Supreme Court confirms holiday pay rights for part-year workers

By Mathew Gullick QC, Lachlan Wilson, and Naomi Webber

3PB Barristers

Introduction

1. The Supreme Court has confirmed that so-called 'part-year' workers (individuals who are engaged on permanent contracts but who do not work every week during the leave year) are entitled to be paid for 5.6 weeks' leave each year, alongside their full-time and part-time counterparts. 3PB Barristers, Mathew Gullick QC, Lachlan Wilson, and Naomi Webber, instructed by Hopkins LLP, represented the successful claimant (Respondent to the appeal), Mrs Brazel.

Background

2. Mrs Brazel is a visiting music teacher at Bedford Girls School, run by the Appellant, the Harpur Trust. She has a permanent 'zero-hours' contract, so is continually employed but only paid for the hours she teaches. The nature of her role is such that she works a variable number of hours each week and only works during school term-time.

3. Like all other workers and employees, Mrs Brazel is entitled to paid annual leave under the Working Time Regulations 1998 (SI 1998/1833) ("WTR"). The WTR implements the Working Time Directive 1993/104 ("WTD") (an EU provision) into UK legislation. The WTR provide that all workers are entitled to a total of 5.6 weeks' paid leave per year. This is made up of 4 weeks' leave required by the WTD and an additional 1.6 weeks' leave to account for UK bank holidays. Until 2011, Mrs Brazel was treated as taking 1.87 weeks' holiday during each of the three main school holiday periods, and was paid as such, meaning that across the leave year she was paid the full 5.6 weeks to which she was entitled. This is referred to in the judgment as the 'Calendar Week Method'.

4. From September 2011, the Harpur Trust changed the calculation. In line with ACAS guidance in force at the time[1], her holiday pay was calculated as 12.07% of the hours she worked each term. This figure comes from the fact that a full-time worker will work 46.4 weeks per year and take 5.6 weeks' annual leave, meaning 12.07% of the working year is paid holiday (5.6 / 46.4 x 100 = 12.07%). This is referred to in the judgment as the 'Percentage Method'.

5. Mrs Brazel brought a claim in the Employment Tribunal for unlawful deductions from wages by underpayment of holiday pay. The Employment Tribunal dismissed her claim, holding that as she was a 'part-year worker' her holiday entitlement should be 'pro-rated' to the amount of the year she worked. Adopting the Percentage Method, by applying the 12.07% only to the hours worked in each term, had the effect of reducing Mrs Brazel's holiday entitlement. The Employment Tribunal held that this was justified as she was not required to work in the School's holiday periods. Mrs Brazel appealed against this decision asserting that there was no legal basis to reduce her holiday entitlement and that Parliament had provided a clear method for calculating how her full holiday entitlement should be remunerated (see below). The EAT allowed her appeal and the Court of Appeal upheld that decision. The Harpur Trust appealed to the Supreme Court.

Decision (Lady Rose and Lady Arden)

6. The case for Mrs Brazel, accepted by the Supreme Court, was simple:

   (a) All workers are entitled to 5.6 weeks' annual leave per year under reg 13 and 13A WTR.

   (b) Reg 16 gives workers the right to be paid for that leave and states that the method for calculating that pay is that set out in s221-224 Employment Rights Act 1996 ("ERA").

   (c) s224 ERA provides for employees with 'no normal working hours'. This states that when calculating a week's pay for such employees, one must take an average of their weekly pay for the last 12 weeks, excluding any weeks in which no money was paid. This means that for a part-year worker under a permanent contract, the average pay is not lowered by the fact that they do not work every week of the year. (It is important

[1] Since the Appeal decisions in this case, this guidance has been withdrawn and the relevant part of the ACAS guidance has been revised.

to note that since April 2020, the period for average pay has increased to 52 weeks, excluding any weeks with no pay (reg 16(3)(e) WTR).)

(d) All workers engaged under a permanent contract (whether required to work part-year or otherwise) are therefore entitled to pay for 5.6 weeks' leave per year, calculated by the above method (the Calendar Week Method). Nothing in the legislation suggests that part-year workers are entitled to less. In fact, for the reasons set out below, the legislation points against any other calculation.

7. The Harpur Trust's case was based on an idea that leave should be 'pro-rated', so that annual leave entitlement is proportionate to the amount of weeks worked per year. It relied on a recent CJEU case of *QH v Varhoven kasatsionen sad na Republika Bulgaria* (C-762/18) [2020] EU:C:2020:504 (*"QH"*). This held that entitlement to paid annual leave should *'be determined by reference to periods of actual work'*. It also relied on the Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000 (SI 2000/1551) which prohibits discrimination against those that work part-time and provides for a *'pro-rata temporis'* principle. The Supreme Court (following the Court of Appeal) accepted that EU law allowed for annual leave to be pro-rated. Nevertheless, this did not prevent UK law from treating some workers more favourably. This is already the case with the fact that UK law provides all workers with the right to 5.6 weeks' paid leave, above the minimum 4 weeks required by the WTD. As such, it was not a barrier to the natural reading of the legislation. Similarly, the Part-Time Workers regulations prevent discrimination *against* part-time workers but does not prohibit better treatment **[34-47]**.

