The Supreme Court Decision in the Harpur Trust v Brazel

Holiday Entitlement and Pay for Part-Year Workers: Practical Guidance

On 20 July 2022, the Supreme Court ("SC") handed down its much-awaited judgment in the case of *The Harpur Trust v Brazel* giving clarity on the calculation of holiday pay for those who work irregular hours over part of the year but have a continuing contract throughout that year ("part-year workers").

This note answers the key questions that schools are likely to have following the SC decision, focuses on the staffing considerations, the potential risks and liability, and explores practical steps which schools will now need to consider taking. It should be read in conjunction with our previous guidance on the Court of Appeal ("CA") decision in this case, as follows:

Court of Appeal determines Holiday Pay Calculation for "Part-Year Workers"

Holiday Pay for Part-Year Workers – A Practical Guide

What is the background to the case?

Mrs Brazel is a visiting music teacher ("VMT") who is employed under a permanent zero hour's contract, on a term-time only basis (i.e. part of the year) at a school run by the Harpur Trust (the "Trust").

In accordance with ACAS guidance at the time (which has since been removed), the Trust calculated her holiday pay entitlement at the end of each term as 12.07% of the hours she worked in the preceding term. The 12.07% multiplier equates to the 5.6 weeks' holiday provided for under the Working Time Regulations 1998 (the "Regulations") divided by 46.4 working weeks. Effectively, the use of this multiplier means that holiday is pro-rated for part-year workers, in comparison to a full-time, year-round worker.

Mrs Brazel argued that basing her holiday pay on the 12.07% multiplier was incorrect and that the correct calculation should have been based on her average hours worked over a reference period prior to the holiday being taken, as per the Regulations. At the time of Mrs Brazel's claim the relevant reference period for the purposes of calculating a week's pay was 12 weeks but this increased to 52 weeks with effect from 6 April 2020.

This calculation method would have given her a proportionally higher entitlement to holiday in comparison with her full-time, year-round colleagues.

Mrs Brazel made a claim to the Employment Tribunal ("ET") for an unlawful deduction from wages due to the alleged underpayment of holiday pay. The key issue in this case was whether the calculation of holiday entitlement or pay for a part-year worker should be pro-rated to that of a worker working year-round. She initially lost the case but successfully appealed to the Employment Appeal Tribunal ("EAT").

The Trust appealed to the CA which, in 2019, upheld the EAT decision. In summary, the CA held that using the calculation method of 12.07% as a way of calculating holiday pay for part-year workers results in them receiving a pro-rata amount of the statutory 5.6 weeks holiday and that the Regulations do not allow for this.

The Trust appealed the CA decision to the SC arguing that:

- EU law (from which the Regulations derive) requires holiday entitlement to be pro-rated;

- there were alternative more logical readings of the statute; and
- it was absurd that someone who worked for part of the year could have a higher percentage of holiday entitlement (as a proportion of the time they work) than someone who worked year-round.

Further details on the facts and the decision of the CA can be found here.

What conclusion did the SC reach?

The SC dismissed the Trust's appeal. As a result, the CA decision stands.

Essentially, the SC determined that:

- the CA decision as to the correct method of calculation for holiday entitlement and pay in these circumstances was correct and in accordance with the Regulations;
- even if this results in Mrs Brazel being entitled to a greater leave entitlement than full-time workers, this construction is compliant with the legislation;
- there is nothing within the Regulations that indicates they should be construed in a different way in these circumstances; and
- the amount of leave to which a part-year worker is entitled is not required to be pro-rated to that of a full-time worker.

What is the correct method of calculating holiday pay for part-year workers?

It is now clear that part-year workers should receive, as a minimum, 5.6 weeks paid holiday per holiday year. In order to calculate holiday pay for employees who work varying hours, employers should, at the time the holiday is to be taken, determine a week's pay in accordance with the calculation method set out in the Employment Rights Act 1996.

As of 6 April 2020, this requires an employer to look back over the last 52 weeks of work, and effectively take an average of pay received. Weeks where the employee carried out no work must not be taken into account, and therefore school holiday periods, and other weeks where no hours are worked, should not be included when looking at the last 52 weeks. This will inevitably mean taking account of weeks in the last academic year, with many VMTs for example working for between 30 and 34 weeks of the year.

