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S O L I C I T O R S

HOLIDAY PAY FOR PART- YEAR WORKERS

A Practical Guide

Abstract

This note provides detailed practical guidance on how to calculate holiday pay in line with the decision in Brazel, how to implement a change in holiday pay as well as the potential wider implications on other “part-year workers” of this case.

A PASSION FOR EDUCATION

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We have previously produced a note on the Court of Appeal (CA) decision in Harpur Trust v Brazel, setting out the findings of that case and the impact on the current method of calculating holiday pay for zero hours workers such as VMTs.

This note provides more detailed practical guidance on how to calculate holiday pay in line with the decision in Brazel, how to implement a change in holiday pay as well as the potential wider implications on other “part-year workers” of this case.

While the case may proceed to an appeal at the Supreme Court (see below), the current position is that the case is binding and schools are finding that employees, and particularly VMTs, are beginning to challenge the method of payment for holiday.

Note: we make reference to “employee” throughout this guidance note. Please be aware that workers are also entitled to holiday pay and this note applies equally to them.

Schools should be aware that the Harpur Trust have made an application for permission to appeal to the Supreme Court. A decision as to whether the permission is granted will be made in the next few months. Further details as to the next steps and implications of this are set out below.

Judgment in Brazel

Please see [here](#) for the note produced previously which sets out the facts and decision of the case.

In summary, the CA have held that using the calculation method of 12.07% as a way of calculating holiday pay for someone who does not work throughout the whole year (the judge coined the phrase “part-year workers”) results in them receiving a pro rata amount of the statutory 5.6 weeks holiday.

While it seems fair that employees who do not work the whole year should only accrue holiday based on the weeks of the year they work, the CA held that the Working Time Regulations 1998 (“the Regulations”) do not allow for this. There is no scope within the Regulations for statutory holiday to be pro-rated other than for the purposes of an employee who works less than a full week.

Furthermore, the Regulations provide a clear method for calculating holiday pay where someone works varying hours. The Regulations provide that a worker is entitled to be paid for a week’s statutory leave at the rate of a week’s pay, and the Employment Rights Act provides that where a worker does not have normal working hours, a “week’s pay” is calculated as an average of all remuneration earned in the previous 12 working weeks.

The CA therefore held that this was the method that should be used to calculate holiday pay for “part-year workers” such as Mrs Brazel, rather than simply paying 12.07% of hours worked.

Correct method of calculating holiday – current position

Based on the decision of the CA in Brazel, 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 order to determine the correct rate of pay to be paid during holiday periods. This will involve looking back over the last 12 weeks of work, and effectively taking an average

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 12 weeks. For employees who work term time only, this is likely to mean that weeks from the end of the previous term will need to be taken into account when calculating a week's pay.

Where the contract of employment 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. Currently 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 contracts of employment will therefore not specify this. As such, a change is likely to be needed to the contract of employment.

Correct method of calculating holiday – from April 2020

To further complicate the impact of this, from 6 April 2020 the reference period for the purposes of calculating a week's pay will change from 12 weeks to 52 weeks as a result of the Employment Rights (Employment Particulars and Paid Annual Leave) (Amendment) Regulations 2018.

This will mean that rather than looking back over the last 12 weeks of work in order to calculate a week's pay where an employee works variable hours, schools will need to take account of the last 52 weeks of work. This change will mean that employers cannot take advantage of a period of lower work levels in order to time holiday pay to the employer's advantage. For example, if a school pays all holiday to a VMT in the Summer holidays, taking account of the last 12 weeks of work, it is quite likely that a week's pay will be less than it would have been had an average been taken at the start of the Christmas holidays of the last 12 weeks' work.

This longer reference period will inevitably mean taking account of weeks in the last academic year, with many VMTs 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. Similarly, where the total weeks of work that an employee has carried out for the school is fewer than the length of the reference period (whether 12 or 52 weeks), only weeks they have worked will be taken into account.

Payment of holiday pay

Schools will retain options as to how and when they actually 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 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 employee 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). Either way, the same calculation method will be needed, paid at the rate of a week's pay at the time the holiday is taken, based on the appropriate reference period.

Worked example

A VMT works 12 weeks in the Autumn term, 11 weeks in the Spring term and 10 weeks in the Summer term, with a rate of pay of £30 per hour.

Hours worked each week:

	Autumn 2019	Spring 2020	Summer 2020
Week 1	15	16	12
Week 2	15	17.5	12
Week 3	15	18	12.5
Week 4	18.5	18	14
Week 5	17	18	14
Week 6	17	17.5	14.5
Week 7	20	17	15
Week 8	20	17.5	12
Week 9	20	17	12
Week 10	19.5	18	12
Week 11	20	18	N/a
Week 12	19	N/a	N/a
Total hours for term	216	192.5	130

Note: although the current reference period is 12 weeks, we will work this example on the basis of the new 52 reference period which will apply from April 2020. Note that where holiday is paid prior to April 2020, it should be calculated on the basis of the current rules which require using a 12 week reference period to determine a week's pay at the time the holiday is taken.

