SQUIRE PATTON BOGGS

UK Supreme Court Gives New Holiday Pay Ruling

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The Supreme Court has given its decision in *Harper Trust v Brazel* and confirmed that "part-year" workers are entitled to have their statutory leave and pay calculated in line with the relevant provisions in the Working Time Regulations 1998 (WTR) and not the widely used 12.07% Method.

This decision will be of most interest to employers in the education sector, where it is more common to have individuals who only work and are paid for part of the year but have a contract in place throughout it. It is possible, however, that it may prompt challenges from other workers who work irregular hours and currently have their pay calculated in accordance with the 12.07% Method, though in most cases the monetary difference between the two is likely to be marginal in the extreme.

At the relevant time, Ms Brazel was employed by the Trust, which runs Bedford Girls' School, as a visiting music teacher. She was engaged under a permanent contract under which the Trust was not obliged to provide her with a fixed or minimum amount of work. She typically worked 10 to 15 hours per week (term-time only), but her hours varied depending on demand from pupils for her lessons. She was paid monthly at an agreed rate based on hours worked in the previous month. The contract provided for holiday to be taken outside term-time, and by agreement she was deemed to take it in three equal tranches, one in each school holiday. Based on that assumption, the Trust paid her holiday pay close to those deemed holiday periods, in three equal instalments in April, August and December each year.

How Should Ms Brazel's Holiday Pay Be Calculated?

Before September 2011, the Trust calculated it in accordance with the week's pay provisions set out in s.224 of the Employment Rights Act 1996 (ERA 1996), as then required by the WTR. As a worker with no normal working hours, this meant taking her average earnings over the 12 weeks prior to the relevant holiday, ignoring (as the law says it must) any weeks in which she did not receive any remuneration either because it was outside term-time or no one wanted music lessons at that time. The Supreme Court referred to this as the Calendar Week Method.

In that September, the Trust changed its approach. Ms Brazel was still treated as taking her annual leave entitlement in three equal tranches between terms, but the Trust began to calculate her statutory holiday pay by identifying the number of hours actually worked at the end of each term, taking 12.07% of that figure and then paying her the agreed rate for that number of hours. The Supreme Court referred to this as the Percentage Method, but it is also often known as the 12.07% Method (12.07% being the proportion that 5.6 weeks of annual leave bears to the total working year of 46.4 weeks, which is the full calendar 52 weeks minus the compulsory 5.6 as holiday). This method is not set out in the WTR but is, nonetheless, widely used by many employers for calculating statutory leave and pay for casual workers with irregular working patterns. In most cases, it will provide an accurate(ish) holiday pay calculation, especially over an extended period, but there will be circumstances, as here, where it does not.

The Trust argued that it was necessary to prorate her holiday pay in this way to reflect the fact she only worked for part of the year.

To do otherwise would mean that she would receive a much greater percentage of her annual earnings as holiday pay than a "full-year" worker or a part-time worker. She would get 5.6 weeks of full pay despite having worked only term-time weeks, while a full-year worker would have done up to 46.4 weeks' slog just to get the same money. The Trust's approach was also in line with Acas' guidance at the time for calculating the holiday pay of casual workers.

As the Trust's new method resulted in Ms Brazel receiving less holiday pay than was previously the case, she brought a claim for unlawful deduction from wages. She was unsuccessful before the Employment Tribunal, but the Employment Appeal Tribunal (EAT) and the Court of Appeal both agreed that her holiday pay should be calculated in accordance with the WTR (i.e. the Calendar Week Method) and there was no justification for the Trust departing from the plain (using the word loosely) statutory language.

The Supreme Court's Decision

The Supreme Court has dismissed the Trust's appeal and agreed with the approach adopted by the EAT and the Court of Appeal. The Trust should have stuck with its pre-September 2011 approach and calculated Ms Brazel's statutory leave and pay entitlement in accordance with the relevant provisions of the WTR. In other words, it should have used the Calendar Week Method and not the Percentage/12.07% Method.