Note that only weeks of work which took place during the last 104 calendar weeks should be counted. Therefore if fewer than 52 weeks of work were undertaken in the last 104 weeks, the week's pay should be calculated on the basis of these weeks only.

Where the contract of employment/engagement specifies that holiday pay will be calculated on the basis of 12.07% and paid in the Christmas, Easter and Summer holidays, schools will need to determine how the 5.6 weeks will be split between each holiday period for the purpose of calculating how much should be paid. For example, this could be 1 week's paid leave during the Christmas holidays, 1 week during the Easter holidays and 3.6 weeks in the Summer holidays. The use of 12.07% as a method for paying holiday means that a breakdown of how much holiday is taken, and when, is not needed and many staff contracts

will therefore not specify this. As such, a change is likely to be needed to the contract of employment/engagement (see further below).

Why is this decision relevant to schools?

This decision has a significant impact on schools, given the number of staff who work irregular hours over part of the year; for example, zero hours music teachers, sports coaches, and exam invigilators. It had been commonplace for schools to calculate holiday pay for such staff based on the 12.07% multiplier and many had continued to use this method in anticipation of the possibility of the SC overturning the CA decision. Those schools will now need to take steps to address the SC ruling, as set out further below.

Which staff are potentially affected by this decision?

Employees and workers that are employed under a permanent contract and work irregular hours for part of the year.

This will include VMTs or other peripatetic staff who are engaged as workers or employees on a permanent contract and work on a zero hours basis but work each term. The guidance in this note is focused, primarily, on these individuals but the case also impacts any zero hours staff who are engaged on a permanent, continuous contract but only work for limited periods of the year (for example, a tennis coach who works in the summer term only or exam invigilators who work for a limited number of weeks each year).

Could there be an impact on other term-time only workers?

The finding of the CA, as confirmed by the SC, was broadly that if someone works part of the year, they should not get a pro-rata amount of the statutory 5.6 weeks holiday pay. Although the case concerned a VMT working on a zero hours basis, it applies equally to a situation where a term time only member of staff's salary is calculated as a pro-rata element of a year round member of staff. This is because by pro-rating the salary, the holiday pay is effectively also pro-rated.

Pro-rating salary by reference to the number of weeks of the year worked, by comparison to a year-round member of staff is a common method of calculating term time only salary, and based on the judgment in Brazel, is incorrect.

An example of how this may work in practice is set out in our note on the CA decision which can be found here, under the heading *"Impact on other term time only staff"*.

Our view is that the risk associated with this situation is lower. This is due in part to the fact that the publicity given to this case has been specifically in relation to zero hours staff and in particular VMTs. In addition, the method for calculating salary for term time only staff is perhaps less transparent, and it is less likely that there will be reference to it within the contract. The calculation method of 12.07% has been the focus of this case and it may not be clear that salary in these circumstances is in fact calculated in a way which has the same end result.

Notwithstanding this, schools should be aware of this potential risk area and take steps to try and address it. The same principles set out below regarding back pay liability will apply. Schools could therefore consider gradually making changes to the method in which the salary is calculated, or through a pay rise which enables the method of calculation to be adjusted such that the 5.6 weeks' holiday pay is deemed as paid.

Which staff are not affected by this decision?

- Teachers who work term-time only but who are paid on a year-round basis (e.g. in twelve monthly instalments). The annualised pay for these individuals already incorporates more than 5.6 non-working weeks with pay and the annual salary will not have been pro-rated against a year-round equivalent.

- Part-time workers who work a full 52 weeks of the year but for less hours or days than their full-time colleagues. It is generally accepted that a week's leave involves a worker being away from work for a week. So, a week's leave for a full-time worker will be five days and for a part-time worker who works three days, a week will be three days. Holiday entitlement for these individuals can still be calculated pro-rata based on their hours and days of work.

- Fixed term employees. Holiday for these individuals can continue to be calculated pro-rata for the duration of the contract. The decision in Brazel applies only to part-year workers on permanent contracts.

- Genuinely independent, self-employed contractors. These individuals are not entitled to holiday.

What happens to any contractual holiday entitlement?

