnachie* [2002] IRLR 600 the EAT had held that the concept of day to day accrual in the 1870 Act must be, as he put it, envisaged by reference to the number of working days in the year and not the number of calendar days because the EAT based itself on the Working Time Regulations 1998 (SI 1998/1833). He also noted, at para 19, that that decision had been followed by the

EAT in *Yarrow v Edwards Chartered Accountants* [2007] All ER (D) 118 (Aug). However, Jay J said at para 20 that those cases were only persuasive in the High Court and that he was not convinced that the Act can be overridden simply because it achieves a poor fit with modern employment law. I agree, although those Regulations set a maximum average number of hours to be worked weekly (subject to contrary agreement), entitlement to rest periods and paid annual leave, none of which is incompatible with the terms and conditions of the employment in question here. It is noteworthy that Jay J then set out the provisions of sections 2 and 7 of the Act and held in para 23 that "the reference to accruing from 'day to day' in section 2 must be to each calendar day". As I read the decision of Jay J, it was based upon section 7 of the Act and, as explained below, I reach a different conclusion from him in respect of section 7.

33. We were also referred to the decision of Blake J in *Cooper v Isle of Wight College* [2008] IRLR 124; [2007] EWHC 2831 (QB). However, that decision seems to me to be of little assistance in deciding how section 2 works in a case like this. Blake J referred to the part of Lord Templeman's speech in *Miles v Wakefield Metropolitan District Council* quoted in para 23 above, including the passage at the end of the quote where he gave the examples of the ambassador and the judge who might be required to devote their Sundays or holidays to work, so that it would be necessary to divide their annual salaries by 365 to define a daily rate applicable to the period of strike, whereas the weekly, daily or hourly wages of the porter and the usher provided a different basis for apportionment. *Cooper* was concerned with pay for a defined 37 hour week.

34. In all these circumstances the cases seem to me to show that the correct approach under section 2 to a case like this, where the contract is an annual contract, is to hold that the salary must be apportioned on a calendar day basis over 365 days, which yields a daily figure of 1/365.

35. In reaching these conclusions I am conscious that I have in this respect reached a different conclusion from the Court of Appeal.

36. Before considering the effect of section 7, it is convenient to consider the approach of the Court of Appeal to sections 2 and 7 together because Elias LJ does so in paras 33 to 38 as follows:

> "33. It is a critical element in the claimants' 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: '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 12 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 12 months to the original landlord, even though the rent for the first half of the year was smaller.
>
> 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."

37. As I understand Elias LJ's reference to equal daily apportionment, he is describing a process which leads to 1/365. For the reasons I have given I would hold that in a case like this the express provision in section 2 that the salaries "shall be considered as accruing from day to day and shall be apportionable in respect of time accordingly" does indeed mean equal daily apportionment. However, I agree with him that Parliament must surely have intended to allow contracting out from the principle. In my opinion it did so in section 7.

38. The question then arises what is meant in section 7 by an express stipulation. On the face of it, it means that there must be an express provision in the contract which has the effect of disapplying the statutory formula so that "no apportionment shall take place". As Elias LJ says in para 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. In my opinion the parties correctly so understood the Act.

39. In paras 40 and 41 Elias LJ refers to two cases on the meaning of section 7 and its predecessor. In *In re Lysaght* [1898] 1 Ch 115 Lord Lindley MR held that but for a clause in a will that certain shares "shall carry the dividend accruing thereon at my death" the Act would have allowed residual legatees to take the benefit of dividends on the shares up to the date of death. As Lord Lindley put it, the clause amounted to "a stipulation, within the meaning of section 7 …, that no apportionment shall take place". In reaching that conclusion (as Elias LJ put it in para 41) Lord Lindley referred to the interpretation put on a predecessor clause in similar terms considered in *Tyrell* v *Clark* (1854) 2 Drew 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. Elias LJ 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."

40. Elias LJ concluded in para 42 that, assuming that section 2 requires pay to accrue at an equal rate daily, and that section 7 permits contracting out of that principle, it seemed to him 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. I would accept that only if it can fairly be said that in a particular case, there is, in the words of section 7, an express stipulation in the contract that no apportionment should take place.

41. As I see it, the amount of the daily rate provided for in section 2 which is to be "apportionable in respect of time accordingly" will depend upon the terms of the particular contract. I agree with Elias LJ (in para 44) that, absent a provision (I would say an express provision) to the contrary the principle of equal daily accrual will be the obvious principle to adopt. For the reasons given above, I am of the opinion that 1/365 is the appropriate rate here. In any case the precise figure will depend upon the true construction of the particular contract. I do not accept the view expressed on behalf of the Court of Appeal that the arguments have been advanced on a false

basis. In this case there is no express (or indeed implied) stipulation excluding the statutory apportionment so that section 7 has no application. A critical feature of the instant case which leads to a figure of 1/365 is that the contracts are annual contracts. If the contracts were not annual contracts the position would be very different and would depend upon the terms of the particular contract.

