NYES | Human Resources

Supreme Court Ruling - Harpur Trust v Brazel

What you need to know for part-time workers

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On 20th July 2022, the final decision was reached by the Supreme Court in relation to the Harpur Trust v Brazel Employment Tribunal; a long-running case first brought by the employee (Mrs L Brazel) in January 2017.

As this case has progressed NYES HR have endeavoured to keep you up-to-date on the often complex legal decisions and the impact they are likely to have on workplaces such as education establishments. As a result of the latest, final development in this case we wanted to provide an update on the situation including some frequently asked questions.

As always, if you have any further questions or queries specific to your setting please contact your allocated HR Advisor/Caseworker or Business Partner in the first instance.

Case Background

Harper Trust employed Ms Brazel to teach music to students under a contract that did not stipulate a set number of hours. Her hours per week depended on the number of lessons needed. Lessons only took place during school term-time, however Ms Brazel remained employed outside term-time.

The Trust took the following approach to calculate Ms Brazel's holiday and holiday pay; calculating 12.07% of the hours she worked in the previous term and paying her the hourly rate of pay for those hours. A common approach taken by employers and sometimes referred to as 'rolled-up holiday pay'. The method was also the one suggested to employers at the time by ACAS (the Advisory, Conciliation and Arbitration Service).

Ms Brazel viewed that this approach was detrimental and resulted in an incorrect calculation of holiday pay entitlement and chose to bring a claim for unlawful deduction from wages.

The Supreme Court Ruling – July 2022

The Supreme Court confirmed that part-year workers must receive 5.6 weeks' statutory holiday pay. This decision is legally binding for employers.

This relates to those workers employed "part-year" (for example term-time only workers, often referred to as TTO) on a continuing or permanent contract throughout the year but only work for certain periods across that year e.g. during school term-time.

These workers must receive 5.6 weeks' statutory holiday pay, which can include bank holidays, and any weeks in which an employee does not work should be discounted for the purpose of calculating statutory holiday pay entitlement. Basically, these workers must have their statutory holiday pay calculated in the same was as other full-year workers.

What now?

As the case has reached its final conclusion it is now appropriate and necessary to take action to ensure you pay your employees correctly in relation to holiday pay, presuming you did not make amendments in anticipation of the final outcome as some establishments previously chose to do.

By way of an example; North Yorkshire County Council (NYCC) took action prior to the final outcome (*at the point the Court of Appeal decision was known but before the Supreme Court verdict was decided*) as it was predicted the Supreme Court decision would be consistent and be found in favour of the employee.

A sensible starting place would be to ascertain from your payroll provider the various formulas/calculations being applied across the Academy/Trust and the reason for each variation.

One obvious reason for having a number of formulas is that, as an academy, you are likely to have employees on numerous contractual terms as a result of TUPE (unless the terms of employment have been re-negotiated post-TUPE).

Employees transferring to academy employment will likely have come across with an inherited formula/calculation used by the previous employers payroll function (for example the Local Authority, a diocese or another Academy Trust) at the point of conversion.

It is likely that any 'formula' is contractual. However, it is worth conducting a process to ascertain the contractual terms stipulated for term-time only holiday pay and consulting with HR and legal experts as appropriate to agree if these are in fact, contractual.

As a Trust/Academy you may have re-negotiated separate terms of employment for new employees joining you (those not joining under a TUPE arrangement) which stipulated a formula for calculating holiday pay.

If you have not already done so you will need to consider the agreed formula in this final judgement against the information provided by your payroll provider and identified in employment contracts to decide whether changes are required and how best to approach making them. NYES HR can support you by offering further advice and guidance based on the specific circumstances within your setting.

Back-pay claims

The Supreme Court ruling has not stipulated whether someone can or cannot make back-pay claims as a result of the findings of this case. As a result of this ambiguity we would tend to seek guidance from other relevant legislation as well as other recent tribunal findings.