Option 1

Continue to pay holiday in each main holiday period. Schools will need to determine the number of weeks to be taken in each holiday period, and will then need to calculate a "week's pay" in order to determine the rate of pay payable for those weeks of holiday.

In this example, the school has determined it will pay 2 weeks at Christmas, 2 weeks at Easter and 1.6 weeks in the Summer.

For simplicity, we will work on the basis that the VMT worked the exact same hours in the previous year.

Autumn term

1. Calculate a week's pay at the time the holiday is to be paid – in order to do this we need to look back at the last 52 weeks of work. This will involve taking account of the hours going back to week 4 of the Summer term 2018 (i.e. from the previous academic year). The total hours worked across those 52 weeks are 848, so a week's pay is $848 / 52 \times £30 = £489.23$
2. Multiply this by the set period of holiday to be taken at that time, i.e. $2 \times £489.23 = \mathbf{£978.46}$

Spring term

1. Calculate a week's pay at the time the holiday is to be paid – in order to do this we need to look back at the last 52 weeks of work. This will involve taking account of the hours going back to week 5 of the Autumn term 2018, (i.e. from the previous academic year). The total hours worked across those 52 weeks are 883.5, so a week's pay is $883.5 / 52 \times \text{£}30 = \text{£}509.71$
2. Multiply this by the set period of holiday to be taken at that time, i.e. $2 \times 509.71 = \text{£}1,019.42$

Summer term

1. Calculate a week's pay at the time the holiday is to be paid – in order to do this we need to look back at the last 52 weeks of work. This will involve taking account of the hours going back to week 3 of the Spring term 2019 (i.e. from the previous academic year). The total hours worked across those 52 weeks are 827.5, so a week's pay is $827.5 / 52 \times \text{£}30 = \text{£}477.40$
2. Multiply this by the set period of holiday to be taken at that time, i.e. $1.6 \times \text{£}477.40 = \text{£}763.84$

Total holiday pay is **£2,761.72**

Note that this figure will fluctuate slightly depending on how the 5.6 weeks are split across school holidays.

Option 2

Move to making one payment in each Summer holiday period for all statutory leave that has accrued that academic year. This will involve calculating a week's pay at the start of the period of holiday, and then making a payment of 5.6 weeks' salary at that rate.

For simplicity, we will work on the basis that the VMT worked the exact same hours in the previous year. The total number of hours worked over the 52 weeks ending with week 10 of Summer 2020 are 827.5 (this involves going back to week 3 of the Spring term 2019). A week's pay is therefore $827.5 / 52 \times \text{£}30 = \text{£}477.40$

Holiday entitlement is therefore $5.6 \times \text{£}477.40 = \text{£}2,673.44$

Summary of options

Both options are legally compliant. However, as illustrated above, the correct method for calculating holiday pay is more complicated than the current method, and will involve taking account of data going back over a year. Therefore it is our view that the simplest method will be to make a one off payment each year in the Summer holidays so that the calculation of a week's pay only need be carried out once each year. In order to do this, schools will need to ensure that the contract allows for holiday pay to be paid in the Summer holiday only. This may require a variation to the contract of employment.

Employment contract

Schools will need to consider their options in respect of strategy for addressing the impact of this, taking account of the possible appeal to the Supreme Court (see below for detail on strategy). If a school decides to make changes to holiday pay arrangements to accord with the CA decision (or any later Supreme Court ratification), it is likely that changes will be needed

to the contract of employment if holiday is currently calculated in a way that is non-compliant with the Regulations, and this is reflected in the contract of employment (for example where reference is made in the contract to the calculation method of 12.07%). The extent of any change will depend on the current wording.

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.

The zero hours employee and worker contracts on the ISBA reference library have been updated. The revised wording covering holiday pay entitlement is fairly broad and does not specify the method of calculation but reflects compliance with the law.

Implementation of new contract and arrangements

Where contractual changes are made, this would ordinarily require a consultation process, unless the change falls under the flexibility clause of the contract which allows for minor changes. However in this situation, where schools choose to implement the calculation method based on Brazel, the change will (a) be required by law and (b) be to the employee's benefit (although see below where the change also relates to change in timing of holiday pay).

If the wording of the contract is such that it needs to be changed (for example because it refers to holiday being calculated as 12.07% of hours worked), affected employees should be provided with the proposed revision to the contract and schools should enter into a low level consultation period. Our view is that this could involve writing to staff with the proposed revision to the contract, an explanation of the change and how it will impact them and a proposed date for implementation. Affected employees should be given the opportunity to meet to discuss this should they wish to do so.

