Supreme Court decision on the paid holiday entitlement of part-year workers

[et_pb_section fb_built="1" _builder_version="3.0.100" background_image="http://davidk423.sg-host.com/wp-content/uploads/2017/09/bdbf_final-stages-1-4-1.jpg" custom_padding="|||" global_module="2165" saved_tabs="all" global_colors_info="{}"][et_pb_row _builder_version="4.16" min_height="66.4px" custom_padding="50px|||false|false" global_colors_info="{}"][et_pb_column type="4_4" _builder_version="4.16" custom_padding="|||" global_colors_info="{}" custom_padding__hover="|||"][et_pb_text _builder_version="4.16" _dynamic_attributes="content" text_font="|700|||||||" text_font_size="27px" background_layout="dark" custom_margin="0px|||" custom_padding="0px|||" global_colors_info="{}"]@ET-DC@eyJkeW5hbWljIjp0cnVlLCJjb250ZW50IjoicG9zdF90aXRsZSIsInNldHRpbmdzIjp7ImJlZm9yZSI6IiIsImFmdGVyIjoiIn19@[/et_pb_text][et_pb_text _builder_version="4.16" _dynamic_attributes="content" _module_preset="default" text_text_color="#FFFFFF" global_colors_info="{}"]@ET-DC@eyJkeW5hbWljIjp0cnVlLCJjb250ZW50IjoicG9zdF9kYXRlIiwic2V0dGluZ3MiOnsiYmVmb3JlIjoiIiwiYWZ0ZXIiOiIiLCJkYXRlX2Zvcm1hdCI6ImRlZmF1bHQiLCJjdXN0b21fZGF0ZV9mb3JtYXQiOiIifX0=@[/et_pb_text][/et_pb_column][/et_pb_row][/et_pb_section][et_pb_section fb_built="1" admin_label="section" _builder_version="4.16" global_colors_info="{}"][et_pb_row admin_label="row" _builder_version="4.16" background_size="initial" background_position="top_left" background_repeat="repeat" global_colors_info="{}"][et_pb_column type="4_4" _builder_version="4.16" custom_padding="|||" global_colors_info="{}"

custom_padding__hover="|||"][et_pb_text _builder_version="4.17.4" text_orientation="justified" hover_enabled="0" use_border_color="off" global_colors_info="{}" sticky_enabled="0"]

The Supreme Court has ruled that permanent part-year workers are entitled to 5.6 weeks' holiday per year, regardless of how many weeks they actually work. Further, if they work irregular hours, their holiday pay must be calculated as an average of pay earned over a reference period – any other method of calculation is not permitted.

What happened in this case?

Mrs Brazel was employed by the Harpur Trust as a visiting music teacher. She had a permanent "zero hours" employment contract. She only worked during term-time (which amounted to between 32 to 35 weeks per year) when she would typically work between 10 to 15 hours per week. She was paid an hourly rate for her work and was paid monthly in arrears. During the school holidays she remained employed by the Trust but received no pay as she had performed no work.

Mrs Brazel was entitled to 5.6 weeks' paid holiday per year. The Trust required her to take holiday outside of term time when schools were closed during April, August, and December. Relying upon Acas guidance, the Trust calculated her holiday pay by multiplying her earnings for the previous term by 12.07% (this multiplier was obtained as follows: 5.6 weeks / (52 weeks – 5.6 weeks)). The end result was that she received less than 5.6 weeks' worth of holiday and holiday pay.

Mrs Brazel said this method of calculating her holiday pay was incorrect and resulted in an underpayment. She said that the law required the Trust to calculate it by reference to her average earnings over a reference period of the preceding 12 weeks, which would have given her a higher amount of holiday pay. This method of calculation is more time-consuming since

it requires the employer to look back over the previous 12 weeks' earnings (discounting any weeks where no pay was received and looking back to earlier weeks if necessary).

The Employment Tribunal rejected Ms Brazel's claim, concluding that where a worker worked for fewer than 46.4 weeks per year, it was permissible to base holiday pay on 12.07% of hours worked. However, the Employment Appeal Tribunal overturned this decision, agreeing with Mrs Brazel that the correct method was to base holiday pay on an average of the hours worked in the previous 12 weeks. The Court of Appeal agreed with the EAT. The Trust appealed to the Supreme Court.

What was decided?

The Trust argued that the paid annual leave entitlement for those who work only part of the year should be pro-rated to reflect to reflect the amount of work actually performed.

The Supreme Court dismissed the Trust's appeal. It held that all workers – including part-year workers – are entitled to 5.6 weeks' paid holiday per year (and this entitlement applies from the beginning of each leave year rather than accruing throughout the year). Therefore, a worker who works for 35 weeks per year is entitled to the same amount of paid holiday as a worker who works for 52 weeks per year. The working time legislation does not permit the pro-rating of the annual leave entitlement, apart from when a worker starts or leaves employment part-way through the leave year.

The Court also held that holiday pay for workers without normal working hours had to be calculated by averaging pay over a reference period. In Ms Brazel's case the relevant reference period was 12 weeks, but this has since been increased to 52 weeks. Any weeks in the reference period where no pay was received are discounted and the employer should look back to earlier weeks if necessary (and if the worker has been employed for fewer than 52 weeks, the

averaging should be based on the number of complete weeks that the worker has been employed). The reference period method was the one adopted by Government and no other method of calculation, including the 12.07% method, was permissible. In the case of part year workers, this may mean counting back further than the reference period in order to discount any weeks not actually worked.

The Court acknowledged that the end result was that part-year workers would have a more favourable holiday entitlement than full-year workers.

What does it mean for employers?

This decision means that holiday pay for permanent part-year workers is 5.6 weeks' paid holiday per year, no matter how many weeks they actually work per year. This means that they will get proportionately more paid holiday than those who work throughout the whole year. A failure to provide this would entitle a worker to bring a claim for unlawful deductions from wages (which can cover deductions going back for up to two years).

The decision also means that holiday pay for workers with irregular hours must always be calculated by reference to an average of hours worked in previous weeks. In Mrs Brazel's case, the averaging had to be conducted over a 12-week period as this was the reference period in force at the time. On 6 April 2020, the reference period was changed from 12 to 52 weeks, which should result in fairer outcomes all round, as such workers will not benefit from the fact that they have taken holiday after a period of more work (and, equally, they will not be disadvantaged for taking holiday after a period of little or no work).

Although this decision is of most relevance to employers within the education sector, it is relevant to any employer who has workers engaged on flexible working arrangements which

mean that they are employed for the whole year but have periods of no work. It is also relevant to all employers who have workers who work irregular hours, since it underlines the correct method of calculating holiday pay.

Harpur Trust v Brazel

BDBF is a law firm based at Bank in the City of London specialising in employment law. If you would like to discuss any issues relating to the content of this article, please contact Principal Knowledge Lawyer Amanda Steadman (amandasteadman@bdbf.co.uk) or your usual BDBF contact.

[/et_pb_text][/et_pb_column][/et_pb_row][/et_pb_section][et_pb_section fb_built="1" _builder_version="4.16" global_colors_info="{}"][et_pb_row _builder_version="4.16" global_colors_info="{}"][et_pb_column type="4_4" _builder_version="4.16" global_colors_info="{}"][/et_pb_column][/et_pb_row][/et_pb_section]