Calculating holiday entitlement for part-year and irregular hours workers

Employment Tax



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Following the recent Supreme Court judgment in *Harpur Trust v Brazel* [2022] UKSC 21, the government has consulted on the calculation of holiday entitlement received by workers who work part of the year only (part-year) and/or irregular hours. The proposals may be of interest to employment tax advisers or payroll providers.

Although it has no statutory basis, until fairly recently, it has been widely accepted that using a formula of 12.07% to calculate holiday entitlement for staff without normal working hours was a simple and effective ‘rule of thumb’. Broadly, the rule worked such that 12.07% x hours worked was given as holiday entitlement.

The UK Supreme Court has recently confirmed in *Harpur Trust v Brazel* [2022] UKSC 21 that the 12.07% holiday entitlement calculation method is incorrect for part-year workers on permanent contracts. In this case, by using the 12.07% method, the

Harper Trust had pro-rated Mrs Brazel's holiday entitlement both on the basis that she was part time (zero hours), but also on the basis that she only worked part of the year (term time). This resulted in less holiday pay than the alternative basis, which took into account her average earnings (and therefore that she was part time), but not that she only worked part year.

The Court said the 12.07% approach was wrong. Mrs Brazel was entitled to the full statutory minimum of 5.6 weeks (28 days) paid holiday entitlement per year, based on her average earnings. The result of the judgment in this case is thatpart-year workers are now entitled to a larger holiday entitlement than part-time workers who work the same total number of hours across the year.

An example of the impact of this, at the extreme end, is where an exam invigilator works one week a year and earns £100. If they remain employed for the remainder of the year, they would essentially be entitled to 5.6 weeks of holiday x £100, so £560.

In a consultation on the calculation of holiday entitlement following the judgment, the government proposes to introduce a holiday entitlement reference period for part-year and irregular hours workers, to ensure that their holiday entitlement is directly proportionate to the time they spend working. As well as dealing with the disparity between part-year and part-time workers caused by the *Brazel* case, the proposal would effectively formalise the 12.07% method for irregular-hours workers, which many employers already use and workers understand and know well.

LITRG has responded to the consultation, particularly focusing on agency workers who work through an umbrella company, given they are often irregular-hours workers and this is a specific area of interest for LITRG.

Our own analysis shows that the *Brazel* judgment should only affect umbrella workers where there are unpredictable periods when they will neither be working, nor on paid leave, but where the engagement nevertheless continues. Our 2021 'umbrella' report showed that (for various reasons) this was fairly unlikely, except for specific cases like supply teachers, etc. where there are often non-worked weeks. Although the reality, in our view, is that most umbrella workers are not really 'Brazel' type part-year workers at all (but full-year workers who just have variable hours each week), we welcome the proposals as an opportunity to bring clarity, certainty and consistency to what is a typically considered a very difficult and

technical area.

In our response, we said that workers will benefit from having improved clarity on their holiday entitlement, allowing them to know when they are not receiving their full entitlement. Umbrella companies will also benefit from the greater clarity in legislation, which will help them avoid accidental non-compliance. This should help workers receive the paid holiday they are entitled to. As an added benefit, holiday pay is taxable as normal income; this in turn will help to raise Exchequer receipts.

We also urged the government to state their position on rolled up holiday pay and to move forward with proposals to enable state enforcement of holiday pay as soon as possible – starting with a consultation to try and identify the most appropriate organisation for doing so.

Given that the proposal for a single enforcement body to protect workers' rights seems to have been put on hold, we wonder whether the idea that HMRC should undertake this role will be resurrected. We also wish to see any improved guidance for employers around holiday pay, including tailored guidance for the umbrella sector covering things like requirements for communicating about holiday entitlement.

The consultation closed on 9 March and although we can expect a swift response and next steps, until the proposals come into law, holiday entitlement for part-year workers should be calculated in line with the principles set out by the court in *Brazel*.

Our response can be found here: www.litrg.org.uk/ref2737

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