

Community Leisure UK

Holiday accrual and pay for casual staff

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Damian...

... advises clients across various sectors and has a particular interest in advising charities and social enterprises

He's a Senior Associate with experience of advising on a range of employment law issues, including disciplinary and grievances, discrimination, TUPE, redundancy and data protection

Paul ...

... is a highly experienced employment and discrimination specialist. He helps charities, social enterprises, profit-with-purpose businesses and other commercial organisations to navigate challenging and strategically important workplace issues, including: employee engagement, change programmes, discrimination, grievances, performance management, disciplinaries, dismissals, whistleblowing, TUPE and data protection

Paul has a particular interest in working with leisure trusts and is the safeguarding trustee at Active Luton. He also sits on the HR Sub-Committee

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Introduction and scene setting

Part-year workers are workers on permanent contracts who do not work every week of the year

Harpur Trust v Brazel has confirmed that such workers shouldn't have paid holiday pro-rated to work actually done

It will have wide-reaching implications for organisations who engage zero-hours and casual workers

The need for paid holiday is a necessary and fundamental part of just employment

While everyone would agree with this providing it can lead to tricky issues for organisations which don't always have typical employment relationships or,...

... where staff are not engaged to work throughout the year

When navigating this, remember holiday entitlement and holiday pay are different

Holiday entitlement – and current approach

Workers, including part-time workers:

- Have a right to at least 5.6 weeks' holiday
- Are entitled a week's pay in respect of each week of holiday

The difficulty applying this to those working on a casual basis or with irregular hours ...

... lead to the approach of saying holiday entitlement accrues at the rate of 12.07% of hours worked ...

... an approach which was recommended by ACAS

Holiday pay – under WTR

Under the WTR, a worker's holiday pay should be a week's pay for each week of leave ...

... calculated in accordance with the “week's pay” rules in the ERA

For a worker who doesn't have normal working hours, this means a week's pay is the worker's average weekly pay in the 52 weeks before the period of leave ...

... with any weeks in which there is no pay being excluded, and earlier weeks included

Note, the reference period was increased from 12 to 52 weeks with effect from 6 April 2020

Harpur Trust - the facts

Ms Brazel was a music teacher. She:

- Was employed on a permanent contract, but for term-time only
- Was only paid for the hours she taught, which varied from week to week
- Took her holiday during the three school holidays when she was not teaching

The Trust made payments for holiday at the end of each school term ...

... calculated as 12.07% of her earnings in the previous term

Mrs Brazel said she was being underpaid for her holiday and claimed:

- She was entitled to payment for 5.6 weeks' holiday ...
- ... based on her average pay during working weeks

Harpur Trust – the initial outcome

The Tribunal dismissed the claim, but the EAT and Court of Appeal agreed with Mrs Brazel

The Trust appealed to the Supreme Court arguing that:

- EU law (from which the WTR derives) requires holiday entitlement to be pro-rated
- There were alternative more logical approaches, and
- It was absurd that someone who worked for a few days a year would have a larger percentage of holiday entitlement (as a proportion of the time they work) than someone who worked full time

Harpur Trust - the Supreme Court decision

The Supreme Court rejected the appeal and confirmed the entitlement to 5.6 weeks' holiday applies to full- and part-year workers, without pro-rating

For those with no normal working hours, pay should be calculated by reference to the hours worked over a 52-week period ...

... rather than be limited by the number of hours worked

In essence the Calendar Week Method argued for by Ms Brazel, was correct

Accordingly, she was entitled to be paid for 1.87 weeks per term (ie, a third of her annual leave of 5.6 weeks)

So, if she had worked 149.5 hours over the previous 12 weeks at £29.50 p,h she'd have earned £4,410.25, and:

- 12.07% of that would give **£532.31**

Logical?

There a logic to the notion that paid holiday is a reward for work done, and should therefore accrue in proportion to working time

This is the logic that has, for many years, underpinned the approach whereby entitlement accrues at the rate of 12.07% of hours worked

This has been comprehensively rejected by the Supreme Court and should no longer be relied on

Provided a worker remains under contract, they have an entitlement to 5.6 weeks' holiday in each year, regardless of the amount of work done

We therefore have a system where non-working weeks are included for calculating accrued holiday entitlement, ...

... but ignored when calculating holiday pay

Who does the case apply to?

Is it just relevant to term-time workers such as those in schools?

Does it affect all casual staff?

Or, all part-time staff?

In a sense it applies to all workers

However, in practical terms it affects workers without normal working hours, and ...

... the biggest impact in practice is on hourly paid workers who have a permanent contract but, for whatever reason, have a number of unpaid non-working weeks during the leave year

The greater the number of non-working weeks, ...

... the greater their holiday entitlement (and pay) will be as a percentage of annual working time and earnings

Note the judgment only applies to employees and workers

It does not apply to genuine independent contractors

However, following the decision in Uber, Tribunals will look forensically to see if that relationship is a sham, and ...

