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Client Alert

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Landmark Holiday Pay Ruling

Last week, the UK Supreme Court issued a significant holiday pay decision, *Harpur Trust v Brazel*, ruling that part-year workers (who only work certain weeks of the year) should not have their paid holiday entitlement pro-rated to reflect the number of weeks not worked in the year. The Supreme Court also confirmed that the method of calculating holiday pay for atypical workers at 12.07% annualised hours (previously recommended in ACAS guidance) is incorrect.

It is now settled law (with no further right of appeal) that part-year workers are entitled to 5.6 weeks of holiday per year and their holiday pay should be calculated by reference to average earnings over 52 weeks. The weeks they are not required to work do not reduce this entitlement. This provides part-year workers with an amount of leave which is disproportionate to the time worked, putting them in a more favourable position than some full-time staff.

The decision is significant not only for the education sector, but for any organisation which uses the 12.07% method for the calculation of pay for casual or zero-hour workers or which employs staff who do not work the entirety of the year (for example, workers on an oil rig).

THE BACKGROUND

The Working Time Regulations 1998 (**WTR**) provide all workers with the right to 5.6 weeks of paid holiday each year. The amount of the payment typically depends on the average weekly pay over a 52-week reference period (or a 12-week reference period prior to a change in legislation in April 2020). The WTR make no express provision for pro-rating this entitlement for employees who only work for part of the year.

Calculating holiday pay for staff with irregular hours is notoriously difficult. The now revoked ACAS guidance on "*Holidays and Holiday Pay*" previously recommended that, in respect of casual staff or those with irregular hours, it is "often easiest" to calculate holiday entitlement that accrues as hours are worked. 12.07% is the proportion that 5.6 weeks of holiday bears to the total working year. The working year is 52 weeks minus the annual leave (5.6 weeks) and so equals 46.4 weeks. 5.6 weeks is 12.07% of 46.4 weeks. ACAS accordingly recommended that

workers with irregular hours be paid leave for 12.07% of the hours they have worked (the "**12.07% Method**"). This approach has historically been adopted by many employers, however there is no reference to such a formula in the WTR.

Ms Brazel worked as a "visiting" music teacher at the school run by the Trust. Ms Brazel was employed on a permanent contract but only worked during term-time. Her working hours varied from week to week, and she had no normal hours of work. Ms Brazel was required to take her paid leave during school holidays and the Trust adopted the 12.07% Method, paying her hourly rate for 12.07% of the hours worked each term.

Ms Brazel brought a claim for unlawful deductions from her wages by underpayment of her holiday. The Employment Tribunal to first hear this claim ruled that Ms Brazel's holiday needed to be pro-rated to reflect that she only worked during term-time rather than the whole working year.

This position was overturned by the Employment Appeal Tribunal and Court of Appeal, which both held that Ms Brazel should be paid a week's pay for each of the 5.6 weeks' leave, calculated using an average from the 12 preceding weeks (prior to this reference period being extended to 52 weeks in April 2020). The Court of Appeal noted this put Ms Brazel in a more favourable position than some full-time workers in that her annual leave was a higher percentage of her total pay.

The Trust appealed to the Supreme Court, arguing that the leave of part-year employees must be pro-rated to avoid this 'absurd' result.

THE SUPREME COURT DECISION

The Supreme Court has agreed with the previous appeal decisions and unanimously ruled that:

- Although European case law suggests that minimum entitlements prescribed by the EU's Working Time Directive (on which the WTR are based) are generally calculated by reference to work actually carried out, the UK is not prevented from making a more generous provision in its domestic laws. The answer therefore depends on the interpretation of the WTR, not EU law.
- There is no express provision for pro-rating holiday entitlement for part-year workers in the WTR. There are provisions for pro-rating leave entitlement where employment begins or ends part-way through a year. Under these provisions, leave entitlement is pro-rated according to the time in the leave year that has elapsed or is yet to elapse, rather than the amount of work done in the leave year. This indicates Parliament considered the question of apportionment of leave and decided that it would adopt a time apportionment basis, not connected to hours or weeks actually worked.
- The WTR provide that holiday pay is calculated on the basis of a week's pay. When applying the 12.07% Method, there is no calculation as to what equals 'a week's pay'. The 12.07% Method is therefore directly contrary to the statutory wording.
- Parliament made a policy choice that holiday pay for workers with irregular hours should be calculated in accordance with average pay over a reference period (now 52 weeks). The hours worked only affect the pay received to the extent that they do so through the average pay calculation.
- The incorrect guidance previously given by ACAS did not affect the proper construction of the statutory wording.
- A slight favouring of workers with an atypical work pattern is not so absurd as to justify the 'wholesale revision' of the statutory scheme which the Trust's proposed alternative methods would require.

IMPLICATIONS

The law is now settled – part-year workers are entitled to 5.6 weeks' holiday per year, regardless of the number of hours or weeks they do. Pay must not be calculated using the 12.07% Method. This is not "new" law – the position from earlier decisions has simply been endorsed, providing clarity for employers, including those who adopted a 'wait and see' approach.

In addition to providing part-year workers with the same holiday entitlement as full-time workers, the decision also means that some part-time workers with regular hours will receive less holiday pay than part-year workers who work the same total number of hours across the year.

Employers with part-year workers or those who have used the 12.07% Method for casual staff may find themselves facing claims for underpaid holiday. Claims for underpaid holiday pay are brought as a claim for unlawful deduction of wages. Such claims need to be brought within three months from the last deduction and are limited to two years' back pay (unless the individual was misclassified as an independent contractor and received no holiday pay whatsoever, in which case the two-year limit does not apply – see our February alert).

Employers should review their holiday practices to understand whether their arrangements for calculating holiday pay for atypical workers comply with the Supreme Court judgment. Any liability for underpaid holiday should be assessed.

Holiday practices should also be reviewed for any "absurd results". For example, the Trust referred to an extreme example of an exam supervisor who works only three weeks a year but then receives 5.6 weeks' holiday at an average week's pay – i.e. twice the amount of his/her actual earnings. The Supreme Court dealt with this example by noting that it would be unusual for a worker whose services are only required for a few weeks a year to be engaged on a permanent contract. Employers should consider whether staff engaged under permanent contracts who spend long periods of time not working might be better engaged on a temporary or freelance basis.

Where holiday has been underpaid, employers should consider their strategy in advance of the issue being raised by employees or trade unions. Will you wait for employees to raise the issue or front-foot it? Will you offer back payments or only seek to rectify the position moving forward?

These claims are a key risk to be considered as part of any M&A due diligence. Buyers should ensure they protect themselves against potential holiday pay liabilities with warranties and indemnities.