8. The Court also noted that there was nothing in the legislation which enabled the amount of leave to be pro-rated. The amount of leave (as opposed to the way it is paid) is governed by reg 13 and 13A WTR and provides for 5.6 weeks' leave only. This means a part-time worker working three days per week every week of the year is entitled to fewer *days* annual leave than their five-day-a-week full time counterpart. However, both workers are still entitled to 5.6 *calendar weeks* free from work. Reg 13 and 13A do not have an equivalent of s224 which excludes the weeks where no work is performed **[48-49]**.

9. Furthermore, other provisions are clearly inconsistent with the idea of pro-rating to the amount of work performed. For example, reg 13(5) and 13A(5) WTR provides for workers that join part-way through the leave year and reg 14 WTR calculates the outstanding holiday due to a worker who leaves part-way through the leave year. Both pro-rate the leave entitlement according to the *time elapsed* in the leave year, <u>not</u> by reference to the

work actually done during that time. For all these reasons the Court concluded the leave for a part-year worker engaged under a permanent contact is not required by EU law to be, and under domestic law is not, pro-rated to that of a full-time worker **[50-52]**.

10. Finally, the Supreme Court rejected the alternative methods the Harpur Trust put forward for calculating part-year workers' annual leave. The first was the 'Percentage Method' which the ACAS guidance had previously suggested, i.e. 12.07% of the hours or days worked by a worker in a year **[54]**. The second was changing the meaning of 'week' to reflect the proportion of weeks across the year the worker worked (so that a worker who worked, for example, 26 weeks per year would be entitled to 5.6 x 0.5 "weeks" annual leave per year) **[56]**. The Court identified a number of difficulties with these methods. Not only were they very different from the approach set out clearly in the legislation, but in a number of ways they contradicted the WTR (for example the Percentage method did not use the calculation of a weeks' pay in s224, as prescribed in reg 16) **[67-68]**. Furthermore, they relied on the idea that leave "accrues" as the worker works throughout the year. This is contrary to how annual leave works. After the first year of employment (governed by reg 15A), workers are entitled to take all their leave from the start of the leave year (see *Broadcasting, Entertainment, Cinematographic and Theatre Union) v Secretary of State for Trade and Industry* (Case C-173/99) [2001] ICR 1152, ("BECTU")). As such, a method proposing that leave entitlement accrues throughout the year after the first year of employment is directly contrary to the WTR **[69]**. In addition, the Supreme Court noted how complex these calculations would be, requiring employers and workers to keep details records of their hours worked, even if they did work on an hourly rate **[70]**.

11. Overall, the Court concluded that the Calendar Week Method was the correct and only way to read the legislation, and that the annual leave entitlement of part-year workers should not be pro-rated to those working all year round.

Comment

12. On the one hand, the outcome of this case is simple. The Supreme Court has made clear that the entitlement to annual leave is fixed at 5.6 weeks for all workers engaged under a permanent contract and that annual leave entitlement does not 'accrue' by reference to hours or weeks actually worked.

13. On the other hand, there remain unresolved issues following this decision. When, for example, does a term-time only worker take their 5.6 weeks' leave? Is it 1.87 weeks in

every main school holiday (as was originally stipulated for Mrs Brazel), or, if the worker is not required to work in any of the school holiday periods, can some of the statutory entitlement be attributed to each of the holidays, including half-term holidays? This could have important ramifications for workers claiming back-pay where there is a series of deductions made at intervals of greater than three months (see *Bear Scotland Ltd v Fulton and anor; Hertel (UK) Ltd and anor v Woods and ors (Secretary of State for Business, Innovation and Skills intervening)* [2015] ICR 221, EAT, although note the doubt expressed about this decision in the *obiter* discussion by the Court of Appeal in *Smith v Pimlico Plumbers Ltd* [2022] ICR 818 at paragraphs 91-101). Further issues will also arise with individuals who have a series of short-term contracts with the same employer. Whether they are continually entitled to 5.6 weeks' leave per year, or whether their leave entitlement 'resets' with each contract, may depend on whether this is seen as an overarching or umbrella worker contract or whether individual worker contracts are entered into each time. Finally, what if a part-year worker who works irregular days/hours wants to take a day off? What proportion of a 'week' is this? 0.2 or something else?

14. Since 2020, there has been guidance from the Department for Business, Energy and Industrial Strategy setting out the correct method of calculation, amended following the Court of Appeal decision (see *Holiday Pay - Guidance on calculating holiday pay for workers without fixed hours or pay*). Astute employers who have followed this guidance should find themselves protected, but the position of workers who have highly atypical working patterns may well result in further appellate litigation.

This document is not intended to constitute and should not be used as a substitute for legal advice on any specific matter. No liability for the accuracy of the content of this document, or the consequences of relying on it, is assumed by the author. If you seek further information, please contact the 3PB clerking team.

1 August 2022

Mathew Gullick QC

Barrister
3PB Barristers

020 7583 8055
Mathew.gullick@3pb.co.uk

3pb.co.uk

Lachlan Wilson

Barrister
3PB Barristers

020 7583 8055
Lachlan.wilson@3pb.co.uk

3pb.co.uk

Naomi Webber

Barrister
3PB Barristers

01865 793 736
Naomi.webber@3pb.co.uk

3pb.co.uk