The decision in Brazel relates specifically to the statutory entitlement to a minimum of 5.6 weeks paid leave. Technically, schools can continue to calculate part-year workers' contractual holiday entitlement (i.e. any entitlement in excess of the 5.6 weeks statutory leave) on a pro-rata basis based on the proportion of the year they work. However, they should ensure that their contracts reflect this approach and taking this approach is likely to be administratively burdensome and impractical in reality i.e. it would require two different methods of holiday calculation, one for the statutory 5.6 weeks' leave and one for any contractual enhancement. It could also potentially give rise to discrimination issues.

Can schools dictate when part-year workers take their holiday?

Yes, provided staff contracts and current practices reflect the school's expectation in this regard. For example, if holiday cannot be taken in term-time, this should be expressly stated within staff contracts.

When should part-year workers receive their holiday pay?

It is important that holiday pay is paid whilst a worker is actually taking his/her leave (rather than, for example, "rolling-up" holiday pay with normal renumeration (a practice which is unlawful).

Schools will retain options as to when they pay holiday pay to this category of staff. Many schools currently pay holiday in each of the three main holiday periods, and this will remain an option. Alternatively, schools may decide to make one payment of holiday for the whole year. This would need to be done in the summer holidays (for example, in the month of August) to ensure that the period of time where the employee is not at work and receiving pay is at least 5.6 weeks.

Where zero hours staff work at times throughout the year, the arrangements for taking the statutory 5.6 weeks holiday throughout the year will differ. This could involve the individual requesting annual leave at times to be agreed, or schools can designate periods for holiday to be taken (either during school holiday periods or at other times). In the latter scenario, schools should be clear within staff contracts what proportion of holiday is to be taken and when. Either way, the same calculation method will apply – staff should be paid at the rate of a week's pay at the time the holiday is taken, based on the appropriate

reference period.

What happens if a part-year worker starts or ends their employment / engagement part way through an academic year?

In these circumstances, schools can lawfully pro-rate holiday entitlement in the usual way based on the full entitlement of 5.6 weeks.

What are the risks following the SC decision?

It is likely that the SC decision will be widely publicised and picked up by the relevant trade unions. The Incorporated Society of Musicians has publicised the SC decision, and Unison was an intervener in the case. Schools are likely to receive communication from trade unions, or staff directly, asking that holiday arrangements are adjusted to accord with the SC decision and requesting back pay for unpaid holiday. It is possible that staff could pursue claims to an ET, or that trade unions pursue class actions on behalf of their members, for any back dated liability as an unlawful deduction from wages.

Could schools be required to pay back pay?

Yes. Schools that have been calculating holiday pay for their part-year workers based on the multiplier of 12.07% or have been applying a different method of calculation that pro-rates the statutory 5.6 weeks leave, are exposed to the risk of claims for back pay.

The current position is that an employee can seek to recover an underpayment of holiday pay by way of a claim for unlawful deduction from wages. An unlawful deduction from wages claim can be brought in relation to a one-off deduction or incorrect payment, provided it is brought within 3 months of the deduction but can also be brought in relation to a "series of deductions". While there is a series of ongoing deductions, a claim can be brought at any time, but must be brought within three months of the last deduction in the series. Therefore, the claim is effectively "crystallised" once the holiday pay is rectified (i.e. the series of deductions ends), whereupon the claim must be brought within 3 months.

So the liability is ongoing while an employer is still making deductions (i.e. paying incorrect levels of holiday pay), but once the practice is changed to accord with the SC decision, the series of deductions ends, and the clock will start ticking on the three-month time limit for claims to be brought.

Is there a limit on the amount of back pay that schools could be required to pay?

Yes. As a rule of thumb, schools should calculate their potential liability on the basis that they could be liable for up to two years' back pay.

Currently, an ET can only consider deductions made in the two years preceding the date of the claim. This two-year period relates to the date of payment of wages from which the deduction was made (i.e. in these circumstances, will only apply to any payment of holiday that was made in the two years prior to any claim).

While there is scope for the two-year period to be challenged, it remains correct under current law and at the present time is likely to represent the limit of liability for schools in this situation. Claims will be for the difference between the amount of holiday actually paid, and that which should have been paid in accordance with the decision in Brazel.

There is also an argument that a series of deductions may be broken by a gap of 3 months or more between two deductions or non-payments. This will be very relevant to schools who have zero hours staff

receiving paid holiday in school holiday periods only, resulting in a gap of more than 3 months between each payment.

