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PowerHour: Holiday and Holiday Pay

Lowri Phillips & Helen Snow

Agenda

- Holiday entitlement

- Holiday pay

- Part-time workers

- *Harpur Trust v Brazel*

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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

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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"*

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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

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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)

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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

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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)

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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

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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

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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

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Harpur Trust v Brazel

- Supreme Court rejected Trust's appeal

- Approved the "Calendar Week Method"

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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 x 1.8 = £687.26

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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

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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

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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)

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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 x £200 = £80

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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

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Questions

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Thank You

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