Calculating holiday entitlement for part-year and irregular hours workers: reflections on the Government Consultation

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Introduction

Following the Supreme Court's judgment in *Harpur Trust v Brazel* (see our case summary here), the Department for Business, Energy and Industrial Strategy ('BEIS') has issued a consultation paper looking at holiday pay for part-year workers. The Government now proposes to make changes to the Working Time Regulations 1998 ('WTR').

Before delving into the detail, it is important to note that the proposal deals with *annual leave entitlement* (currently set out in reg 13 and 13A WTR) rather than *holiday pay* (governed by reg 16 WTR and ss221-224 Employment Rights Act 1996). The decision in *Harpur Trust v Brazel* was in fact focussed on the latter. This is unsurprising as the method for calculating holiday pay is fairly uncontroversial (one week's pay for each week of leave – see reg 16 WTR 1998). It is only by reducing leave entitlement for part-year workers that holiday pay will be reduced.

Overall, the Government's policy intention on this question appears to be relatively settled – i.e.the decision is to attempt to reverse the effect of *Harpur Trust v Brazel*. The consultation is about how to do so. Nevertheless, it is important to highlight that the consultation is not accompanied by any draft of the proposed new regulations that the Government wishes to apply. This is despite it now being 6 months since the UKSC decision and over 3.5 years since the Court of Appeal decision, and surprising in a field where the technical language of the legislation is extremely important.

Calculating overall leave entitlement

Turning to the detail of the consultation, the main proposal is to calculate entitlement to annual leave on a 'pro-rata' basis by using a 52-week holiday entitlement reference period. The key points are:

- One must 'look back' at the previous 52 weeks (Year A). A worker would be entitled to annual leave in the following 52 weeks (Year B) in proportion to the number of weeks worked in the Year A period.
- The proportion would be calculated by multiplying the total hours worked over the past 52 weeks by 12.07% (i.e. the proportion of the year for which a full-year worker will be entitled to holiday – 5.6 weeks/46.4 weeks x 100%). Unlike the calculation for holiday pay (reg 16(f) WTR), one would **not** discount weeks where no work is performed.
- In terms of when the period would start and end, the proposal prefers a fixed period – i.e. at the start of the leave year, a worker's leave is determined by 'looking back' at the previous 52 weeks. This means the amount of leave in one year would always depend on the amount of work done in the year before.
- This leads to the following formula: **Hours worked in previous 52 weeks x 12.07% = annual statutory entitlement in hours**
- For the first year of employment, the same approach would be taken but on a month-by-month basis (**Hours worked in previous month x 12.07% = monthly statutory entitlement in hours**).
- Holiday entitlement for agency workers would also be calculated on a month-by-month basis in this way for assignments shorter than a year.

This approach is not dissimilar to the method previously suggested by ACAS before the *Harpur Trust v Brazel* litigation – in other words, affording each worker 12.07% of their working time as holiday. It also, in effect, combines the two methods argued for by the Harpur Trust in the Supreme Court: the 'percentage method' and the 'worked year' method. The key criticism of the Supreme Court was that these methods were contrary to the statutory framework – which, of course, the Government is entitled to seek to change.

Nevertheless, there are significant issues with this proposal:

- As holiday entitlement would be determined by reference to work done in the previous year, workers who increase their hours in any given year would not be afforded sufficient holiday. This could lead to breach of Article 7 of the EU Working Time Directive ('WTD') (to the extent that it will continue to have relevance as a matter of

UK law) which mandates that all workers are entitled to four weeks' annual leave in any given leave year.

- The 'month by month' approach for first-year workers still works retrospectively, meaning workers would not be entitled to leave in their first month of employment, contrary to the current regulations (reg 15A). This also means that those who work on very short contracts (say, 2-3 weeks) may not be entitled to any leave at all.
- If the new system is going to calculate holiday entitlement based on hours of work that have been performed, how is the system going to operate for workers who take sick leave, compassionate leave or parental leave in the previous leave year on which entitlement is based? Will that be counted towards their hours worked in that leave year when calculating their holiday entitlement, and if so, how many hours of notional work are going to be attributed to each day or week of sick leave and how is such a calculation to be done? If the intention is not to count periods of sick leave or compassionate leave or parental leave towards the hours worked in Year A when calculating holiday entitlement for Year B in which such leave may not be taken at all, is that fair to workers?
- It does not specify who will be affected. As currently stated, this proposal appears to affect salaried workers who do not work the whole year if they leave part way through the leave year, when calculating payment in lieu of untaken statutory leave under reg 14(2) WTR. This could have a significant effect on, for example, teachers, who are salaried but are not required to work during school holidays.
- It relies on an accurate recording of hours worked, even where workers are not paid at an hourly rate. This was also noted as an issue by the Supreme Court in *Harpur Trust v Brazel* (see paragraph 70). This could prove to be a significant burden for some employers.
- Finally, what happens if employers and workers disagree about how many hours have been worked in Year A for the purpose of the holiday entitlement calculation? Is that a matter that will only reach the Employment Tribunal, if at all, if the worker is denied the leave they claim to be entitled to in Year B? How are such disagreements going to be resolved in practice?

What is a day's leave?

In addition, the proposal seeks to look at the amount of leave which is taken when an individual takes a 'day off'. This question was not answered by the Supreme Court in *Harpur*

Trust v Brazel nor in other case law. Currently, the best place to look is the BEIS guidance on Calculating Statutory Holiday entitlement: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/865247/BEIS_Holiday_Entitlement_Calculation_Guidance.pdf

The preferred method in the consultation is to use the reference period to calculate a 'flat average working day'. This would calculate the number of hours on average each day the worker worked across the reference period and the worker would be paid their usual hourly rate for that many hours on that day.

Again, while this method appears pragmatic on its face, it encounters the difficulty that it requires a detailed and accurate recording of a worker's hours. It also assumes that all workers are paid an hourly rate – which, of course, is not always the case.

Where does this leave other reforms of the Working Time Regulations?

The WTR are an example of 'retained EU law' (law made under s2(2) of the European Communities Act 1972 to give effect to the Working Time Directive). As we have previously reported, the Retained EU Law (Revocation and Reform) Bill, currently going through Parliament, puts a 'sunset' on all retained law, so that if it is not preserved, clarified or replaced by a particular date (currently 31 December 2023) it will cease to have effect.

Given, therefore, decisions will soon have to be made about the entirety of the WTR, it is interesting that BEIS have chosen this time to consult on reform to a small part of a much wider set of regulations. Does this mean the WTR will otherwise remain largely unchanged? Or will this feed into wholesale reform? It is an area for employment lawyers to watch closely in the months ahead.

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