Could the two-year back-stop be extended?

It is likely that the two-year back stop will apply but, in limited circumstances, it could be extended.

If a member of staff was misclassified as an independent contractor and did not receive any holiday pay as a result, the claim period might be longer than this. In the case of *Smith v Pimlico Plumbers*, the CA ruled that the two-year limit on the claim did not apply, which led to a significant pay-out for Mr Smith. For further details on this case, please read our article here.

Another possibility may be to present a claim in the civil court for breach of contract which has a limitation period of six years from the date of claim. Whilst the statutory rights under the Regulations cannot be implied into contracts to confer a contractual right to paid leave, part-years workers could (although it is unlikely) try to rely on express contractual wording to pursue a claim for breach of contract.

In reality, however, the most likely claim is for an unlawful deduction from wages in the ET in respect of which the two-year back stop currently applies.

What will happen to ET claims that were stayed pending the SC decision?

Some schools had complaints brought against them in the ET which were stayed (i.e. placed on hold) subject to the SC decision. These claims can now proceed, and schools will need to reconsider their approach to the litigation (see further below).

Could the position change in the future?

Whilst we could see legislative reform in the future, for now, the law in this area is settled.

What should schools do now?

1. Audit current arrangements

Schools will need to proactively audit who they employ or engage (or have recently employed or engaged) on a permanent contract but for only part of the year to determine who might be affected by the SC decision. This should include any staff falling within this category who are engaged as workers, as well as employees, as both will have an entitlement to paid holiday.

It will then need to review the arrangements in place with those part-year workers (in particular, determine how their holiday entitlement and pay was/is calculated) and consider the changes required to the calculation and payment of holiday pay in order to be compliant with the current legal position.

2. Assess financial liability

If there has been a historic underpayment as a result of schools pro-rating holiday pay for part-year workers, it may be necessary to pay back pay to affected staff. Schools should quantify their potential back pay liability in respect of all staff who may be affected by this decision. In doing so, they should calculate the difference between holiday pay staff have received, and what they should have been paid had their holiday not been pro-rated in proportion to their part-year working. Schools should look back over a two-year period when assessing the potential liability.

Schools should also consider notifying their insurance provider if there is a significant liability and/or risk of litigation.

3. Adjust holiday arrangements to accord with the SC decision

Given that the SC decision is final and binding, where necessary, schools are advised to change their approach to holiday entitlement and pay moving forward to ensure legal compliance and, at the point of rectification, "crystalise" the risk of potential claims for back dated holiday pay (subject to the three-month time limit).

This means paying holiday based on the week's pay calculation set out in the Employment Rights Act 1996 and multiplying that figure by 5.6 weeks (or any contractual enhanced holiday entitlement).

Schools will therefore need to audit existing and template staff contracts to determine whether a change in contractual arrangements is required.

Will schools need to amend existing staff contracts?

Possibly, depending on the contractual wording.

If holiday is currently calculated in a way that is not compliant with the Regulations and this is reflected in staff contracts (for example, where reference is made in the contract to the calculation method of 12.07%), contractual changes will be required. The extent of any change will depend on the current wording and legal advice should be sought.

If the current contract provides for holiday pay to be paid in each school holiday period, and it is the intention to change this such that holiday is paid once a year, this will also amount to a contractual change.

If the contract is not prescriptive as to how holiday pay is paid, but schools wish to make changes to the arrangement, in particular in respect of the timing of holiday pay, this is likely to amount to a change of an implied contractual term.

In circumstances where the contractual wording is fairly broad and does not specify the method of calculation but reflects compliance with the law and is clear when holiday pay shall be paid, contractual changes may not be required.

Any contractual variation could be implemented by way of a letter of variation rather than the issuing of a new contract. Schools should seek legal advice when implementing a change in contract.

How should schools amend existing staff contracts?

This will, ultimately, depend on the changes that are required.

Where contractual changes are necessary, this would ordinarily require a consultation process with affected staff, unless the change falls under a flexibility clause within the contract which allows for minor changes. In this situation, changes to the calculation method based on the SC decision will (a) be required by law and (b) be to the employee's benefit (although see below where the change also relates to a change in timing of holiday pay).

