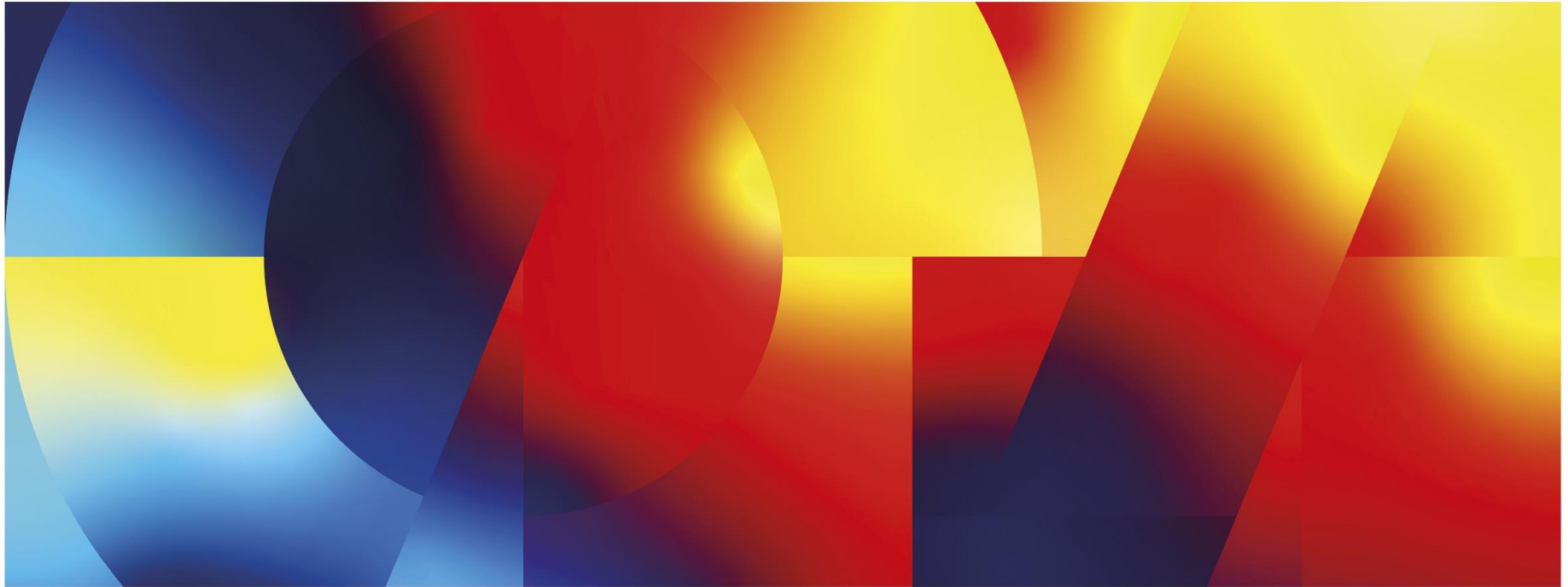


15 September 2022

Graham Vials and Tom Shears

ward
hadaway

Holiday pay for schools in light of the *Harpur Trust v Brazel* judgment



Key points to cover

- Who does this impact?
- The position following *Harpur Trust v Brazel*
- Potential historic liability
- Potential alternative solutions for schools
- Does this also affect regular term-time only staff?

Who does this potentially impact?

- Schools, colleges, universities
- Early-years providers e.g. nurseries
- Any other organisation which engages individuals on certain atypical working patterns
- In particular, those who have staff on any form of 'zero hours' or casual contract

The position – holiday entitlement

- Under UK law, all workers have the right to 5.6 weeks' paid annual leave each year.
- Under the Working Time Regulations, this is broken down into two separate rights:
 - The right to take 5.6 weeks' holiday; and
 - The right to holiday pay when leave is taken – “a week's pay for a week's leave”.
- Straightforward for most people in employment e.g. salaried full-time employee:
 - 5.6 weeks' leave = 28 days; and
 - Entitlement to normal salary when holiday is taken.

The position – holiday entitlement (part-time)

- Potentially trickier with part-time workers, depending on their working pattern
- Under employment law, employers should normally ‘pro-rate’ entitlements for part-time workers
- Examples:
 - An employee who works shorter days across 5 days per week still receives 28 days’ leave as they still need to take 5 days’ leave to cover one week’s holiday from work
 - An employee who only works 1 day per week would receive 5.6 days’ leave, as taking one day’s leave gives them one week’s holiday from work
 - As with full-time employees, because they have regular working hours they are entitled to be paid their normal pay whilst on holiday.

The position – atypical workers

- Becomes far more complex when you consider a ‘zero-hours’ worker
- WTR still say 5.6 weeks’ paid leave per year
- Casual workers or ‘zero-hour’ workers do not have “normal working hours” – therefore treated differently under the WTR
- When holiday is taken by these workers, it is paid based on **average** weekly remuneration over the last 52 weeks **discounting any weeks in which no remuneration was paid.**

The position – atypical workers

- What does 5.6 weeks' leave mean for an employee with fluctuating working hours (including long periods where they don't do any work)?
- What is the 12.07% method and how did it come about?
- 12.07% previously encouraged by ACAS – but now removed from their guidance / advice.

