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Supreme Court Rules in Significant Holiday Pay Case

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1 August, 2022

The question of holiday pay (and how to calculate it) has been a challenging issue for employers for a long time. In the latest and most significant development for this area of law, the Supreme Court has ruled in *Harpur Trust v Brazel* that employees who work only part of the year, including term-time or casual workers, are entitled to 5.6 weeks' statutory holiday pay, the same as employees who work full-time all year.

Background

Ms Brazel, a music teacher, was engaged on a zero hours contract. She worked during term-time throughout the year and her hours varied each week. She was entitled to 5.6 weeks of paid holiday, which she had to take during school holidays. The Trust calculated Ms Brazel's holiday pay using the "percentage method". Namely, for every day Ms Brazel worked, she accrued 12.07% of that time as holiday. The 12.07% method is arrived at by dividing 5.6 weeks' holiday by 46.4 weeks (being 52 weeks – 5.6 weeks). However, this method has no basis in law, save to say many employers (and Acas for a long time) adopted the calculation as what was felt to be the fairest and most straight-forward way to calculate the holiday pay of employees with irregular hours. The percentage method was preferred by the Trust to the "calendar week" method set down in the Working Time Regulations i.e, to base holiday pay for someone with no normal hours of work on their average pay over a 52-week reference period immediately before the holiday (or a 12 week reference period prior to April 2020). You ignore weeks when there was no pay and bring earlier weeks into account.

Ms Brazel received her holiday pay at the end of each term in accordance with the 12.07% method and the then Acas guidance for calculating the pay of casual workers (which has since been updated and rewritten).

Previous court decisions

Ms Brazel brought a claim to the Employment Tribunal for unlawful deductions from her wages. The Tribunal dismissed her claim and held that the 5.6 week entitlement should be pro-rated when an employee works less than the standard working year of 46.4 weeks (the number of weeks in a year, less the minimum amount of holiday available under the Working Time Regulations 1998). As the school year would vary from 32-35 weeks a year, the Tribunal accepted the Trust's argument that her holiday entitlement should be pro-rated. The Tribunal held that if the Working Time Regulations' calculation was used then this would result in Ms Brazel receiving proportionally more holiday pay than full-time workers and this would be unfair. Ms Brazel appealed this decision.

The Employment Appeal Tribunal (EAT) allowed Ms Brazel's appeal and held her holiday pay should be calculated using the calendar week method under the Working Time Regulations and not the 12.07% method. The EAT determined there was no justification for not following the clear and unambiguous legislation which stated that an employee should be paid a week's pay for each of the 5.6 week's leave she is entitled to, calculated by using an average pay from the then 12-week reference period (now a 52-week reference period having been amended by statute).

The Trust appealed this decision to the Court of Appeal, which upheld the EAT's decision. Although the Court recognised that the Working Time Regulations' calculation put Ms Brazel in a better position than some full-time employees, it was felt that this was not a reason to ignore the legislation.

Supreme Court decision

The Trust appealed to the Supreme Court. The Trust argued that the "conformity principle" derived from EU case law should apply, which is the principle that annual leave and holiday pay should reflect the amount of work done. The Supreme Court concluded that the Working Time Regulations are not based on the conformity principle and that European law does not prevent the Court from making a more generous provision than the conformity principle would otherwise produce.

The Trust also proposed two alternative methods of calculating holiday pay. However, the Supreme Court found that both methods conflicted with the obligations set out in the Working Time Regulations. It was also noted that the suggested methods would require employers to carry out complex calculations. The complex calculations would result in employers recording employee time by hours, even for those who are not paid hourly which would be an unnecessary requirement on employers.

Finally, the Trust argued that the construction from the Court of Appeal's decision led to an "absurd" result as casual workers could receive more holiday pay than full- time workers. However, the Supreme Court also rejected this argument and responded by stating that a slight favouring of casual workers is not so absurd as to justify revising the legal provisions for holiday pay.

Impact

This landmark decision is significant for any employer that engages individuals on zero hour/ casual contracts that do not work the whole year. Employers should immediately review their current method of calculating holiday pay and ensure they are now using the calendar week method. To calculate holiday pay using the calendar week method, an employer must calculate the average weekly earnings of the worker over a 52-week reference period before the holiday is taken.

Employers should also be aware of potential claims for unlawful deductions from wages from employees that have had their holiday pay previously calculated using the now discredited percentage method and decide on a method of resolving this issue. Employees will be encouraged by unions to claim for underpaid holiday, particularly as the UK's largest union was involved in the case, so employers should prepare how they will deal with employee queries regarding holiday pay. Employers should work on the basis that they could be liable for up to two years' underpayments as employees are limited by how far back they can claim.

Finally, employers should also be aware that this judgment is also likely to lead to higher rates of holiday pay in their organisations where they employ term-time or casual workers.

Specific advice should be commissioned for specific situations. This document does not constitute legal advice for individual circumstances. If you would like to discuss any of the measures outlined above, please contact the London Employment Law team, **Jonathan Maude** at jmaude@vedderprice.com, **Daniel Stander** at dstander@vedderprice.com or **Rachel Easton** at reaston@vedderprice.com.