Under the Deductions from Wages (Limitation) Regulations 2014, albeit with some exceptions, an employee is limited to making a back-claim two years from the date the claim is presented.

However, a recent noteworthy decision this time by the Court of Appeal of Northern Ireland deemed that unlawful deduction claims can go back many years and in another similar case relating to holiday pay, the Court of Appeal (UK and Wales) expressed their agreement with the views of Northern Ireland in that regard.

Again, by way of an example In June 2020 North Yorkshire County Council engaged in negotiations with UNISON to reach a collective agreement on back-pay for term-time only holiday pay. Nationally at the time UNISON were asking for 6 years back pay for employees and made clear that they expected Academies/Trusts to negotiate separately.

Where the arrangements in your establishment were not in-line with the Brazel judgement made at the Court of Appeal, Similar to NYCC, you may also have opted to enter negotiations with Trade Unions prior to the final verdict in readiness and anticipation of the final verdict.

As mentioned, UNISON previously expressed that Academies/Trusts would need to arrange separate negotiations on this matter as separate employers. However, as a number of Trusts within NYCC boundaries pay into the facilities arrangement, NYES-HR advised that, where UNISON is the only recognised union, it would be worth exploring with UNISON whether they would allow such academies to 'lift and apply' any agreement reached by NYCC on this matter.

Once you have ascertained the situation in relation to your organisation; whether the formulas in place did not provide the 5.6 weeks of statutory holiday pay for TTO workers; the number of employees in scope for a back-payment (employed currently and previously employed) etc. we recommend liaising with your recognised Trade Unions and taking HR and legal advice on the best course of action for your organisation (i.e. entering into negotiations for collective settlement and with what terms).

Common Questions and Responses

Can we make these changes without union involvement?

As such a change is extremely likely to constitute a change to employee's terms and conditions it would be appropriate to enter into consultation and negotiation with employees.

There may be additional complexities in relation to the recognition of unions for collective bargaining and also where a Trust crosses Local Authority boundaries therefore NYES-HR would recommend speaking with your HR Professional for advice and guidance on how best to approach this.

Remember, when and if consulting, you are likely to be addressing two matters;

- Making changes to the way holiday-pay is calculated going forward
- How to recompense employees where the previous formula being applied did not match the formula confirmed by the Supreme Court in July 2022, to their detriment

Does this stop me dictating when an employee takes leave?

This final Supreme Court judgement has not removed the ability to stipulate working and leave periods and such arrangements should be clear in an employee' contract of employment. It is recommended good practice to routinely bring the new academic-year arrangements to the attention of all staff, especially those that work term-time only on an annual basis with as much notice as possible but ideally within 12 weeks of the new academic year commencing (typically around first week of June). This is especially important for those employees working 'plus days' (days in addition to the term time days, for example during term time and 10 additional days) as you may have a 'fluid' arrangement as to when the additional days must be worked.

Can I simply move employees to a higher, hourly rate of pay to compensate for holiday pay?

In essence doing this would be classed as "rolled up" holiday pay and it is expected that holiday pay be a separate element to an individual's pay with payment made when leave is actually taken although most education establishments spread holiday pay across each pay-period equally.

Aside from the above, changes to an employee's salary could also likely cause further complications such as equal pay issues and role grading inconsistency so this approach is not advised.

What if we do nothing?

If, after completing a review of current arrangements you find your formula for calculating holiday pay payments is not consistent with the recent Supreme Court ruling, the Trust/Academy will be at significant risk of legal challenge should it chose to make no changes to current arrangements.

Useful Links & Further Reading:

- Employment Appeal Tribunal Decision: Mrs L Brazel v The Harpur Trust: UKEAT/0102/17/LA - GOV.UK (www.gov.uk)
- Supreme Court Decision Harpur Trust (Appellants) v Brazel (Respondent) - The Supreme Court
- Previous NYES HR Newsletters have provided information and advice. February and May 2020, plus February 2021.