

Brazel Special Severance Payments

Philip Bundy

Senior Adviser, Employment Law

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Brazel (AB 705): the facts

- Mrs Brazel is a visiting music teacher
- Zero hours contract: worked mainly during term time only
- Contract stipulated she was entitled to 5.6 weeks' leave, as per the Working Time Regulations 1998 (WTR)
- She was paid holiday pay using 12.07% formula: Acas
- She claimed her statutory holiday pay should be calculated in line with the week's pay provisions in the Employment Rights Act 1996 as WTR state

S.221-224 of the ERA

- S.221-3 cover those with normal working hours and s.224 those with no normal working hours
- S.224: average pay in the previous 12 weeks/52 weeks in the case of annual leave (up to 104 weeks if discounting)
- **In doing so you discount any week in which no remuneration was payable**
- In Mrs Brazel's case that means discounting school closure periods

Impact of discounting weeks

- It pushes up the week's pay figure to above 12.07%
- Doesn't factor in any pro-rating for the fact that the employee works less than a whole year
- E.g. TTO worker works 5 days per week during term time you get 5.6 weeks' holiday based on pay for a 5 day week, so the same pay/holiday as a 5 days a week full year worker

Supreme Court Decision

- The employer argued the WTR/ERA week's pay provisions should be read so as to provide for pro-rating due to the fact Mrs Brazel was a TTO worker
- The Supreme Court rejected that: the WTR/ERA provisions are clear and building in a pro-rating principle would create a whole new scheme. Regulation 16 of the WTR reflected a policy choice by Parliament to apply the ERA provisions as they stand

Who does the decision apply to?

- All workers: All workers get the 5.6 weeks' pay as set out in the WTR - the SC has simply said you apply the week's pay provisions for pay during those weeks
- So for casual/zero hours workers you carry out the average of 52 weeks' pay calculation, discounting weeks not worked
- 'Absurd' result in some circumstances: exam invigilator on permanent all-year contract works 3 weeks full-time a year but gets 5.6 weeks' holiday and pay

Fixed-term casual workers

- If employed on separate fixed-term contracts then the WTR provide for pro-rating of the 5.6 weeks' holiday entitlement
- You can pay in lieu on termination on a pro-rata leave accrued basis (reg 14)
- But where there are a number of separate fixed-term contracts is there an umbrella one, so employment continues between?

Fixed-term casual workers

- Umbrella contracts: crucial test, is there mutuality of obligation during periods when not working?
- A commitment on the part of the employer to offer work and on the worker to accept work - many terms of engagement are drafted with express terms which deny any such commitments
- Audit and decide on the correct approach?
- Practical issues of managing separate contracts

Contractual entitlements

- You get the better of your statutory or contractual entitlement
 - Reg 17 “Where during any period a worker is entitled to a rest period, rest break or annual leave both under a provision of these Regulations and under a separate provision (including a provision of his contract), he may not exercise the two rights separately, but may, in taking a rest period, break or leave during that period, take advantage of whichever right is, in any particular respect, the more favourable.”
- Green Book guidance on calculating pro-rata contractual leave for TTO employees (Part 4.12 plus [3 December 2022 NJC Circular](#))

Time limits

- Claims should generally be brought within three months of the unlawful deductions
- If an employee has been paid correctly for the last three months it breaks the chain
- In any event, only two years' back pay can be claimed
- Breach of contract claim (six years' back pay)? Not if a claim for statutory holiday pay: reg.16(4) provides WTR pay entitlement does not confer a contractual right

Proposed reforms

- [Closed Consultation](#) on annual leave for part-year and irregular hours workers
- 52-week holiday **entitlement** reference period, **including** weeks not worked
- Holiday entitlement = 12.07% of the hours worked during the past year (5.6 weeks is 12.07% of 46.4 working weeks)
- Pay for that calculated under existing ERA method
- Monthly accrual in first year: 12.07% of hours worked in the previous month

Special severance payments

- 12 May 22: [Statutory Guidance](#) issued on SSPs ([AB 703](#))
- It applies to ‘best value authorities’: includes councils
- Purpose is to set out what SSPs are and the criteria employers should consider in the ‘exceptional circumstances’ where it may be appropriate to make an SSP
- Payments made to employees, office holders, workers, contractors and ‘others’ **outside of** statutory, contractual or other requirements when leaving employment/service

Special severance payments

- Issues with the guidance
- Does it apply to maintained school employees, fire and rescue authorities, PCCs and PFCCs? On the face of it yes, but accompanying documentation indicates otherwise
- Approval process: payments between £20k and £100k must be approved by the Leader: is that lawful? Staffing functions are non-executive ones
- Please report any issues to us at eru@local.gov.uk

Further information

<https://www.local.gov.uk/our-support/workforce-and-hr-support/employment-relations>