The position – Harpur Trust v Brazel

- Peripatetic music tutor
- Worked at the school only during term-time, but importantly had no guaranteed hours.
- Paid holiday pay at the end of each term equal to 12.07% of earnings in that term. Universally accepted that this meant that she took 1.87 weeks' holiday at the end of each term (one-third of 5.6 weeks).
- Mrs Brazel argued that each time she took holiday, she should be paid her average weekly earnings over the last 52 weeks excluding those in which she had earned no pay under WTR.
- This would essentially give her 5.6 weeks' full pay for holiday – same as a year-round worker – even though she only worked in a maximum of 39 weeks per year.

The position – Harpur Trust v Brazel

- The Supreme Court agreed with Mrs Brazel.
- Their decision was based on their technical interpretation of what the WTR say, not what they considered to be 'fair'. Their view was although the 12.07% may be a reasonable way to pro-rate holiday entitlement, it didn't strictly comply with the legal wording of the WTR.
- The Supreme Court noted that this would treat casual workers more favourably than full-time workers, or even part-time workers with regular hours.
- Whilst part-time workers are legally protected from being treated less favourably than full-time counterparts, there is no legal ban on treating part-time workers more favourably.

The position – Harpur Trust v Brazel

- Why is this a problem?
- In Mrs Brazel's case, she was entitled to around 50% more holiday pay than she had received under the 12.07% method.
- However, this is towards the less extreme end of the spectrum.
- Disparity between holiday pay calculations based on Harpur Trust v Brazel rather than 12.07% will be greater where an individual works their hours in more condensed periods over fewer weeks, as shown by the following examples:

The position – Example 1

- Salaried admin assistant paid £10/hour is employed to work 1 hour each day Monday – Friday year round (5 hours per week)
- Entitled to 5.6 weeks' paid holiday
- Works 232 hours in the year (5 x 46.4) and has 28 hours' holiday (5.6 weeks x 5 days per weeks)
- Has “normal working hours” so receives normal pay during holiday hours
- Effectively receives **£280** in holiday pay in a year (£10 x 28)

The position – Example 2

- Casual lunchtime supervisor is paid £10/hour and works “as and when required” during term-time, without regular hours.
- In this example, works 232 hours in a year across 30 separate weeks (doesn’t work at all in the other weeks)
- Entitled to 5.6 weeks’ paid holiday
- 12.07% method = $232 \times £10 \times 12.07\% = \underline{\underline{£280.02}}$
- *Harpur Trust v Brazel* method = $5.6 \times (232 \times £10 / 30) = \underline{\underline{£433.07}}$

The position – Example 3

- Casual invigilator is paid £10/hour and works “as and when required”, typically only during exam periods
- In this example, works 232 hours in a year across 8 separate weeks
- Entitled to 5.6 weeks’ paid holiday
- 12.07% method = $232 \times £10 \times 12.07\% = \underline{\underline{£280.02}}$
- *Harpur Trust v Brazel* method = $5.6 \times (232 \times £10 / 8) = \underline{\underline{£1,624}}$
- May also be a casual invigilator at another unconnected employer – entitled to 5.6 weeks’ paid holiday there too.

Potential historic liability

- Holiday pay claims are notoriously complex and the specific time limit and (potential) compensation limit which applies will depend on the exact arrangements
- Schools who have never paid holiday pay to casual workers have the biggest risk – no time limit or compensation limit protection
- More complicated for schools who can show that they have paid holiday pay (even at the wrong rate). Broadly unlikely to be able to go back past the previous academic year, with an absolute two-year backstop from the date of any claim
- However, no absolute certainty for employers as there are always potential arguments about extending time limits or bringing claims under different legislation to get around time limits (e.g. part-time worker less favourable treatment claims)

Potential historic liability

- From a practical perspective, any potential claims will (most likely) be driven by the trade unions. How keen and quick will they be to mobilise their members who may be able to claim backpay?
- Likely to seek voluntary back-payment from employers in the first instance – through negotiation
- If claims were brought, most likely that large schools employers would be the first targets e.g. local authorities, larger multi-academy trusts
- Large-scale collective claims in Employment Tribunals typically take years rather than months

Potential alternatives – what should schools be doing?

- First step – understand how many workers you currently have who may be affected by this. Try to get a ballpark understanding of potential worst-case scenario financial liability.
- Consider whether you have any casual workers who haven't worked at all for a long period. If so, look at whether you can remove them from your books and P45 – casual staff who work sporadically are those who will potentially cause a disproportionate holiday pay liability.
- If you are retaining casual staff (even as an interim measure), consider whether you can offer them a small number of hours in weeks where they otherwise wouldn't work. This can help reduce holiday pay burden.
- Terminating all casual worker contracts is an option to consider, if operationally feasible. This will crystallise any time limit. However, take advice on risks where (a) casual workers have been employed for 2+ years; and/or (b) there are 20+ workers.

