PAYROLL BRIEFING

HOLIDAY ENTITLEMENT AND PAY

February 2023

Introduction

For anyone involved with HR and/or payroll, the amount of holiday that someone is entitled to and the amount to pay in respect of that holiday, has in some situations become very complex and, since a Supreme Court ruling last summer, in certain circumstances results is some very illogical outcomes.

Who is entitled to holiday?

Individuals entitled to holiday are those with full time, part time or zero hours contracts. This covers all employees, all "workers". Self employed individuals are excluded unless the individual is working through an agency, when they are then classified as a "worker". For the purposes of this article, anyone entitled to holiday will be called "a worker(s)".

How much holiday leave are they entitled to?

The minimum amount of holiday that a worker is entitled to will depend on the number of days/hours that are worked. Holiday entitlement is built up from the day the worker starts working and includes time when they are on sick leave or any form of parental leave.

By law, a worker is entitled to a minimum of 28 days (5.6 weeks) paid holiday and this is usually made up of 20 days (4 weeks' holiday) plus an additional 8 days, which are usually bank holidays. Depending on the type of work performed, bank holidays may be rolled up into the entitlement and hence the worker may simply be given 28 days' holiday. An employer may offer additional holiday which will be written into the employment contract

If a worker works part time, eg 3 days a week, their statutory annual leave is 16.8 days (60% of 28 days), a straight proportion of the days worked compared with a full time worker; such workers are referred to as "part-time workers". If full time workers receive additional leave, the

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same rules must apply to part time workers eg if full time workers are given 33 days, including bank holidays, then the worker working three days a week, will be entitled to 19.8 days. This is all logical so far.

However, the position becomes more complicated for shift, term-time or zero hours workers with ongoing contracts, referred to as "part-year workers". Such workers are entitled to 28 days' holiday as a minimum; this is not apportioned. A UK Supreme Court ruling in 2022 (the Harpur Trust v Brazel case) clarified the rules involving a term time worker, contracted to work for 39 weeks a year, but employed by a school on a permanent basis (52 weeks a year), and required to take their annual leave during the school holidays. Whilst it may have logically been thought that this individual would be entitled to a proportion of the 28 days, as she only worked during term time, the Court ruled there was an entitlement to holiday of 28 days, regardless of how many weeks per year she worked.

This ruling gives rise to the anomaly that a part-year worker is entitled to the same amount of holiday as a full-time worker. In extreme cases, a worker who has only worked for say four weeks in any given year, but is on a permanent contract, will be entitled to a minimum of 28 days' holiday This can result in the worker's holiday pay being greater than their actual annual earnings when they worked! As a result of the ruling, workers who work a small number of weeks per year, but are engaged for the whole year, will see the greatest benefit from this case.

Minimum holiday that must be taken per annum

Ignoring the temporary provisions that came into effect during the pandemic, which are largely redundant now, a worker must take the statutory minimum holiday of 20 days (as apportioned if a part-time worker) in any given holiday year, with the possibility of carrying forward 8 days, if permitted within their employment contract. If a worker is entitled to more than 28 days, their contract should provide details of any allowed carry forward of holiday. A worker cannot decide to take a payment in lieu of holiday, ie receive an additional amount of pay compared with their normal salary, unless they are leaving the employment. In this situation, the employer can request that the worker takes their holiday during their notice period rather than pay an additional amount for untaken leave in their final pay.

It should be noted that it is the employer's responsibility to ensure that a worker does take their minimum holiday entitlement, as a refusal to let a worker take their holiday in the holiday year can be both a health and safety issue and employment issue, which are both protected by law. However, if an employee is given the opportunity to take holiday and chooses not to, they will lose the 20 days.

The carry forward of holiday is however permitted if an individual is on maternity/adoption leave or long term sick leave. The carry forward rules are different for these two circumstances:

1. for any maternity/adoption leave, a worker is entitled to carry forward their normal entitlement as if they were at work;
2. for long term sick leave, the minimum permitted carry forward is 20 days, subject to the employment contract providing a more generous carry forward.

How much to pay when a worker takes holiday

Whilst a payment in lieu of taking the minimum holiday is not permitted, the amount of pay when a worker is on holiday may need to be calculated in certain situations.

For a full time worker on a fixed salary, with an annual Christmas bonus, for example, the fact that the individual is on holiday is not relevant to their pay. Their pay will be the same as if they were at work.

