

APSCo Update on Legal & Compliance Issues

NEW August 2022

Supreme Court Decision on Holiday Entitlement - Harpur Trust v Brazel [2022]

On 20 July 2022, the Supreme Court handed down its landmark, unanimous judgment dismissing the Harpur Trust's appeal.

The Supreme Court agreed with the approach of the [Employment Appeal Tribunal \(EAT\)](#) and [the Court of Appeal ruling](#) that the holiday entitlement of a permanent employee who works only part of the year should not be pro-rated to that of a full year worker. Part-year workers are entitled to the [statutory 5.6 weeks' holiday](#) and pay per year calculated in line with the provisions under the [Working Time Regulations 1998 \(WTR\)](#) and not the widely adopted 12.07% percentage. Despite the fact that in applying the WTR, this may result in part-year workers receiving a proportionately greater amount of leave than a full-time worker.

It was also ruled that the method of calculating pay for the holiday should be to use the Calendar Week Method; taking the worker's average pay over the 52 week period before the holiday or 12 weeks at the time of the claim in line with the rules that applied then, ignoring any weeks that had not been worked.

You can read the judgment [here](#) and the press summary [here](#).

The Facts

The Harpur Trust run Bedford Girls School. Mrs Brazel was a music teacher and started working at the school in September 2002. During the school term-time, Mrs Brazel worked different hours each week. She usually taught between 10-15 hours per week during term time but some weeks much less. During the school holidays she did not teach and was not required to work. She was not paid a salary and was instead paid an hourly rate of pay for each hour she worked in term time.

Mrs Brazel was employed under an employment contract dated 11 April 2011, and her claims for unauthorised deductions from her pay related to periods between 1 January 2011 and June 2016. The schedule to her contract of employment set out the role of the visiting music teacher. There were no minimum hours of work guaranteed to Mrs Brazel.

Mrs Brazel's pay during the period with which the Supreme Court was concerned was £29.50 per hour that was paid in arrears at the end of each month. The contract provided that the annual leave year ran from 1 September to 31 August and that during the leave year, Mrs Brazel was entitled to 5.6 weeks' paid leave. That leave must have been taken during the normal school holidays or at such other times as were convenient for the school. Mrs Brazel had always been treated as having taken her annual leave entitlement in three equal tranches in the winter, spring and summer holidays. As such, 1.87 weeks of each school holiday was treated as annual leave for which Mrs Brazel was entitled to be paid.

Unused leave entitlement could not be carried forward to a subsequent leave year and there was no pay in lieu of unused leave except on termination of her employment. The contract confirmed that there were no collective agreements which directly affected her terms and conditions

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Harpur Trust's holiday pay calculation before September 2011

Before September 2011, Mrs Brazel's pay for the 1.87 weeks was taken during each school holiday was determined in accordance with [section 224 of the Employment Rights Act 1996](#) ("the 1996 Act"), as is required by [regulation 16 of the Working Time Regulation](#) ("WTR") which incorporates section 224 for this purpose.

Section 224 defined "a week's pay" for this and several other purposes as the amount of Mrs Brazel's average weekly remuneration in the period of 12 weeks ending with the start of her leave period, ignoring any weeks in which she did not receive any remuneration. The Harpur Trust therefore worked out how much Mrs Brazel had been paid during the twelve term-time weeks prior to the school holiday, divided that total by 12 and paid her 1.87 times that weekly average.

Harpur Trust's holiday pay calculation after September 2011

As of September 2011, the Harpur Trust changed their calculation method.

Mrs Brazel was still treated as taking her annual leave entitlement in three equal tranches. However, the Harpur Trust calculated Mrs Brazel's hours worked at the end of each term then took 12.07% of that figure and paid her the hourly rate for the number of hours. The Supreme Court referred to this method as the "the Percentage Method".

The Harpur Trust said that in calculating her leave entitlement in that way, they were following the method recommended by Acas in its guidance booklet entitled 'Holidays and Holiday Pay for calculating the pay of casual workers'. The relevant passage in the booklet states that if a member of staff works on a casual basis or on very 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 annual leave bears to the total working year.

