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Harpur Trust v Brazel: Supreme Court upholds holiday pay decision for part-year workers

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The Supreme Court has now issued its long-awaited judgment in the case of Harpur Trust v Brazel, upholding the decision of the Court of Appeal. This decision will have significant financial ramifications for a number of employers and employees alike, with many employers awaiting the final judgment before making any adjustments to their holiday pay calculations.

Who will be affected by this decision?

This case relates to how holiday leave and pay should be calculated for those workers who are employed throughout the whole year but who only work for part of it ('part-year workers').

Why was there an issue?

Without some degree of pro-rating of leave for part-year workers, this results in them being treated more favourably than full-year workers – both would be entitled to 5.6 weeks' statutory leave, despite one working for fewer weeks than the other. This could cause understandable tensions within a workplace with both full-year and part-year staff.

The Trust was seeking to use a percentage method (12.07%) for calculating holiday pay to ensure parity between full- and part-year staff. This method was the approach previously recommended by Acas for calculating the pay for casual workers, although this guidance has since been rewritten. The Supreme Court however, (agreeing with the Court of Appeal), held that there was nothing preventing this more favourable treatment and that the percentage method should not be used.

How should holiday pay be calculated?

Part-year workers who are employed throughout the holiday year are entitled to 5.6 weeks statutory leave, irrespective of the fact that they do not work for part of the year. A 'week's pay' for each week of this leave needs to be calculated in accordance with the provisions of the Employment Rights Act 1996 – and so, for part-year workers with no 'normal hours' of work, a 52-week average will need to be calculated. However, and this is where the potential unfairness comes in, weeks in which no remuneration is payable must be disregarded, and earlier weeks brought in to bring the average up to 52-weeks.

So are all issues now resolved?

Well, not quite. It is clear what amount of leave in weeks part-year workers are entitled to, and it is clear what methodology should be used to calculate pay. But what is actually a week's leave (as opposed to a week's pay for a week's leave)?

Take the situation (however unrealistic) of a worker who wants to break their holiday down single days throughout the year:

- If they are a full-year worker working 5 days a week, they are entitled to 5.6 weeks leave, amounting to leave on 28 different occasions throughout the year.
- If they are a full-year worker working 3 days a week, they are again entitled to 5.6 weeks but in this case, this amounts to them taking leave on 17 (rounded up) different occasions throughout the year.
- If they are a part-year worker on variable hours/days, they are also entitled to 5.6 weeks leave. But on how many occasions can the worker request leave?

This isn't addressed by the judgment, because it didn't need to be; in this case, Ms Brazel was always treated as taking her leave in three separate tranches, amounting to 1.87 weeks' at a time and so the Supreme Court was not required to consider this point.

Managing leave

Given the difficulties identified above and the administration involved with carrying out 52-remunerated-weeks averaging exercises each time leave is taken, employers may wish to consider reviewing when holiday can be taken. Under the Working Time Regulations, employers can serve notice requiring leave to be taken at a particular time provided that this right has not been varied by a relevant agreement and that the appropriate notice is given.

Alternatively, employers who do not wish (or need) to be prescriptive about when leave is taken may still consider obliging employees to take leave in blocks of time to limit the number of averaging calculations that are required, and/or to require leave requests to refer to a week or proportion of a week.

Given that holiday terms are required to be included in contracts of employment, we'd suggest advice is sought before making any amendments which would result in contractual changes (including changes to terms within collective agreements). In addition, care would need to be taken if changes are only to be applied to part-year workers to avoid any potential discrimination claims.

Managing employee relations

As set out above, there may well be some full-year workers who feel that the outcome of this decision is unfair. For example, in Brazel, the example was given of an exam invigilator, who works only three weeks a year but who works 40 hours in each of those three weeks. Using the averaging method to calculate holiday pay would result in this individual receiving holiday pay almost twice the amount of their annual earnings.

Employers who do engage workers who work for only part of a holiday year may wish to give greater consideration as to how those arrangements will work moving forwards.

Assessing the impact

Employers will need to review the arrangements that they have in place for calculating holiday leave and pay entitlements for part-year staff to ensure that they are consistent with the approach taken in Brazel. Part of this process may well involve legal audits to review whether practices are consistent and, if not, what the potential risks and/or costs associated with the same are.

If you would like to discuss the impact of the Brazel decision on your organisation and your current annual leave and holiday pay arrangements for part-year workers, please contact Ian Deakin.

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