Employment Law Brief

with

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Entitlement to paid annual leave has to be one of the most fiercely litigated subjects in employment law. One of the reasons for this is that the Working Time Regulations took a rigid and limited approach to what sums counted towards the calculation of a week's pay.

That approach has not withstood 20 years of case law from the European Court of Justice and there is now a significant mismatch between the words of the Working Time Regulations and a worker's rights under the Working Time Directive. Since the Regulations must be interpreted to comply with EU law (a position that is not immediately affected by Brexit) it is the worker's rights under the directive that prevail.

Slightly unusually, however, the latest decision from the Court of Appeal – The Harpur Trust v Brazel – centres of the operation of the Working Time Regulations themselves. It was actually the employer who argued (unsuccessfully) that EU law should take precedence. In a decision that will concern many in local government the Court upheld a ruling from the EAT that a casual term-time only music teacher had to have her holiday pay calculated on the basis of a twelve week average of her earnings – even though this gave her a proportionately higher entitlement than year-round staff.

The Working Time Regulations themselves seem pretty clear on this point. All workers are entitled to 5.6 weeks' leave - that is the four weeks' annual leave required by the Working Time Directive plus 1.6 weeks of additional leave set out in the Regulations to represent public holidays. Each week of leave must be paid at the rate of a normal week's pay. Where there are no normal working hours (as in this case) then a week's pay is determined by taking a twelve-week average.

An important point that is sometimes missed is that the weeks where the employee earns nothing, do not count towards this. So, if in the previous twelve weeks there were some weeks with no pay due, then you must pass over that week and count further back until you have twelve *paid* weeks on which to base the average.

In Brazel the employer had followed Acas guidance on holiday pay for casual workers and calculated holiday pay on the basis of 12.07 per cent of earnings. That calculation is based on the idea of holiday entitlement accruing with each hour worked. A worker employed throughout the year will work for 46.6 weeks with 5.6 weeks' holiday entitlement. The pay for 5.6 weeks works out as 12.07 per cent of the total paid in those 46.6 weeks.

The problem with this formula is that it was specifically designed for casual workers who do not have an ongoing contract with the employer. For them it is necessary to calculate their holiday entitlement at the end of each

period of work and the 12.07 per cent figure seems to be a reasonable way of doing that. The figure may also work for those who have a consistent working pattern throughout the year. But you cannot get away from the fact that the Working Time Regulations do not say that entitlement to holiday pay accrues with each hour worked. The formula to apply is the twelve-week average. If this results in a higher figure for term-time only workers (in Brazel's case it apparently came out at about 18 per cent) then why should the worker concerned not be entitled to the benefit of that?

The employer argued that to follow the Regulations gave part-timers an advantage over full timers. But there is no law against that. Part-time workers are protected from less favourable treatment under the Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000 but there is nothing preventing them from receiving more favourable treatment. In the Court of Appeal the employer argued that the European Court of Justice had accepted that the entitlement to paid annual leave was subject to the 'pro-rata' principle. We are used to having to interpret our domestic legislation so as to comply with EU law, but that only applies when that approach is needed to meet the minimum requirements of a directive. EU rights are a floor not a ceiling and the UK is free to improve on them. The Court of Appeal held that even if it could be said that the Working Time Regulations provided a better entitlement to annual than was strictly required under the directive, then that was not something with which they could interfere.

In a sense of course we already do have a pro-rata system. All workers are entitled to 5.6 weeks' leave but what constitutes a week will vary depending on the employee's working pattern. For someone working a standard five-day week that will amount to 28 days' leave in a year. For someone who works three days a week that will equate to 17 days (with a bit of rounding up). It is always worth remembering however that the Regulations deal in weeks and proportions of a week, not in days or hours.

The frustration for employers is that the approach dictated by the Regulations is not easy to reproduce in a payroll system. It is much easier to allocate a fixed percentage of a worker's pay as the basis for calculating holiday pay without having to worry about individual working patterns over variable periods of time. Add to this the difficulty of knowing whether or not overtime and other allowances are sufficiently regular and predictable to be included and it is easy to see why so many disputes arise. All the same, it is no defence to a claim to argue that your payroll software cannot easily perform the calculation that the Regulations require.

The most practical solution may be to agree regular top-up payments when the operation of the payroll system may result in an underpayment of holiday pay. This may not strictly count as compliance, but if workers are ultimately being paid what they are entitled to over the course of a year then it is unlikely that they will want to bring a claim.

Don't forget to check more about Darren Newman on his blog at A Range of Reasonable Responses or on twitter at @DazNewman