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Employment Law Update

The Harper Trust v Brazel (2019)

A recent landmark Court of Appeal ruling has changed the way holiday entitlement and pay should be calculated for part-year, permanent employees who work term-time only on zero-hour contracts. This court case affects a very specific type of contract but is still worth taking note of.

Ms Brazel was a music teacher on a zero-hour but permanent employment contract at Bedford Girls School. Her services were required regularly but she was only paid for the work she carried out, as per her contract of employment. Her employer provided more holidays than the statutory minimum so her paid holiday entitlements were calculated by assessing her earnings at the end of the three school terms and working out one-third of 12.07% of that figure. The method used by the school was the one recommended by ACAS, however Ms Brazel stated that her holiday entitlement should be calculated on her average weekly pay in the 12 weeks prior to the calculation date, and that she was therefore not receiving the correct amount of holiday entitlement and pay. Ms Brazel raised a claim with an Employment Tribunal, which ruled her employer was correct.

Ms Brazel appealed the decision and the Employment Appeal Tribunal ruled in her favour, arguing that the Working Time Directive clearly states that irregular workers should have their holiday entitlement calculated as Ms Brazel and section 224 argued. The interesting and controversial result is that this could mean that employees like Ms Brazel could end up with more holiday entitlement and pay than their full-time colleagues. When responding to this, the Employment Appeal Tribunal argued that part-time workers cannot be treated less favourably than full-time workers, but that nowhere in the Working Time Directive did it say that holiday entitlement **must** be calculated pro rata to ensure full-time employees are not treated less favourably than part-time employees.

Understandably, this ruling was then appealed by Bedford Girls School in the Court of Appeal. The school argued that it was necessary to pro rata Ms Brazel's holiday entitlement because if they didn't it would result in her and other zero-hour workers who only work part of the year, receiving significantly more holiday entitlement than full-time employees. The Court of Appeal disagreed, arguing that Ms Brazel only works part of the year and is a "part-year worker", not a part-time employee. The Working Time Directive only requires workers to accrue annual leave in proportion to the time they work, it does not place a requirement on employers to pro rata leave entitlements of "part-year workers" in comparison to "full-year workers", and therefore Ms Brazel's employer was wrong to do this.

This is a very important case as it affects how holiday entitlement and pay should be calculated for part-year, permanent employees who work term-time only on zero-hour contracts. What this ruling now means in practice, is that employees who fit this description are now entitled to 5.6 weeks holiday and pay, regardless of the amount of work they complete. An extreme example is that of the cricket coach who works one week of the year and earns £1,000 for that week, who would now be entitled to 5.6 weeks holiday, and £1,000 holiday pay per week. This is understandably a controversial ruling, the Government and ACAS are currently updating the advice they give employers on calculating holiday entitlement and pay, and many employers will now need to decide if any of their employees are affected by this ruling. Any employees who are affected may be entitled to receive back payments for under paid holiday within the last two years only.

However, we don't think employers need to overly worry about this ruling. In reality, it should only be a minority of employees who are affected as this type of contract is not very common. Secondly, it is highly likely that this ruling will be appealed in the Supreme Court, and many HR / Employment Law Professionals are expecting it to be overturned because it does potentially leave the door open for other similar claims form part-time or zero-hour employees who disagree with their holiday entitlement being calculated on a pro rata basis.

In the meantime, we advise employers to review the type of contracts in use and ask whether the right contracts are being used. For example, why does a Cricket teacher who only works one week of the year need to be employed on a permanent zero-hour contract? It would be more sensible to engage this employee on a fixed-term contract, or even source a self-employed Cricket teacher. The Court of Appeal Judge argued that this ruling would only be unfair in extreme cases where, most likely, the "wrong" type of employment contract was being used. If an employee is only needed for a certain number of weeks of the year, there is no need to retain the employee on a permanent zero-hour contract, so it would be wise for employers to conduct an audit of the type of employment contracts in operation within their Company.

Brexit – 31st October 2019

At the end of the month it may be possible that the country will leave the European Union without a deal (although it should be noted that there are current talks about delaying Brexit until January 2020). What this will mean for employment law remains to be seen, although it can be expected that our employment law will no longer be dictated or influenced by the European Court of Justice, in the future. In many ways, we will not know what Brexit means until it happens, especially if there is no deal, but what we can confirm is as follows:

- Right to work checks on EU and EEA nationals will continue to be as they currently are until January 2021. During this time, employers should use the "Prevention of Illegal Working" guidance that was published by the

Government in January 2019. EU and EEA nationals who plan to remain working and living within the UK will need to apply for “settled status”, which they have until December 2020 to do.

- A no-deal Brexit will end free movement as soon as possible, which means that free movement could end as early as 31st October 2019. A transitional period will be offered for EU workers up until January 2021, wherein EU citizens will be able to freely travel to the UK for work for a period of 3 months only. Any EU citizen who wishes to stay longer than the 3 months will be required to apply (and be approved) for Temporary Leave to Remain, which will give them the ability to remain living and working in the UK for up to 3 years. After this period of 3 years, the individual would be required to apply for leave to remain under the new skills-based immigration system that will be introduced from 2021, detailed information on this is yet to be provided.
- Irish citizens are entitled to remain living and working within the UK under the “Common Travel Area” agreement.

How We Can Help

If you have any queries relating to any of the above, please don’t hesitate to contact us at hradvice@hasslefreehr.co.uk