

A photograph of three business professionals (two men and one woman) sitting at a long table in a modern office or cafe at night. They are all looking at laptops. The woman is on the left, wearing a grey blazer. The man in the middle is wearing a light blue sweater. The man on the right is wearing a dark red shirt and is gesturing with his hand while talking. There are coffee cups and a small potted plant on the table. The background shows a large window with a view of city lights at night. The word 'geldards' is written in white lowercase letters in the top right corner.

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PowerHour: Holiday and Holiday Pay

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Agenda

- Holiday entitlement
- Holiday pay
- Part-time workers
- *Harpur Trust v Brazel*

Holiday Entitlement for Workers

- Working Time Directive
 - 4 weeks paid annual leave
- Working Time Regulations 1998
 - 4 weeks – Regulation 13
 - Additional 1.6 weeks – Regulation 13A
- Paid at a rate of a week's pay in respect of each week of leave – Regulation 16

Holiday Pay

- Calculated in accordance with the “week’s pay” rules
 - Sections 221 – 224 of the Employment Rights Act 1996
 - Normal working hours
 - No normal working hours
- Not compatible with WTD
 - “normal remuneration”
 - *“remuneration which is intrinsically linked to the performance of the tasks which the worker is required to carry out”*

Holiday pay

- Normal working hours
 - Pay calculated with reference to those hours
 - No reference period
- Normal working hours – variable pay
 - Average remuneration over the 52 weeks before the calculation date
- No normal working hours
 - Average of all remuneration earned in the previous 52 weeks
 - Ignoring weeks of no remuneration – earlier weeks brought into account to up maximum of 104 weeks

Part-time workers

- Entitlement to 5.6 weeks
- Pro-rated FTE

Part-time worker who works 3 days per week

Entitlement 3/5ths FTE equivalent

3/5th of 28 days

16.8 days (17 rounded up to the nearest half day)

Part-time workers – variable hours

- Variable hours
- Part-year workers
- Difficult or impossible to express pro-rated holiday in terms of hours or days
- Historically employers used the 12.07% calculation
 - 5.6 weeks' holiday is 12.07% of the working year of 46.4 weeks

Harpur Trust v Brazel

- Visiting music teacher
- Permanent contract on a zero hours basis
- No fixed minimum amount of work
- Paid only for the amount of work carried out
- Worked school term time (32 – 35 weeks)

Harpur Trust v Brazel

- Part time in two senses
 - Didn't work a full week
 - Didn't work all weeks of the year
- Entitled to 5.6 weeks holiday – taken during school holidays
- No particular week designated as statutory holiday
- Payment in respect of holiday at the end of each term
- 12.07% of earnings at the end of each term

Harpur Trust v Brazel

- Unlawful deductions from wages & less favourable treatment
- 12.07% not compatible with requirement under Regulation 16 WTR
- “Week’s pay” provisions should be applied
- Level of average earnings over **12 week*** period, ignoring any weeks were no earnings
- Higher percentage of annual earnings as holiday pay

**This reference period increased to 52 weeks in April 2020*

Harpur Trust v Brazel

- ET – dismissed the claims
 - Pro rata principle should apply
 - Payment for part-time workers who worked fewer than 46.4 weeks capped at 12.07% of annualised hours
- EAT and COA
 - Allowed Mrs Brazel's appeal
 - No requirement in the WTR to pro rate holiday pay for part time workers
 - No cap should be applied

Harpur Trust v Brazel

- Supreme Court rejected Trust's appeal
- Approved the "Calendar Week Method"

Calendar Week Method

- 1/3 (1.87 weeks) of holiday entitlement taken in Easter holidays 2013
- Worked 127 hours in spring term
- Spring term 10 weeks long so 22.5 hours of last two weeks of previous term added
- 12 week* reference period of 149.5 hours of work
- 149.5 hours @ £29.50 per hour = £4,410.25
- Divided by 12*
- Average week's pay of £367.52
- Pay for 1.87 weeks' holiday would be $£367.53 \times 1.8 = £687.26$

Implications of the decision

- Relevant for workers without normal working hours
- Percentage method of 12.07% rejected
- Use Calendar Week Method for calculating holiday pay

Impact of the decision

- Administrative burden
- Potential for multiple unlawful deductions from wages claims
- Limitation period – 3 months from date of last deduction
- 2 year back pay from the date of the claim
 - Deduction from Wages (Limitation) Regulations 2014
- Factor in breaks of 3 months in the chain of deductions

Practical example

- Casual worker with variable hours or days per week
- Certain weeks where they won't work at all
- Number of days worked on average over 52 weeks
- Average week is 2.5 days
- Holiday day is $1 \div 2.5 = 0.4$ of a week
- Holiday entitlement reduced by 0.4 ($5.6 - 0.4 = 5.2$ weeks)

Practical example

- 0.4 of week's pay
- Average weeks pay over 52 weeks (only counting week's paid up to 104 weeks back)
- A week's pay = £200
- $0.4 \times £200 = £80$

Practical example

- Individual has previously been paid holiday by applying 12.07%
- Claim for unlawful deduction from wages
- Limit liability?
 - Has the claim been brought within 3 months of the last deduction?
 - Looking at the individual's holiday pattern are there gaps of 3 months of more in periods of deduction
 - Cap at 2 years

Questions

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Thank You

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