



# HR Bulletin

E-Update 82 – March 2018

## Term Time Holiday Pay

*The Employment Appeal Tribunal has ruled that it was not sufficient to set the holiday pay of a term-time only worker at the same 12.07% of earnings applied to those who worked throughout the year. This makes perfect sense if you just follow the logic of the Working Time Regulations.*

There are two key things to remember about holiday entitlement. The first is that entitlement is expressed in weeks rather than days. We might talk about workers being entitled to 28 days' holiday, but it is always worth remembering that the entitlement is set out in the Working Time Regulations as 5.6 weeks. This leads to the next key point, which is that workers who work less than 5 days a week are also entitled to 5.6 weeks' leave. An employer should be able to point to 5.6 weeks in the calendar year and say 'in these weeks, the worker was not required to come into work, but was still paid as normal'. Of course, then we have to figure out what 'paid as normal' means.

In *Brazel v The Harpur Trust* the worker was a casual music teacher at a school. Her hours of work varied and she only worked during term time. That meant that over the course of the year she would only be asked to work for between 32 and 35 weeks. Her contract specified, quite rightly, that she was entitled to 5.6 weeks' holiday per year. The issue was how the employer paid her for that holiday.

Her holiday pay was paid three times a year – at the end of April, August and December – so that her designated holiday period was always outside term-time. Her payment was based on the monthly time sheets she submitted showing the amount she had actually earned in the relevant reference period.

This was clearly right. As a worker whose work varied with the amount of work done, she was entitled to have her holiday pay calculated on the basis of an average of the previous 12 weeks' earnings.

The problem came when the school sought to 'cap' her holiday pay at 12.07% of her overall earnings. That figure was based on Acas guidance on calculating holiday pay for a casual worker. The guidance assumed that the worker works for 46.4 weeks in the year (that is, 52 weeks minus the 5.6 week holiday entitlement). In other words, if you take the hours worked over 46.4 weeks, the pay for an additional 5.6 weeks will work out as 12.07% of the amount paid for the hours worked.

Ms Brazel, however, only worked during term time. If, in a year, she only worked 32 weeks, then pay for an additional 5.6 weeks would amount to 17.5% of the money she earned during the year. The school's position was that it was appropriate to 'pro-rata' her holiday pay so that she was not put in a more favourable position than a worker who worked throughout the year. Ms Brazel argued that the Working Time Regulations clearly gave her a right to 5.6 weeks' paid leave based on the amount she earned in the weeks she actually worked.

The Tribunal rejected her claim, finding that the school was entitled to calculate her holiday pay in that way. They relied on two ECJ cases (*Greenfield v The Care Bureau Ltd* [2016] IRLR 62 and *Zentralbetriebsrat der Landeskrankenhäuser Tirols v Land Tirol* [2010] IRLR 631) which held that it was appropriate for holiday entitlement for part-timers to be calculated on a pro-rata basis.

The EAT nevertheless allowed the appeal. The pro-rata principle was a way of making sure that part-time workers were not placed at a disadvantage. There was no legal principle that prevented part-time workers being placed in a more favourable position than full-time workers. There was therefore no reason not to apply the clear words of the Working Time Regulations, which set out the basis on which a worker's holiday pay was to be calculated.

Ms Brazel was entitled, just like any other worker, to 5.6 weeks' holiday. Her holiday pay, under the Regulations, fell to be calculated on the basis of an average of the hours she worked in the previous 12-week period and there was no basis for applying any cap to that entitlement just because she was a term-time only worker.

The result of this case may seem like a windfall for the worker - but it strikes me as being right. Once you surrender to the logic of the Working Time Regulations, it follows that all workers are entitled to 5.6 weeks' leave and that leave should be calculated based on the amount they are normally paid when they are working. If Ms Brazel's holiday was taken in three instalments at the end of each term then her holiday pay had to be calculated as an average of the previous 12 weeks' earnings in each case. The fact that there were also a number of weeks in the year when she was not working and not entitled to be paid was neither here nor there.

It is worth noting that the provisions in the Employment Rights Act 1996 setting out the 12 week average, make it clear that any week in which no work is done is not counted (see s.223(1) if you're keen). So if the employer in this case had insisted on Ms Brazel taking her holiday just before the start of each term, following a period when she was not working, then her entitlement would have been the same.

The weeks of school holiday in which she did not work would not count towards the calculation of her average week's pay.

Another lesson emerging from this case is that employers should make it clear when a term-time only worker is actually on annual leave. The right, after all, is to take paid leave – not just to be given a payment representing holiday pay. It will not quite do to simply 'roll-up' holiday pay into an overall rate for a casual worker, because the amount of that entitlement will vary through the year and depend on exactly when holiday is taken. We should also remember that rolled-up holiday pay has been held to be a breach of the Working Time Directive (see the ECJ's decision in *Robinson-Steel v RD Retail Services Ltd* [2006] IRLR 386). On balance it is better if possible to designate fixed weeks in the year as holiday and make sure that the worker is paid for those weeks in the normal way.

## Keep in Touch

Twitter - @DazNewman

Blog – [darrennewman.wordpress.com](http://darrennewman.wordpress.com)

## #LOVEYOURHR

#collaborate

#digital

#mindset

WME and LGA are inviting you to attend a national conference and help us build upon the #LoveyourHR movement, initially established through the #LoveyourHR blog.

The movement is a reminder that the HR and OD profession plays a vital role in transforming public services and ultimately the communities we serve.

The #loveyourHR conference offers a unique opportunity to hear from a high profile line up of thought leaders and access an exciting programme of workshops and activities framed around three key themes we believe are critical ingredients to success and enablers to transformational change.

To really put people at the centre of what we do we need to **collaborate** with partners across the public sector to ensure our services are 'customer centric' and reflect the developing public sector reform agenda.

We must embrace the **digital** arena as a key enabler and most significantly, we should aim to create a culture with the right **mindset** and resilience to enable positive change where there is no blue print!

### Who should attend?

This public sector event is not just for **HR professionals** but is also aimed at those **working in organisational development, transformation, change management and resourcing** – in fact anyone who believes that whether you are recruiting, managing, developing or retaining talent, people are at the heart of what we do.

The #loveyourHR movement is a reminder that the HR profession plays a vital role in transforming our public services; so what better way to open our first conference than with HR Guru, **Dave Ulrich** who is flying in to deliver a keynote address. Dave is one of the most internationally renowned thought leaders and critical to our theme is his work focussing on the importance of engaging stakeholders through viewing our roles from the 'outside in'.

### Keynote Speakers

- David Wilson – To bring us up to speed on the digital pathway to success
- Dr Henry Kippin - Leading the public sector reform agenda for the West Midlands
- David D-Souza - Giving the CIPD perspective on the future of our work is

### Book your place now!

This event is not to be missed if you work in HR, OD transformation, change management, and resourcing or any public sector role where you need to put people at the heart of what you.

With a charismatic line up of speakers and a great value price of just £220 + VAT we anticipate demand for places to be high, so book early to avoid disappointment.

**Early bird - £195 + VAT on bookings confirmed by 16<sup>th</sup> April 2018**

### To book your place

<https://www.smartsurvey.co.uk/s/loveyourhrregistration/>