... claimants may look to extend the decisions related to misclassified workers to determine that liability can go back further than just two years

Calculating holiday pay for irregular work

The question now arises - how best to calculate holiday and holiday pay for:

- Part-year workers
- Casual workers, and
- Others with irregular hours

... so as to be legally compliant?

The only reliable answer is now to use the Calendar Week Method, ie

- If the worker takes a week's holiday, they should be paid a week's pay calculated according to average pay over the previous 52 weeks, while ignoring weeks with no pay
- This may produce a different rate of pay each time holiday is taken

Seems simple enough, but there is still a difficulty in expressing the holiday entitlement in terms of days or hours

The WTR provide no clues at all and nor did the Supreme Court

One possible solution is to base it on the number of days in an average week over a representative period. See BIES guidance:

[How to calculate holiday entitlement for workers on different types of contract - GOV.UK \(www.gov.uk\)](http://www.gov.uk)

For example, if the average week is 2.5 days long, then a day's holiday equals $1 \div 2.5$ or 0.4 of a week

It should therefore attract 0.4 of a week's pay, and ...

... would reduce the remaining holiday entitlement from 5.6 weeks to 5.2 weeks

If there is no standard length for a working day, a similar exercise could produce holiday entitlement in hours

Where does this leave the law?

The significant impact is on people who are under a permanent contract for the whole year but actually work for less than a full year

As argued by the Trust, this could lead to some “absurd” results

For example, an exam invigilator retained on a permanent contract who works only one week of the year, earning £1,000 for that work

The invigilator would be entitled to 5.6 weeks' annual leave

Holiday pay for this leave must be calculated based on their average pay over the last 52 weeks – but ignoring any weeks in which they received no pay

So, they would receive £5,600 holiday pay for a job that paid only £1,000.

The Supreme Court dealt with this by saying that general rules sometimes provide anomalies in untypical cases, and that it would be unusual for a permanent contract to be used for this kind of arrangement

What next: solutions and legal reform

If you have people under contract for the whole year ...

... but they work short of a whole year,

Or

... if you use the 12.07% method for casual workers on permanent contracts, ...

... it would be sensible to get your contracts looked at and start considering your options

Some may find themselves facing significant claims for underpaid holiday from irregular workers on permanent contracts where the 12.07% method has been used

However, it is worth noting that this was also the position under the earlier court decisions

You may also want to review contracting options more widely

Generally speaking, the risks from this judgment arise when you have people under contracts for long periods of time when they are not working

Returning to the exam invigilator example, they might be better hired as freelancers or on a temporary contract which ends after each annual week of work

You could consider migrating away from ongoing umbrella contracts and operating a system whereby each engagement terminates at end of each assignment, and ...

... then simply make a payment of accrued but untaken holiday on termination of each engagement as set out in the contract

Although it would be unfortunate if this case had the effect of deterring permanent contracts ...

... when policymakers are promoting greater stability through the Good Work

The better solution though would be for the government to reform the law to cater for modern flexible working relationships

Also, now may be a good time for the government to consider allowing rolled up (but separately itemised) holiday pay, as long as it genuinely represents a supplement to normal pay

This is prohibited by pre-Brexit ECJ case law, which remains binding on the UK but the government could now legislate to permit the practice

Rolled up holiday pay was recommended as a possible option in 2017 by the Taylor Review

Audit and assessment of financial liability

Audit who you employ or engage (or have employed or engaged) on a permanent contract but for only part of the year

These staff might be affected

Work out what the difference is between what they are currently being paid for holiday pay ...

... and what they should be paid following the Supreme Court's decision

This is your annual underpayment

How far back should you look?

Generally, a claim for unlawful deduction of wages can be brought for a maximum of two years' worth of back pay, and ...

... a claim needs to be brought within three months from the last deduction

Plan your comms strategy and what to do about back pay

Keep SLT and your board informed of progress and get their input in charting the way forward

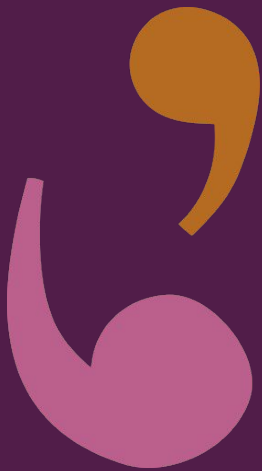
Will you offer up back payments? If so, how far back will you go?

Will you otherwise wait for employees to raise the issue of historic pay and only rectify the position moving forward?

Remember that trade unions are alive to this issue. UNISON made submissions in the case despite not being a party

So, if you recognise a union be prepared for them to ask about what you are planning to do following this decision

For more about how to manage union relationships please email me at p.seath@bateswells.co.uk



We can help with all of this
and can find practical
solutions, so get in touch
to discuss –

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