The working year is the whole year (52 weeks) minus the annual leave (5.6 weeks) and so 46.4 weeks. 5.6 weeks is 12.07% of 46.4 weeks. The Harpur Trust therefore treated Mrs Brazel as entitled to 12.07% of her total pay for the term.

The relevant part of the guidance issued by Acas has now been [rewritten](#).

BEIS Guidance

Following the decision of the Court of Appeal in this case, the Department for Business, Energy and Industrial Strategy issued [guidance](#) ("the BEIS Guidance"). There is a separate section in the guidance that specifically deals with term-time and part-year workers, including those who, like Mrs Brazel, only receive pay during the periods when they are working and not during the non-working periods.

The BEIS Guidance reflects the decision of the Court of Appeal in this case and confirms that the employer should not:

- include in the holiday reference period any whole week in which no pay was received, or

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- apply the Percentage Method.

The example given in the BEIS guidance sets out the effect of the decision of the Court of Appeal:

"a part-time music teacher has a zero-hours contract entitling them to 5.6 weeks' annual leave. They have a term-time contract meaning they work 32 weeks per year but remain in employment for the full year. They must take their 5.6 weeks of annual leave during the school holidays. They should therefore be paid for 5.6 weeks of leave taken at some point during the school holidays. The school breaks up for summer holidays on Friday 25 July and the teacher decides to take a two-week paid holiday in mid-August before school returns on 10 September. The employer should therefore take an average of the teacher's pay rate over the last 52 weeks in which they worked, starting with the last week at the end of the summer term and omitting any other periods of school holiday in which the teacher was not paid."

Amendments to the WTR introduced with effect from 6 April 2020

The above example given in the BEIS Guidance refers to a 52-week reference period. That is because, as a result of amendments to the WTR introduced with effect from 6 April 2020, the reference period applicable for calculating the average week's pay due for statutory leave was increased from the 12-week period that is set [in section 224 of the 1996 Act to 52 weeks](#) (see the [Employment Rights \(Employment Particulars and Paid Annual Leave\) \(Amendment\) Regulations 2018](#)).

Calendar Week Method

The difference in pay resulting from the two methods used by the Harpur Trust before and after September 2011 can be shown by using the school year 2012-2013 and the annual leave that Mrs Brazel was treated as having taken during the Easter school holidays in April 2013 as an example.

That spring term was made up of ten working weeks running from 7 January to 18 March 2013 (ignoring half term breaks during which she received no remuneration). During those weeks, Mrs Brazel worked different hours, from a minimum of 10.5 hours in the first week of term to a maximum of 14 hours each in two of the term weeks. She was also continuously paid at rate of £29.50 per hour.

The pay to which Mrs Brazel claimed she was entitled would be worked out as follows. As mentioned, the assumption made is that Mrs Brazel is entitled to be paid for 1.87 weeks in the Easter holidays. She worked 127 hours over the whole spring term. However, that term was only for a ten-week period and section 224 requires a 12-week reference period. The hours Mrs Brazel worked in the last two weeks of the Autumn term 2012 must be added to make up the 12 weeks.

Ms Brazel worked 22.5 hours in the last two weeks of the Autumn term therefore her total number of hours in the reference period was 149.50. Multiplied by the hourly rate of £29.50, that makes the total pay received in the preceding 12 weeks £4,410.25. Dividing that by 12, one arrives at the average week's pay of £367.52. Her pay entitlement for the 1.87 weeks' leave she took during the Easter holiday 2013 was therefore £687.26.

The Supreme Court referred to this method as the "Calendar Week Method."

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Percentage Method

According to the method adopted by the Harpur Trust after September 2011, the Trust took the total number of hours worked by Mrs Brazel's which was 127 hours during the spring term. 12.07% of that is 15.33 hours. The Trust then multiplied that number of hours by the hourly rate of pay of £29.50 to arrive at £452.20 for her pay for the annual leave she was treated as taking during the Easter holiday.

