Browne Jacobson

Changes to holiday pay for part-year workers

In July 2022, the Supreme Court handed down its long-awaited Judgement in the case of Harpur Trust v Brazel relating to the correct calculation of statutory holiday pay for part year workers. This decision has implications for all part year workers on contracts which subsist all year round, whether their hours are normal or irregular.

07 October 2022

In July 2022, the Supreme Court handed down its long-awaited Judgement in the case of Harpur Trust v Brazel relating to the correct calculation of statutory holiday pay for part year workers. Employers could be forgiven for thinking that the application of the Supreme Court's decision in Harpur Trust v Brazel is limited to irregular hours workers; after all, Mrs Brazel was an irregular hours worker. Unfortunately, the Supreme Court's decision has implications for all part year workers on contracts which subsist all year round, whether their hours are normal or irregular.

The decision has highlighted the manner in which the courts interpret the Working Time Regulations 1998 (WTR 1998) and employers will want to ensure their practices in respect of all part year staff are consistent with the appliable rules explored below.

For education employers, the decision has particular importance due to the prevalence of a special type of part year worker: the term-time only worker, being a worker who only works the weeks when students are in. However, the principles from the decision also apply to casual and zero-hours workers provided they are engaged under permanent continuing contracts, rather than on a "per assignment" basis.

Many education employers employ a variety of part year workers on a permanent basis to work a limited number of weeks each year. They may also engage casual or zero-hours part year workers on continuing contracts. The principles outlined in this article apply to all of those workers.

What happened in the Supreme Court case?

Mrs Brazel was a peripatetic music teacher at Bedford Girls School, which is run by Harpur Trust. She was engaged on a term-time only basis to provide music lessons as demand required. Mrs Brazel had irregular hours, which varied each week. She typically worked between 10-15 hours per week.

Mrs Brazel brought a claim for unlawful deduction from wages in relation to the 12.07% method for calculating her statutory holiday entitlement and pay which Harpur Trust had begun using in 2011, following guidance from Acas. Prior to 2011, Harpur Trust was using a different method to calculate holiday pay for Mrs Brazel and the introduction of the 12.07% method in 2011 created a reduction in holiday pay. This is what prompted Mrs Brazel's claim to the Employment Tribunal.

The case was considered by the Employment Tribunal, Employment Appeal Tribunal and Court of Appeal before it came before the Supreme Court in November 2021. The Supreme Court handed down its decision on 20 July 2022 which sets out the following:

- Despite the fact Mrs Brazel did not work a full year, she was entitled to 5.6 weeks' paid statutory holiday in common with every other worker.
- It is not permissible to pro-rate part year workers' statutory holiday entitlement and pay to take into account the part of the year they do not work. The use of the 12.07% percentage method to calculate statutory holiday pay has the effect of pro-rating. The 12.07% method was devised on the basis that it gives workers a percentage of holiday against their hours worked, as 5.6 weeks of the full 46.4 weeks worked year is 12.07% (52 – 5.6 = 46.4 worked weeks). The Supreme Court decided that this is not the correct method to use.

- Statutory holiday pay should be calculated according to the worker's "week's pay", which must be formulated in accordance with sections 221-224 of the Employment Rights Act 1996 (ERA 1996). For part year workers with irregular working hours like Mrs Brazel, this entails averaging the worker's weekly remuneration over the previous 52 weeks, discounting unremunerated weeks and bringing forward remunerated weeks from up to 104 weeks before. In carrying out this calculation, you should only count back as far as needed to get 52 weeks of usual pay. If necessary, you can look at the pay received over the previous 104 weeks, but no further. This calculation resulted in an increase in Mrs Brazel's statutory holiday pay compared to the previous 12.07% calculation method used.

Have all the issues been resolved?

No, sadly not. Whilst the judgement confirms the position on the calculation of statutory holiday pay for part year workers with irregular hours, putting that statutory formula into practice for irregular hours workers is not without its own challenges due to the number of times employers may have to perform these calculations. Employers are required to perform holiday pay calculations on each occasion the worker takes holiday. Where employers have not specified in their contracts when holiday may be taken or is deemed to be taken, workers may take holiday at different times of the year and may make requests for a greater number of short holidays (for example, one day at a time).

The judgement did confirm that employers cannot pro-rate holiday entitlement and pay for part year workers, as all workers are entitled to 5.6 weeks paid holiday; however, it did not address how to calculate statutory holiday pay for part year workers with normal hours as Mrs Brazel did not fall within this category. The legislation, the ERA 1996, provides two formulations of "a week's" pay for workers with normal hours and it is unclear which formula part year workers with normal hours fall under, creating further legal and administrative difficulties.

What does this mean for education employers?

Following the Supreme Court's decision, employers will want to consider their methods of calculating statutory holiday pay to ensure that they comply with the ERA 1996. If employers are still applying the 12.07% percentage method for calculating holiday pay, they should look to curtail this practice and move to the calculation method set out in the ERA 1996. This requires the application of the calendar week method, whereby statutory holiday pay is calculated as follows: 5.6 x the worker's "week's pay" as formulated in the ERA 1996 (set out below). If employers continue to apply the 12.07% method they are at significant risk of legal challenge by their workers. The 12.07% method does not produce accurate statutory holiday pay and in the case of some workers, like Mrs Brazel, it can result in an underpayment.

