Employment Law Brief

with

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The saga has now ended – the Supreme Court has given its decision in the case of Harpur v The Brazel Trust. Ms Harpur first won her claim for unlawful deductions from wages in January 2017. More than five years later the Supreme Court has upheld that decision.

Calculating holiday pay dues under the Working Time Regulations (WTR) is a notoriously complicated exercise but I have always regarded this case as being rather straightforward. Ms Harpur is term-time only music teacher who is paid by the hour and whose hours of work vary throughout each term. There was no dispute that she is a 'worker' within the meaning of the WTR and so she is entitled to paid annual leave. The question is – how much leave, and how much was she entitled to be paid for it?

The question of the amount of leave could not be simpler – though some of the employer's arguments in the Supreme Court did seem to try to cloud the issue. The WTR state that all workers are entitled to 5.6 weeks' leave per year (that is made up of 4 weeks annual leave and 1.16 weeks additional leave but we can just lump the two together for the purposes of this case). There is no provision allowing workers who are employed for the whole year to get anything less than that. A part-time employee who works two days a week is still entitled 5.6 weeks leave – it is just that each of those weeks consists of two days off work.

So there was never really any doubt that Ms Harpur was entitled to 5.6 weeks' leave – even though she was only paid to work during term time. Her contract was in place for the whole year and so she was always going to be entitled to a whole years' worth of annual leave.

The question was a little more difficult when it came to calculating her holiday pay. When she took a week's leave – in practice she was told by the employer that 1.87 weeks of each school holiday would be treated as annual leave – she was at first paid according to the statutory formula. The WTR incorporate the same rules for calculating a week's pay as is used in other areas of employment law such as the calculation of a redundancy payment. For Ms Harpur That involved taking an average of her previous 12 weeks of paid work. It is worth noting that since April 2020 the averaging period has been increased to 52 weeks, but that did not affect Ms Harpur as her claim pre-dated that change.

At some stage however, the employer took on board ACAS guidance that – at the time – said that for casual workers the easiest way to calculate holiday was to pay the workers 12.07% on top of each hour they worked. So, when Ms Harpur took her holiday in the summer term, she would be paid 12.07% of the total amount she had earned since the Easter break.

That percentage figure is derived from the fact that there are 52 weeks in the year and someone who has a holiday entitlement of 5.6 weeks leave is therefore at work for 46.4 weeks. 5.6 is 12.07% of 46.4 so someone who is paid an extra 12.07% of their annual earnings has in effect been paid for an extra 5.6 weeks.

That strikes me as rather a complex way of going about things – but it does have the advantage of being an easy way for payroll software to calculate the holiday pay of casual workers.

Unfortunately, however, this method left Ms Harpur worse off. This is because the calculation of week's pay using an average of the previous 12 (now 52) weeks, any weeks where no pay is due are ignored and replaced by earlier weeks. In Ms Harpur's case, since a term might only be 10 weeks long that would involve brining in her pay from the last two weeks of the previous term. That gave her a more favourable rate for a week's pay than the percentage approach. It also meant that her holiday pay was higher than it would have been if she had worked at the same rate throughout the year rather than on a term-time only basis.

The employer argued that the percentage approach was fairer because it respected the pro rata principle. Taking a 12-week average would mean that Ms Harpur's holiday pay was a higher proportion of her annual earnings that the 12.07% that those employed across the whole year would achieve. They argued that the pro rata principle was enshrined in EU law and so it was necessary to interpret the Working Time Regulations so as to comply with that principle.

The employer's arguments might seem to have basic fairness on their side – and the way in which the averaging approach operates could certainly have some surprising results for workers who are only needed for a small part of the year. The example was given of an exam invigilator who remains under a contract for the whole year but is only called upon to work for a total of four weeks in the year. Such a worker would also be entitled to 5.6 weeks' leave – because all workers are – but the holiday pay for that worker would not be 12.07% of their earnings, but 5.6 times the amount the earned in the average week when they were actually working. Essentially holiday pay would more than double their annual earnings. Could that be right?

The Supreme Court made the sensible point that such an individual would be unlikely to be employed for the whole of the year. A much more common arrangement would be a short-term contract covering the period for which they were actually needed. At the end of the contract, they would be entitled to a payment for holiday accrued but not taken and their entitlement would not be the full entitlement of 5.6 weeks but proportionate to the amount of time they were employed – the 12.07% calculation would then be the right one for them.

If an employer were to give such workers contracts that remained in place throughout the year, then they would just have to live with the consequences in terms of holiday pay - because Ms Harpur's arguments had one overwhelming advantage over those of the employer. The approach to holiday pay she was arguing for was the one actually set out in the Regulations. The employer was arguing that those Regulations should be ignored and some other system put in place because it was more in line with EU law.

We are of course used – particularly when it comes to holiday pay – to ignoring the wording of legislation to

comply with EU law and it is worth emphasising that so far Brexit has made no difference to the approach the courts take. The WTR are part of what is called 'retained EU law' and must be interpreted with the same respect for EU law as they were before Brexit. But EU law only requires a minimum standard to be applied. The pro-rata principle protects part-time workers from less favourable treatment but nothing in EU law prevents them from being given more favourable treatment. The Working Time Directive might *allow* a different calculation of holiday pay in Ms Harpur's case but does not *require* it. It sets the minimum amount that Ms Harpur is entitled to, but if the Working Time Regulations provide for a more generous calculation then that is not a breach of the Directive. On that basis her claim was upheld.

The consequence is that all workers – whatever their working pattern – are entitled to 5.6 weeks' paid leave in each holiday year. Where their weekly pay varies with the amount of work they do then an average week's pay needs to be worked out based not on some percentage of their annual earnings – though that will be a useful formula to use in many cases – but on the average amount that they earn in the weeks when they are actually earning. Now that the Supreme Court has made the final decision, there can no longer be any doubt about that.