Where the contractual wording requires updating, schools should facilitate a low-level consultation period with affected staff. If schools are also intending to change the payment date for holiday pay (for example, to cease the practice of paying 'rolled up' holiday pay (which is also unlawful) or to move to a single payment of holiday pay in the summer holidays), this should be made clear, and may require a more

involved consultation process with reassurance to staff that it will not impact on the amount they would receive, only the timing of it.

If the current wording is not prescriptive and no change is to be made to the timing of holiday pay, schools should still write to staff to notify them of the change in holiday pay calculation.

Communication over the SC decision and the implementation of the new holiday pay arrangement will be key, and we recommend that schools take specific legal advice in this regard (particularly in respect of their approach to back pay).

Will template contracts for new staff need to be updated?

Possibly. Schools should review and, where necessary, amend template staff contracts to ensure that newly engaged part-year workers receive 5.6 weeks annual leave and that it is clear when holiday pay is paid.

Could schools consider engaging part-year workers in a different way?

Yes. In an attempt to reduce the cost of holiday pay moving forward, schools may want to consider whether staff who are only likely to work for part of the year, or who are only required for specific periods or tasks, could be engaged in another way, for example, on a fixed term temporary basis. As noted above, the decision in Brazel affects only part-year workers who are engaged on permanent contracts. Those on fixed term contracts are not affected.

Schools should be mindful, however, that engaging staff on fixed term contracts will impact on DBS checks and they will be required to repeat checks or get a subscription to the DBS Update Service if staff will not be working in a school for a period of three months. Whilst this is an administrative burden, the added entitlement to holiday for this category of staff and the associated costs may well make it a necessity for some schools.

4. Budget for the additional cost

Some schools will now need to make provision for higher holiday pay for their part-year workers and should revise their future budgets accordingly.

5. Decide how to deal with the liability

Schools will then need to make a strategic decision based on their individual circumstances in respect of their approach to back pay. Schools have three options in this regard: to pay backdated holiday pay in full; in part or not at all.

- **Pay back-pay in full** – whilst this may well come at a significant cost, the safest option legally would be to make changes to the calculation of holiday entitlement and pay moving forward in order to "crystalise" the liability and pay back-pay in full (i.e. to cover the preceding two-year period). This should avoid potential litigation.

- **Pay back pay in part** – for some schools, financial constraints may mean that it is not viable to pay back pay in full but, in an attempt to reduce the risk of litigation and maintain staff morale, they may take the approach of making changes to the calculation of holiday entitlement and pay going forward and offer to pay an amount of back pay (for example, one academic year's worth). If taking this approach, schools will need to be mindful that the risk of litigation would remain (albeit somewhat reduced) unless staff were required to sign a settlement agreement waiving their right to bring an unlawful deduction from wages claim.

- **Not pay back pay** - schools could take the approach of making changes to the calculation of holiday entitlement and pay going forward, but not acceding to any claims for back pay unless or until such time that they are actively challenged by staff with the threat of ET claims. Any claims are effectively "crystallised" once the holiday pay is rectified (i.e., the series of deductions ends) and therefore would need to be brought within three months.

The approach a school chooses to take will need to take account of a number of factors, including its appetite for risk, concerns over employee morale and the extent of the potential liability. Communication over the implementation of the new holiday pay arrangement will be key, and schools will need to respond carefully to requests for back pay.

6. Where relevant, consider approach to stayed ET claims

As noted above, following the CA decision, some schools had unlawful deduction from wages claims brought against them which were successfully stayed pending the decision of the SC. As these claims can now proceed, schools will need to reassess their approach to the litigation and, in most circumstances, the best option is likely to be to seek to resolve such claims through settlement negotiations (rather than through protracted and expensive litigation).

What should schools do next?

Due to the strategic, financial, and possibly reputational implications of any decisions made in respect of the issues raised in this note, this potential risk should be highlighted to the Governing Body.

An audit of the school's holiday pay arrangements will be necessary in order to assess the extent of any potential liability. Legal advice should be sought as to a school's particular circumstances and prior to deciding on the next steps.

We also recommend that schools liaise with their insurance broker / providers given the potential for litigation.

With thanks to Rachel Parkin and Hannah Wilding for co-authoring this guidance.

For specific queries, please get in touch.

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