For part year workers with irregular hours

A "week's pay" is the amount of the worker's average weekly remuneration over the previous remunerated 52 weeks, discounting unremunerated weeks and bringing forward remunerated weeks from up to 104 weeks before (s.224 ERA 1996). You should only count back as far as needed to get 52 weeks of usual pay. If necessary, you can look at the pay received over the previous 104 weeks, but no further.

For salaried part year workers with normal hours

A "week's pay" is according to one the following formulations in the ERA 1996:

- Normal weekly pay: the amount which is payable by the employer under the contract of employment for a normal working week (s.221(2) ERA 1996); or
- 52-week pay average: the amount of remuneration for the average number of weekly normal working hours at the average hourly rate of remuneration over 52 weeks, discounting unremunerated weeks and bringing forward remunerated weeks from up to 104 weeks before as necessary (s.224 ERA 1996).

For the majority of salaried workers, calculations under s.221(2) and s.224 should not result in any significant differences in holiday pay; however, the application of s.221(2) could result in an underpayment for part year workers whose pay has reduced in the last 52 remunerated weeks. Employers will need to consider which formulation to adopt.

What about full year, full-time and part-time workers?

The Supreme Court's judgment has no impact on the way you calculate full year workers' statutory holiday entitlements and pay. However, employers may wish to use this as an opportunity to check they are calculating full year workers' statutory holiday pay correctly

under the ERA 1996.

What about staff engaged on an assignment basis?

If employers have part year staff who are genuinely engaged to work on a per assignment basis, rather than having continuity of contract for the whole year between those assignments, the Supreme Court's decision does not apply to them. An example is exam invigilators issued with a contract that starts and ends with a discrete period of work that they need to complete only. However, employers should still ensure that they calculate these workers' statutory holiday entitlements and pay correctly in accordance with the ERA 1996. If employers have been paying these workers statutory holiday pay on the basis of the 12.07% percentage method, it should produce the right holiday pay where the worker has worked each week of the assignment. If these workers have had weeks of no-pay during the assignment, the 12.07% will not produce an accurate result and employers will have to apply the method for calculating workers' statutory holiday pay set out in s.221-224 of the ERA 1996 outlined above.

Does this affect contractual holiday?

The Supreme Court's decision has no bearing on contractual holiday entitlement or pay; it only relates to statutory holiday.

Where contractual holiday entitlement exists above the statutory minimum, employers can pro-rate this enhancement. Employers should be mindful of their obligations under the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000. These regulations provide that pay and benefits for part-time workers, including part year workers, must be pro-rated proportionately taking into account the amount of time worked compared to a full-time equivalent comparator. Some unions are already pursuing settlement of prospective group claims from their term-time members on this basis.

Employers should check their part year workers' pay and contractual holiday entitlements are consistent with these regulations.

What claims can part year workers bring?

Affected workers outlined above may claim for:

- Unlawful deduction from wages in relation to the underpayment of statutory or contractual holiday pay. This claim must be brought within three months in the last of a series of deductions; however, these claims can only be made going back a maximum of two years.
- Breach of contract in relation to underpayment of contractual holiday pay only. These claims must be brought within six years of the breach.
- Claims under the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000. Claims must be brought within three months of the act or omission complained of. There does not appear to be any limit on how far back claims can stretch in respect of breaches of the Regulations, provided claims are brought in time.
- Pension loss, where underpayment of holiday pay impacted on pension contributions. Generally, such claims must be presented within six years.

Should we consider making changes to our contracts?

Some employers might be considering reviewing their business practices in relation to part year workers engaged on whole year contracts, particularly those who work a relatively small number of weeks for whom the Supreme Court's decision is likely to result in the largest increase in statutory holiday pay (e.g. exam invigilators, etc.). In respect of these workers, employers might be considering engaging workers on an alternative, per assignment, basis. Employers should be cautious and take advice before attempting to unilaterally change their workers' existing contracts as this may give rise to further claims.

Where should employers start?

It is recommended that employers do the following:

- Review their current approach to holiday entitlement and pay for all workers depending on the type of worker that they are (e.g. part year/whole year with regular/irregular hours).
- Apply the new calculations to workers and assess how those new calculations impact pay (favourable or unfavourable).
- Make any adjustments to their calculations necessary to avoid further underpayments.

- Where employers have identified that their workers have been paid incorrectly under 1., they should assess their exposure to claims from workers.
- Review their contracts of employment to limit risk of further complications in the future.

We explore these issues further in our Holiday Pay webinar, which is available now on demand

Contact

Sarah Linden

Legal Director

sarah.linden@brownejacobson.com

+44 (0)330 045 2186

Related expertise

Services

Employment

HR services for schools and academies