42. Elias LJ put the position in paras 59, 60 and 61 as follows:

> "59. It will be clear from my discussion of the effect of the 1870 Act that I believe that the arguments have been advanced on a false premise. It is a fundamental feature of the claimants' 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 claimants 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 [in *Amey*] 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."

43. Finally I should refer to para 64 in these terms:

> "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."

44. I respectfully disagree with the approach in those paragraphs, essentially for these reasons. The directed work is plainly important but it is only part of the teacher's responsibilities. While there is a relationship between the directed work and undirected work, much of the undirected work is very important in its own right and is carried out outside the hours of directed work: see in particular paras 18, 19 and, especially 20, above. Moreover the role of a teacher as described by Scott J is a multi-faceted one.

45. The appellants' case may be summarised as follows. Mr Monk's case is typical of that of all the appellants. He was employed on an annual salary of £38,421 payable to him monthly at the end of each month. He was paid that salary to perform the duties referred to in his contract, as set out above, notably in clause 1 and in Appendix 4 set out in the Red Book. There is no suggestion in any of the documents referred to above that some of his duties were paid and some unpaid. Section 2 of the Act provides that his salary must be considered as accruing "from day to day" and "be apportionable in respect of time accordingly". There is nothing in the contract which stipulates for any apportionment other than a day to day apportionment, which (as appears above) the cases show means calendar day. In the

context of an annual contract in which payment is monthly and, given the wide variety of work carried out, whether directed or undirected work, where there is no distinction between days upon which work is carried out and days upon which work is not carried out, the natural effect of the Act is that, as submitted on behalf of the appellants, the apportioned part of his salary on the day he was on strike was the same as any other day, namely 1/365 of his annual salary. In short, it was deemed or "considered" by section 2 to be part of his annual salary.

46. As to para 59 of Elias LJ's judgment, quoted above, I would accept the submission made on behalf of the appellants that section 2 of the Act implies the principle of equal daily accrual unless excluded by a clear inconsistent clause. I would accept the appellants' arguments set out in para 45 above that they were paid a salary to perform the duties referred to in their contracts and there is no suggestion that some of those were paid and some unpaid. On that basis, as para 59 puts it, I agree that 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. However, I do not agree with the Court of Appeal that, as stated in paras 60 and 61 of the judgment of Elias LJ, the natural construction of the contract on that assumption would not be that pay accrues at an equal rate day by day. It appears to me that it is wrong to say that, as Jay J put it in *Amey*, there is a close relationship between the directed hours and pay. Indeed, as Elias LJ says in para 61, 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. This is clear, for example, from the many different "Professional Duties" identified in Appendix 4 of the Red Book and quoted in para 18 above under the heading of "Other Activities" and not "Teaching". In short they are not limited to the week days but cover many other days including evenings and weekdays. Hence the conclusion that, in the context of an annual salary, the provision in section 2 that the salary "shall … be considered as accruing from [calendar] day to [calendar] day and shall be apportionable in respect of time accordingly" points to an apportionment of 1/365.

CONCLUSION

47. For these reasons I would hold that section 2 of the Act applied in this case and was not excluded by section 7. As to the questions posed in para 8 above, I would hold that (a) section 2 of the Act applied to this case, (b) that "accruing from day to day" means accruing calendar day by calendar day and (c) that section 7 of the Act has the meaning discussed in paras 38 to 41 above and does not apply on the facts of this case.

48. The contract involved many different obligations and was not restricted to direct work five days a week. Under section 2, the salary "shall be considered as accruing from day to day, and shall be apportionable in respect of time accordingly" and the cases show that an apportionment must be carried out on a calendar day by calendar day basis. To my mind those cases are correctly decided and are to be preferred to those which doubt that approach. Once a calculation based on five days a week has been rejected, it follows that the solution cannot be a deduction of 1/260 of the annual salary for one day's strike. Once the 1/260 approach is rejected, it seems to me that the natural solution is to take 1/365. Indeed, it is hard to see what other approach could fairly be adopted. It does seem to me that to take 1/365 is to respect (and reflect) the statutory approach in the cases of calculating the value of one calendar day in cases where the contracts provide for an annual salary paid monthly. The rate would no doubt be different if the contracts were not annual contracts.

49. For these reasons I would allow the appeal and invite the parties to agree an order. Failing agreement, written submissions on the form of order and on costs must be filed within 21 days of the handing down of the judgment.