The Supreme Court concluded that the amount of leave to which a part-year worker under a permanent contract is entitled is not required under EU law to be, and under domestic law must not be, prorated in this way to be proportional to that of a full-time worker. It acknowledged that the Calendar Week Method put Ms Brazel in a more favourable position than some full-time workers, in the sense that the amount of pay she received for holiday represented a higher percentage of the total pay she received over the year compared to someone who worked all 46.4 weeks of the year, but said that it did not regard "any slight favouring of workers with a highly atypical working pattern as being so absurd as to justify the wholesale revision of the statutory scheme". The incorporation into the WTR of the definition of an average week's pay in the ERA 1996 for the purposes of determining holiday pay – including for those who work irregular hours – was a choice made by Parliament and was not to be interfered with by the courts. Parliament's choice was that this should be calculated in accordance with a 12-week reference period ignoring weeks in which no pay is received. It could have opted for the 12.07% Method but did not, and although that method acted as convenient shorthand for the strict entitlements under the WTR for many employers and employees, that did not make it compliant with them.

Note that the 12-week reference period for calculating holiday pay has since been increased to 52 weeks following changes to the WTR in 2020.

What Does This Decision Mean for Employers?

It is important to remember that this decision only strictly affects so-called "part-year" [NB, not part-time] workers, i.e. those, like Ms Brazel, who are engaged on permanent contracts but only actually work for part of the year. It will, therefore, have immediate implications for the education sector, where visiting music teachers such as Ms Brazel are frequently engaged on such contracts. Clearly, in light of this ruling, local authorities/trusts will no doubt be changing their approach (to the extent they have not already done so) if they want to avoid the risk of future claims. Where a claim is presented as an unlawful deduction from wages claim, there is a two-year backstop in any event.

But what does this decision mean for other employers that engage zero-hours workers or casual workers for short periods of time rather than on permanent contracts? Should they too be changing their approach if they are currently using the Percentage Method? Strictly speaking, yes, because although this case concerned a particular type of worker, there is no reason why the rationale of the Supreme Court would not apply to other workers. The key message is that all workers 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 guidance from the government refers to the Calendar Week Method as the legally correct way of calculating holiday pay for casual workers. Acas' guidance no longer refers to the Percentage Method.

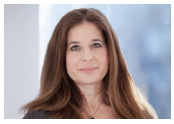
We recognise that despite some judicial tutting over the years, employers have historically adopted the Percentage Method, largely because of the hideous practical and administrative challenges of working out casual workers' holiday pay entitlements in strict accordance with the WTR provisions, especially when you are dealing with large numbers of them. If employers choose to continue with this approach for the sake of administrative convenience and because its logic and mathematics are easily explainable to staff, they must do so knowing that there may be a risk of claims if workers would be entitled to more holiday pay under the Calendar Week Method and (which is far from a given) the sums involved are worth litigating over.

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

Contacts

Bryn Doyle
Partner, Manchester
T +44 161 830 5375
E bryn.doyle@squirepb.com

Charles Frost
Partner, Birmingham
T +44 121 222 3224
E charlie.frost@squirepb.com



Miriam Lampert
Partner, London
T +44 207 655 1371
E miriam.lampert@squirepb.com

Matthew Lewis
Partner, Leeds
T +44 113 284 7525
E matthew.lewis@squirepb.com

Janette Lucas
Partner, London
T +44 207 655 1553
E janette.lucas@squirepb.com

Annabel Mace
Partner, London
T +44 207 655 1487
E annabel.mace@squirepb.com

Ramez Moussa
Partner, Birmingham
T +44 121 222 3346
E ramez.moussa@squirepb.com

Caroline Noblet
Partner, London
T +44 207 655 1473
E caroline.noblet@squirepb.com

Alison Treliving
Partner, Manchester
T +44 161 830 5327
E alison.treliving@squirepb.com

Andrew Stones
Partner, Leeds
T +44 113 284 7375
E andrew.stones@squirepb.com

David Whincup
Partner, London
T +44 207 655 1132
E david.whincup@squirepb.com