Holiday pay | Court bans pro-rating entitlement for zero-hour and casual workers – September 2019

Few things give employers a headache quite like trying to get to grips with holiday pay rules. Throw into the mix employees who don't work set hours, and it can feel like an impossible task.

To complicate matters further, following a recent landmark decision by the Court of Appeal, employers must now abandon generally accepted methods for calculating holiday pay for part-year workers.

What the law says

In Great Britain, the **Working Time Regulations (WTR) 1998** entitle workers to a minimum of 5.6 weeks' paid annual leave. If a worker doesn't have normal working hours, a week's pay is taken to be their average weekly pay in the previous 12 weeks.

How these rules apply to workers with no set working hours can be difficult to establish. A common approach is to say that workers accrue annual leave at the rate of **12.07%** of hours worked (as 5.6 weeks is equal to 12.07% of the total hours worked in a year).

The Harpur Trust v Brazel & Unison

Mrs Brazel was a visiting music teacher employed on a permanent, zero-hour contract to work at a school run by The Harpur Trust. She worked when required at an agreed hourly rate. She didn't work during school holidays, and it was agreed that this is when she would take her statutory and contractual annual leave of 5.6 weeks.

As is common, the Trust's annual leave policy stated that casual and term-time employees are entitled to an annual leave allowance of 12.07% of actual hours worked. Mrs Brazel, who typically worked 32 weeks a year over three terms, was therefore entitled to 3.86 weeks' annual leave, with each day paid at 12.07% of her salary. The Trust calculated Mrs Brazel's earnings at the end of each term and payed her one-third of 12.07% of that figure.

In March 2015, Mrs Brazel complained to an Employment Tribunal (ET) for unlawful deduction from her wages in the form of holiday pay underpayment. She contested the Trust's method of calculation, arguing that this bore no relation to the calculation required by the WTR and meant she received less in holiday pay than was permitted.

Instead, she said that her holiday pay should be calculated by:

- Working out her average weekly pay for the 12 weeks before annual leave;
- Multiplying this by 5.6 (statutory annual leave entitlement);

- Paying one third of this amount each term.

She argued that there is nothing in the WTR to say that holidays for part-year workers should be subject to a pro-rata reduction.

However, the ET dismissed Mrs Brazel's case on the basis that the Trust's means of calculating holiday pay entitlement meant she received proportionately the same as a full-year employee. Mrs Brazel appealed the decision to the Employment Appeal Tribunal (EAT), and this was granted on the basis that there is nothing in the WTR which would cap the holiday pay of a part-year worker to 12.07%.

After a lengthy legal battle, the case ended up before the Court of Appeal (CoA). Here, the Trust drew attention to the fact that adopting Mrs Brazel's method would mean would mean she was paid proportionally more in annual leave than full-time employees (receiving 17.5% of her annual earnings in holiday pay compared to the usual 12.07%). They argued that as Mrs Brazel worked fewer weeks than the standard working year, her entitlement should be pro-rated accordingly.

Despite this, and the fact that this method of calculation could incur bizarre results (such as enabling a person working just one week a year to claim 5.6 weeks' holiday), the CoA held that the WTR make no provision for pro-rating. They simply require, as Mrs Brazel maintained, the straightforward exercise of identifying a week's pay and multiplying that figure by 5.6.

> NB: It's important to note that the judge distinguished between employees whose hours are variable and not guaranteed (as in the above case) and employees who are on a part-time contract but who have normal working hours (e.g. Monday to Wednesday each week for a full year). For the latter, pro-rating holiday entitlement **is** permitted.

Where does this leave employers?

The verdict confirms that staff employed on a zero-hour contract, who may not work or be paid for certain parts of the year, are still entitled to receive a minimum of 5.6 weeks annual leave – and this should be paid at the rate of a week's pay (or based on the average payment for the preceding 12 weeks, if work is irregular).

For expert guidance on holiday pay rules, contact Ellis Whittam on 0345 226 8393 or email Howard Trafford on howardtrafford@elliswhittam.com.