If schools are also intending to change the payment date, 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. Schools can explain the administrative complexity of the new method of holiday pay calculation as a reason for implementing this change alongside it. Schools should consider implementing this change on contractual notice, given the impact on earnings in the short term. If the change is not implemented prior to April 2020, the current rules over the 12 week reference period will apply in the interim when calculating holiday pay.

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. Depending on the current wording of the contract, it may still be advisable to implement new contractual wording.

As part of this process, employees should be asked to sign and return the revised contract.

We recommend that schools seek advice in implementing changes to existing holiday pay arrangements.

If using the new ISBA template contract, which does not go into the method of calculation, it would be advisable for schools to provide employees with a summary of how holiday pay will be calculated where changes are being made.

Back pay liability

Schools who have been paying their zero hours employees based on 12.07% 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 under the Employment Rights Act 1996. 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 building up while an employer is still making deductions (i.e. paying incorrect levels of holiday pay), but once the practice is changed, the series of deductions ends and the clock will start ticking on the three month time limit for claims to be brought.

Legislation was introduced in 2015 which has the result that claims for unlawful deductions from wages can only go back in respect of deductions made 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). This will limit the ability to claim for back pay. While there is scope for the two year period to be challenged, it remains correct under current law and at the present time is 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 of the CA in Brazel.

There is also 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.

Other zero hours staff

The guidance above has focussed primarily on VMTs or other peripatetic staff who work on a zero hours basis, but work each term. However, the decision in Brazel, while affecting holiday pay for this category of staff, also has a disproportionate effect on any zero hours staff who 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.

Where those staff are employed on a **permanent contract**, the case will affect them and will lead to erroneous results. An exam invigilator working for 6 weeks of the year will be entitled to 5.6 weeks holiday, paid at the rate of a week’s pay; essentially an average of the weeks they have worked for the school based on the correct reference period (either 12 or 52 weeks, depending on whether it is after April 2020).

The methods above can be used to calculate a week's pay for the purposes of calculating holiday pay for these staff and the same issues in respect of the contract of employment apply. Schools may therefore wish to review their method of engagement of such staff (see Strategy below).

Impact on other term time only staff

The finding of the CA in Brazel 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 of Brazel 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.

Example

Year round salary for a role is £20,000. Role is to be carried out term time only, 34 weeks per annum.

If the salary is calculated as follows:

Pro rata proportion of full time $34/46.4 = 0.73$ (using 46.4 rather than 52 on the basis that this is the actual number of weeks worked by the year round member of staff, having taken off their holiday)

$$0.73 \times £20,000 = £14,600$$

The correct method for calculating the salary for someone in that situation would be to determine the weekly pay (note that the method above for calculating a week's pay is not relevant as the employee does not work varying hours) as follows:

$$£20,000/52 = £384.6$$

$$\text{Multiply that by the total number of weeks' worked, plus the statutory holiday i.e. } 34 + 5.6 = 39.6$$

$$\text{The correct salary therefore is } £384.6 \times 39.6 = \mathbf{£15,230.16}$$

In this example, this equates to a difference in salary of £630.16

While the incorrect calculation method shown above is common in schools, 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 be reference to it within the contract. The calculation method of 12.07% has been the focus of the issues with this method 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, subject to the possible appeal to the Supreme Court (see below). The same principles above regarding back pay liability will apply, and the potential claims of back pay

will again “crystallise” at the point of rectification, with a three month time limit. 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.

Impact of appeal to the Supreme Court

The Harpur Trust have sought permission to appeal to the Supreme Court against this decision and this may well impact on the strategy that schools adopt.

We understand that the Supreme Court is likely to make a decision as to whether or not to grant permission to appeal in around January or February 2020. This decision will determine whether or not the case will be heard by the Supreme Court.

- **If permission to appeal is granted**, any claim brought by a claimant in respect of the same legal issue may be successfully stayed. The “stay” of a claim essentially puts the case on hold pending an event, in this case the decision by a higher court of a point of law. The decision to stay will be at the discretion of the tribunal, usually upon application by the respondent, which is made once a claim is filed.
- **If permission to appeal is refused**, we would recommend that Schools at that stage implement the changes as set out in this note in order to give effect to the CA decision.

If leave to appeal is granted, the case would be listed for a hearing, which we understand is likely to be between 4 and 8 months after permission to appeal is granted. It therefore seems likely that if the case progresses to an appeal in the Supreme Court, it will not be heard before Autumn 2020.

Note that while the Harpur Trust do not currently have permission to appeal, and applications to stay claims may therefore not be successful if brought now, given the timescales involved in filing and processing an Employment Tribunal claim, it is quite likely that a decision on permission to appeal will be made by the time schools are in a position to respond to claims and can at that stage make an application to stay the claim, should permission to appeal be granted.

