

Harpur Trust v Brazel – Holiday Pay – July 2022

This Supreme Court case has substantially changed the way holiday pay is calculated for individuals employed on a permanent contract of employment who work only part of the year or irregular hours. This is a binding judgement, meaning holiday pay calculations for affected employees now need to comply with the below.

The specific circumstances of the case itself are available in the judgement ([here](#)); below are the outcomes and ramifications.

Outcome

- Individuals who are employed on a **permanent contract of employment** who work only part of the year and/or work irregularly are entitled to the full 5.6 weeks holiday per year, regardless of how much time they actually work during the year
- Calculations for holiday pay in this scenario should be as follows: determine the employee's average weekly pay, using a reference period of 52 weeks, and multiply that average weekly pay by 5.6 weeks
- If the employee has worked for you for less than 52 weeks, you will use the referenced period worked to date
- For more information and worked examples of calculating holiday pay for employees (or workers) with irregular hours, please see the Gov.uk guidance [here](#)
- This amended method of calculating holiday will result in increased holiday entitlement for those employees who are affected by this judgement. In fact, such employees will be eligible for proportionately more paid holiday than a colleague who works on a full-time basis.

Who is affected by the judgement

- This judgement (currently) only affects workers engaged on a permanent contract of employment who work irregular hours and/or part of the year and/or the contract is a "zero hours" arrangement
- Full-time permanent employees are unaffected by this judgement
- Fixed hour part-time permanent employees are unaffected by this judgement
- Temporary PAYE workers engaged directly by a staffing agency are unaffected, providing the worker is engaged on a temporary contract for services where each assignment constitutes a separate contract and no contract exists between assignments
- Self-employed (sole trader / CIS) and limited company contractors are unaffected by this judgement as they are not entitled to holiday pay anyway
- Umbrella company workers **are** affected by this judgement if the umbrella employs the worker on a permanent, zero-hours contract.

Next steps

- Check the contracts you use with direct PAYE workers to confirm they are not permanent employment contracts. If Labvolution has drafted your PAYE T&Cs, or if you use REC model contracts (without amendments), your contracts are already fit for purpose and you should not be exposed to any risk.

- If you use umbrella companies, ask them to confirm if the way they engage with workers means they are affected by the Harpur Trust judgement. Do bear in mind that it's likely the umbrella companies will be flooded with similar queries, so you may need to be patient when waiting for a response!
- If agencies and/or umbrellas are affected by the judgement, they have the following options for moving forward:
 - o Keep workers on their existing permanent contracts and increase their charges to agencies / end clients to account for the higher holiday pay entitlement (more detail below).
 - o Persuade workers to agree to terminate the existing permanent contract of employment and move to a temporary contract for services where each assignment constitutes a separate contract. Once the new contract is signed, the worker isn't affected by the judgement because of the temporary nature of the contract. Contracts further up the chain, between agencies and umbrellas, and agencies and clients, may also need to be amended, since contracts often require that the agency or umbrella "fully employ" their workers.
 - o If the worker refuses a change to their contract, then if the agency or umbrella terminates the contract anyway, that could constitute unfair dismissal and result in claims to an employment tribunal which can be costly and time-consuming. It may be possible to transfer the worker to a different umbrella company who does not use an employed model for any future assignments but again this would require the worker's agreement.
- If workers remain on permanent contracts going forward, the cost to employ those workers will increase due to the higher holiday pay entitlement. Therefore umbrellas will want to increase the rate paid by the agency, and the agency will want to increase the rate paid by the client, to accommodate those costs. Whether such increases are contractually enforceable will depend on the clauses in the contracts between the umbrella, agency and client. Contracts should therefore be reviewed to determine whether increased costs can be upcharged (without agreement if necessary) to the next party in the chain.
- If client charge rates are likely to increase, you will need to communicate with those clients as quickly as possible to determine the best way to move forward. Even where you have a contractual right to increase charge rates, some clients may simply refuse an uplift, in which case you may need to terminate the assignment or accept the erosion in margin caused by the additional holiday pay entitlement.
- Client contracts which reference the 12.07% multiplier for holiday calculations will need to be varied to reference the correct calculation method going forward (only for workers engaged on a permanent contract of employment).
- Check whether your KID templates for umbrella company workers reference the 12.07% multiplier. If it does, and the worker is going to continue on a permanent employment contract going forward, the KID template will need to be changed to reference average weekly pay (based on the 52-week reference period) x 5.6 weeks.
- Workers affected by this judgement may choose to bring retrospective claims for holiday pay against their employer, which may be your agency if you employ your PAYE workers, or may be an umbrella company if the umbrella uses an employment model for their workers.
- It's likely that some smaller agencies and umbrellas (possibly even some of the larger umbrellas) will not be sufficiently financially stable to pay out back-dated claims for all their

workers. Realistically not all agencies and umbrellas will survive the ramifications of this judgement. Keep a close eye on the financial viability of the 2nd tier agencies and/or umbrellas you are working with.

- It is very likely that other types of worker(s) who work irregular hours (e.g direct PAYE workers) will now bring similar claims to determine if they are also entitled to the higher holiday pay entitlement. We will keep you informed of any updates in this area.

For more information, guidance or support, please contact bernie@labvolution.com.