Potential alternatives – what other options do we have to meet staffing needs?

- Continue with current arrangements – ‘wait and see’
- Continue using casual staff and use updated holiday pay calculations – hard to quantify cost
- No other perfect solution which offers the same flexibility at low cost. Potential options (which may or may not be feasible depending on operational requirements) include:
 - Guaranteed fixed weekly hours
 - Guaranteed minimum weekly pay
 - Separate contract for each casual ‘assignment’ – no overarching contract between assignments
 - Annualised hours contract (potentially)
 - Overtime from existing staff
 - Supply agency
 - Mix of the above

What about regular term-time only staff?

- The *Harpur Trust v Brazel* judgment doesn't impact them in exactly the same way as they would almost certainly be held to have "normal working hours"
- 52-week average calculation for holiday pay when leave is taken therefore wouldn't apply
- Their rights are to (i) 5.6 weeks' holiday; and (ii) being paid at their normal rate when they take holiday
- Typical for all salaried employees to be paid an annual salary which takes account of their entitlement to paid holiday, so (ii) shouldn't be a problem.
- However, judgment still has some relevance - 5.6 weeks' leave cannot be pro-rated to less than 5.6 calendar weeks simply because a worker only works during 39 weeks of the year. Compliant with (i)?

TTO 'support staff'

- Generally employed on 'Green Book' / NJC terms
- Minimum Green Book FTE annual leave entitlement = 32 days or **6.4 weeks** (22 days plus 2 'extra statutory days' plus 8 public holidays)
- Entitlement increases to 35 days or **7 weeks** after 5 years' service
- Potentially an issue because of how the Green Book essentially converts annual leave entitlement into paid salary for TTO staff
- Staff work 39 weeks (or similar) regardless of holiday entitlement. Increased holiday entitlement is reflected in a higher salary

TTO 'support staff' – old pro-rating method

- Full-year staff with the Green Book's minimum 6.4 weeks' holiday entitlement work the remaining 45.6 weeks of the year
- TTO staff who work 39 weeks per year generally have their salary pro-rated based on $39/45.6 = \underline{85.53\%}$. This works out as 44.47 weeks' salary.
- As the TTO staff member work 39 weeks, this suggests that they are potentially only paid for another 5.47 weeks' holiday.
- This may now be a problem as the *Harpur Trust v Brazel* judgment sets out that they are still entitled to 5.6 weeks' holiday – which seems to cause a shortfall of 0.13 weeks' paid annual leave.

TTO 'support staff' – new pro-rating method

- Contained in the revised guidance in Part 4.12 of the Green Book, sent to schools in June 2021.
- Uses FTE of 260.71 working days per year. Employees on GB minimum entitlement of 32 days therefore work 228.71 days per year. They therefore accrue holiday at a rate of $32/228.71 = \underline{14\%}$.
- $14\% \times 195 \text{ days} = 27.3 \text{ days paid leave, plus } 195 \text{ days worked i.e. } 222.3 \text{ days } (\underline{85.27\%} \text{ FTE pay}).$
- For a TTO employee working 5 days per week during term-time, **27.3 days** equates to **5.46 weeks** – underpayment of **0.14 weeks** paid annual leave in light of *Harpur Trust v Brazel*?
- Green Book guidance referred to above thinks so (based on Court of Appeal judgment which was being appealed at the time). It says an additional **0.7 days** pay should be added to salary in these circumstances to total 28 days' paid leave in total (5.6 weeks for a 5-day TTO worker).

TTO 'support staff'

- The position is different for Green Book staff with service-linked enhanced annual leave entitlement of 7 weeks.
- This gives a total payment for 45.07 weeks' (including 6.07 weeks' paid leave) under the 'old method', or 225.24 days (including 30.24 days (or 6.05 weeks' paid leave) under the 'new method' (see Green Book example)
- *Harpur Trust v Brazel* does not stop employers from pro-rating salary or holiday, or say that casual workers must receive the same holiday pay entitlement as full-time year-round staff. TTO staff are not entitled to 32 or 35 full days' paid leave. Employers can still pro-rate provided that it is appropriate and done fairly, and ensuring that it doesn't reduce actual paid holiday entitlement below 5.6 weeks.
- However, there isn't any complete certainty around the position with regular TTO staff. The *Harpur* case underlines just how unpredictable the courts can be interpreting the WTR – we may have to wait for another case.

- The position is different again with teachers
- The Burgundy Book doesn't set out a specific annual leave entitlement for teachers in England and Wales. They are employed to work 195 days per year, with the default legal position being that their statutory holiday entitlement of 5.6 weeks is used during school closure periods and accounted for in their annual salary
- Unlike TTO staff employed on Green Book terms, teachers' salaries and holiday entitlements are not pro-rated based on the idea of a FTE 'year-round' teacher
- Nothing in the *Harpur* judgment suddenly suggests that teachers don't receive at least 5.6 weeks' paid holiday each year