Strategy

1. Review current arrangements

We recommend that as a minimum, schools now proactively review the arrangements in place and consider the changes that would be needed to the calculation and payment of holiday pay for VMTs and other zero hours employees in order to be compliant with the current legal position. The zero hours employee and worker contracts on the ISBA library contain a range of clauses to cover differing circumstances which are compliant with the decision of the CA in this case, without setting out specific calculation methods. This means that schools can implement these contracts for new staff regardless of their intentions in respect of implementing the CA decision or waiting for news of the appeal. The term time only holiday clause in the support staff contract has also been updated in the same way.

In the case of staff working for a short period each year, such as exam invigilators, we recommend that schools consider engaging such staff on a fixed term temporary basis wherever possible. Schools may also wish to review the contractual arrangements in respect of such staff and consider whether it may be possible to make changes such that they are employed on fixed term contracts for the period of the assignment. Engaging staff on fixed

term contracts will impact on DBS checks and will require repeated checks or a subscription to the DBS Update Service if they will not be working in a school for a period of three months, but the added entitlement to holiday for this category of staff and the cost associated with that may well make it a necessity. Schools should take advice in respect of the arrangements they have in place before making any changes.

2. Calculate back pay liability

Schools should also quantify their potential back pay liability in respect of all staff who may be affected by this decision. This will involve reviewing holiday pay paid in the last two years from the point that the practice is corrected, and for the same period calculating the correct holiday pay, based both on contractual arrangements in respect of timing of the holiday pay, as well as the revised calculation. Remember to discount any weeks where no work has been done, but include weeks where a small amount of work was done.

Where queries are received by employees in light of Brazel, it is highly likely that those employees are aware of the scope to claim for back pay and will be seeking not only changes in the method of calculation going forward, but also payment of the back pay liability. The Incorporated Society of Musicians (of which Mrs Brazel was a member) has publicised the outcome of this case, and Unison was an intervener in the case, and as such many VMTs and other staff are becoming aware of the issue and its impact on them.

Our recommendation in relation to potential back pay liability is that where this is requested from employees, schools do not make such payments until we have further clarity as to the status of a potential appeal. Should employees bring claims in the Employment Tribunal, and permission is granted for the Harpur Trust to appeal to the Supreme Court, schools can at that stage apply to stay any claims for back payment in respect of incorrect calculation of holiday pay.

If the Harpur Trust do not get permission to appeal, schools may take the approach of making changes to the pay going forward (see below), 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 Employment Tribunal claims. The approach a school chooses to take will need to take account of a number of factors, including the 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.

Regardless of when back payments are made, the current limit of 2 years from the point of claim will apply. It will therefore not impact on the quantification of claims if schools await further progress of the appeal or await Employment Tribunal claims before acceding to any claims for back pay.

If claims for back pay are successfully stayed and the Harpur Trust are later unsuccessful on appeal, any stayed claims will then proceed.

3. Consider calculation method going forward

Schools will need to consider the options available to them given the current binding CA decision, in conjunction with the potential appeal to the Supreme Court and whether or not to make any changes to the calculation of holiday pay for affected staff as a result of the CA decision at this time.

Broadly speaking, the options are:

- a. Schools may wish to continue using their existing (currently unlawful) method on the basis that the Harpur Trust may obtain leave to appeal, and if so, may then ultimately be successful in overturning the decision on appeal. If taking this approach, schools will need to deal with queries raised by staff affected by the CA decision, using the grievance procedure and noting that the school will await progress of the appeal before making any decision to change practices.
- b. Schools may wish to implement changes to their practice now such that they are compliant with the binding decision of the CA, using the methods set out within this note. If the Harpur Trust obtains permission to appeal and is successful in that appeal, schools will then be paying holiday pay at a higher level than is necessary and may at that stage wish to try and review and ultimately reduce this, but should be aware that the process involved in reducing holiday entitlement will be more difficult than increasing it, with greater risk. Being open and transparent with staff over a change may help with later reducing holiday pay should it be feasible to do so, but will inevitably draw attention to the potential for bringing claims now for back pay. We cannot predict the decision of the Supreme Court, but clearly if unsuccessful in obtaining permission to appeal, or if unsuccessful at an appeal hearing, the same issue would apply if implementing a rectified holiday pay calculation at that time.

By implementing the change to practices, whether now or following an unsuccessful appeal, as set out above, claims for back pay will “crystallise”, and the 3 month time limit for pursuing claims will begin.

Where schools are maintaining their current practice for existing staff, there will be the option for new staff of introducing a calculation method which is consistent with the CA decision in Brazel, although acknowledging that this will mean staff are paid differing rates.

Given the complications associated with this decision, we would recommend that schools seek specific legal advice prior to deciding on next steps.

**Harrison Clark Rickerbys
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