Under this method, the Harpur Trust stated that the leave requirement accrued in proportion to the time the worker worked.

The Harpur Trust's Position

The Harpur Trust argued that alternative calculation methods were appropriate and not in contravention of the WTR. It was argued that leave requirement accrues in proportion to the time that the worker works, holiday pay could therefore be calculated on a pro-rata basis to reflect the fact that a part-year employee worked fewer weeks a year compared to a full-year worker.

Supreme Court Decision

The Supreme Court dismissed the Harpur Trust's appeal and agreed with the decisions of the EAT and the Court of Appeal. Mrs Brazel a part-year worker's annual leave entitlement is not required to be pro-rated to that of a full-time worker.

The Supreme Court concluded that the Court of Appeal was correct to hold that the Calendar Week Method represents the correct implementation of the WTR and that this is fully compliant with EU law.

The Supreme Court summarised their principal reasons at para [78] as follows:

- *Although the CJEU's case law suggests that in general, the minimum entitlements prescribed by the WTD are calculated by reference to work actually carried out by the worker (subject to exceptions), the WTD does not prevent a more generous provision being made by domestic law.*
- *Even if, therefore, the proper construction of the WTR results in Mrs Brazel being entitled to a greater amount of leave than she might be strictly entitled to under the WTD and to a proportionately greater leave requirement than full-time workers, such a construction is compliant with the WTD.*
- *The incorporation into the WTR of the means of calculating an average week's pay set out in section 224 of the 1996 Act for workers, including those who work very irregular hours, was a policy choice made by Parliament according to which the number of hours worked affects the amount of a week's pay in some circumstances but not in others.*
- *There is nothing in the WTR which indicates that the regulations should be construed so as to permit the alternative methods of calculating pay that have been adopted or proposed by the Harpur Trust*

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and aspects of their proposed methods are directly contrary to what is required by the statutory wording and the WTR.

Key Takeaways

The amount of leave which a part-year worker under a permanent contract is entitled to is not required by EU law to be, and under domestic law is not, pro-rated to that of a full-time worker.

All workers employed under permanent contracts who work irregular hours or part of the year are entitled to 5.6 weeks' paid leave (irrespective of the amount of work done) and statutory holiday pay should be calculated in accordance with the relevant provisions in the WTR.

The current government guidance refers to the Calendar Week Method as the legally correct way of calculating holiday pay for casual workers.

This decision will also impact umbrella workers under permanent contracts who work on assignments.

Note that this decision does not affect those working part-time or full-time with set hours throughout the year e.g., working 4 days a week. Their holiday can still be pro-rated to that of a full-time worker because this will still result in them getting 5.6 weeks' holiday at their normal rate of pay.

Actions to consider

- APSCo recommends that members complete an audit of their current arrangements in place for calculating holiday leave and pay entitlements for part-year and irregular hour workers to ensure that they are consistent with the Supreme Court decision.
- To avoid the risk of potential claims, members should ensure they calculate worker's holiday entitlement in accordance with the WTR, and their holiday pay entitlement in accordance with the ERA. By continuing to use the 12.07% calculation method for holiday accrual and holiday pay calculations, employers should be aware that they may potentially be underpaying holiday pay and therefore run a risk of being non-compliant.
- Consider any historic liability arising from workers who work part year or irregular hours under permanent contracts of employment. An unlawful deduction from wages claim must be presented within 3 months from the date of the last underpayment, and a Tribunal can usually only order an employer to repay any unlawful deductions going back 2 years.
- Consider whether moving forwards it may be appropriate for workers to be engaged on fixed terms contracts or contracts for services which come to an end after each assignment, with no continuity in-between.
- Employers should consider seeking legal advice as appropriate on the following:
 - any changes that may be necessary to your contractual arrangements for part-year/irregular hour workers;

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- related policies and procedures including how to set the appropriate leave year period; and
- on the process to follow in order to implement any changes to the existing contractual arrangements, policies and procedures etc.

If you have any queries, please contact the legal helpdesk at legalhelpdesk@apsco.org.