However, if the worker is regularly paid commission, bonuses or overtime (guaranteed and possibly non guaranteed or voluntary), and by definition as they are on holiday will not be in a position to earn any additional sums over and above their basic pay, the amount they receive whilst on holiday should ensure they are not put in detriment. This calculation is only required, unless the employment contract states otherwise, for the first 4 weeks of their paid holiday. However,

some employers find it is easier to pay this additional amount across all the holiday. The overall principle is that holiday pay should reflect the worker's usual rate of pay as if they had been working.

Hence, if an individual's pay whilst on holiday needs to include additional amounts over and above their basic pay, the pay needs to be calculated by reference to their average weekly earnings over the previous 52 working weeks, and if during any of those 52 weeks the individual was not working, an earlier week should be used in its place, again ignoring when the individual was not working. The maximum look back period is 104 weeks. For an individual who has only been working for a shorter period, the period is based on the pay from when they commenced employment to date, using the same criteria. This basis can be complex as a high proportion of workers are paid monthly and information provided for the purposes of payroll will not provide sufficient detail for the calculation of average weekly earnings to be made.

This rule applies for workers on zero hours contracts and adds to the complexities of calculating holiday pay, as historically an employer would not have had the need to know when a worker was on holiday – as far as they were concerned, the worker was simply not available for work. In order for the worker to be paid, the employer must now know when the worker is on holiday, as holiday pay should be paid when the leave is taken.

The average weekly pay calculation, together with the way the actual holiday entitlement is calculated, can result in the greatest anomalies, especially where a worker has only worked for a few weeks, but is on a permanent contract and, when working, is paid a high amount – their holiday pay will be greater than a worker who has worked the same number of hours but over a greater number of weeks.

The only circumstance where a payment in lieu of holiday can be made is when a worker is leaving – the same principles for the calculations apply here both in terms of the amount of leave and the pay.

Holiday Pay calculated at 12.07% - no longer permitted

Various employment contracts, where the hours worked are variable or zero, include a provision for holiday pay based on the hourly rate at 12.07%. This is calculated by reference to the minimum holiday entitlement of 5.6 weeks divided by the number of weeks worked 46.4 weeks (52 less 5.6 weeks) giving 12.07%. For example, worker X is paid £15 per hour, plus holiday pay of £1.81 per hour, for every hour worked, to cover the time when the individual did not work and hence did not accrue any hours to be paid. Each pay period, worker X would have received £16.81 per hour. However, since the Supreme Court ruling, this is not permitted and all contracts with this clause must be amended.

Government Action

The Government has recognised the unintended anomalies of part year workers getting more holiday pay than part time workers, despite working the same number of hours across a year, that has arisen from the Supreme Court ruling. As a result it has opened a consultation for comments to try and rectify this point, which closes on 9 March. Whilst this may result in a more logical approach to holiday entitlement and pay, it is unlikely to be implemented until at least the end of the current calendar year and also will not be retrospective.

For those interested, here is a link to the consultation here.

Pages 17 and 18 gives some good examples of the anomalies created by the Supreme Court ruling.

Possible actions for employers

There are some areas which employers may wish to consider:

1. With regards to workers on zero hours or irregular hours contracts, does the contract need to remain in place if the individual is not generally being asked to work? Consider terminating the contract and then putting a new

one in place as and when the worker is required. It may be worthwhile introducing a system where all contracts for workers not actually working for a period of one month are reviewed, with a view to terminating the contract.

2. Review the way historic holiday entitlement and pay has been calculated and see whether any retrospective action is required. It should be noted that an employee can only bring a claim for underpaid holiday up to 3 months from the last underpayment. However, subject to certain rules, the backdated claim can be for a period of two years.
3. Do the current employment contracts need to be updated in terms of how holiday entitlement and/or pay is/are calculated? Particular attention should be paid to holiday pay clauses of 12.07% which are now illegal.

Conclusions

This is a hugely complex area and one which the Government recognises needs to be simplified. However, it is not likely that the law will change anytime soon and hence employers need to be aware of the recent ruling and consider what action they need. Whilst some employers may decide not to take any action, there is a risk that their workers may make claims against them, with the possibility if matters do not get resolved beforehand, of an employment tribunal.

If this area applies to you as an employer, you will need to consider what action is required. As always, discussing the process that you are going to adopt with your workers is highly recommended and is likely to reduce the possibility of legal action being taken against you.

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