

Advice note: The Harpur Trust v Brazel – Part-year and Casual Workers

Audience: Schools and Multi-Academy Trusts

Action required: Review your contracted workers who are paid/work less than 52 weeks and review casual worker arrangements. Where changes are required to comply, please instruct us via the 'Support Staff Pay Award' survey on the Portal

EPM support: Please contact your named HR Adviser for further support

Summary

Following the ruling that a worker who only works for part of a year (e.g. a term time only worker) is entitled to the same statutory holiday pay as their colleagues who work all year round, it's imperative to ensure that your workers are paid accordingly.

Contracted, part-year workers

As per our previous [*advice note \(The Harpur Trust v Brazel – Supreme Court ruling\)*](#), we strongly recommend that you review your contracted workers who are on contracts of less than 52 weeks to determine whether they are paid less than 5.6 weeks annual leave and, therefore, in breach of the Working Time Directive.

You can review this by assessing the entitlement weeks paid to your staff. In most cases, for customers who buy into an HR Admin and/or Payroll contract with EPM, this will be visible on your Staff List report available on the EPM Portal, in the '**Reporting**' and '**Standard Reports**' section. Column BC will indicate the entitlement weeks payable on each individual contract. If this does not accurately reflect the pro-rata annual leave that you pay your staff, due to the calculations that we have been instructed to use for your employees, please contact your named HR Adviser at EPM (or other relevant HR Adviser provider) for further advice.

If you need to instruct us to make an amendment to your employees' entitlement weeks to ensure that they do not fall below 5.6 weeks, please use the support staff survey on the Portal to confirm. You are also able to inform us of your decision regarding the support staff pay award, if known at this time, using the same survey on the Portal. If you instruct us to adjust the entitlement weeks for those affected by the ruling, prior to confirming your support staff pay award, you only need to answer the relevant questions on the survey regarding Brazel v Harper Trust and submit your pay award decision via the Portal once confirmed. We will send a further update on the support staff pay award pending the outcome of ongoing union consultations.

For any updates to the terms and conditions of pay, such as entitlement weeks and pay scale changes, you must inform us **no later than the**

1st of the month for the instruction to be effective in that month's payroll, otherwise the changes will be made the following month.

We are in the process of drafting an example communication that can be sent to contracted staff to inform them of the action you are taking to address the potential implications of The Harper Trust v Brazel case - these will be available in due course.

Casual workers

It is important to review casual worker arrangements and ensure that you are comfortable that all workers you are paying as 'casual' meet the definition of a casual worker. You must also end any live casual appointments where the worker is no longer undertaking work for you.

Where EPM processes the payroll, we are developing a report to help with this exercise, to identify the last occasion that pay was received against each casual appointment.

How do I know if a person is a genuine casual worker or an employee?

This is an important question despite there being no simple answer, since employees and workers have different rights, responsibilities, and obligations. The employment status of an individual depends on the nature of the relationship between them and the organisation engaging them. If the organisation engages a person on an ad hoc basis (such as during staff shortages, busy times of the year, or when an emergency arises), and recognises that they can turn down the request to work, the person is unlikely to be an employee. However, if the organisation regularises the arrangement with them to provide work on specified days and times, which are agreed, it is likely that the individual is an employee. Therefore, irrespective of what you call them, 'casual workers' who are regularly paid on a 'claims' basis through the school payroll are likely to have the legal status of an employee.

Gov.uk states:

"Someone who works for a business is probably an employee if most of the following are true:

- they're required to work regularly unless they're on leave, for example [they're on holiday](#) or [on sick leave](#) or [on maternity leave](#)*
- they're required to do a minimum number of hours and expect to be paid for time worked*
- a manager or supervisor is responsible for their workload, saying when a piece of work should be finished and how it should be done*
- they cannot send someone else to do their work*
- the business's disciplinary and grievance procedures apply to them*
- the business provides the materials, tools and equipment for their work"*

Ultimately, an Employment Tribunal will determine the true nature of the contractual relationship, based on the facts of each case.

In some cases, Schools/Trusts will need to weigh up the risk of a claim from an individual that they meet the definition of an employee with the benefits of continuing to engage them as a casual worker, if this is what is required. If you are unsure whether you should change how any of your current casual workers should be categorised, or would like to discuss this further, please contact a member of the HR Advisory team directly. If you do not buy into an HR Advisory service with EPM, we suggest contacting your HR Adviser for further advice.

How should I calculate pay for holiday for a casual worker?

Where you continue to engage workers on a casual basis, you will need to ensure that their entitlement to annual leave is calculated in accordance with the following guidelines:

- [Calculating holiday pay for workers without fixed hours or pay](#)
- (Full guide) [Holiday pay: calculating holiday pay for workers without fixed hours or pay](#)

This may mean ensuring that you have appropriate systems and record-keeping in place at the School (or Trust) level to enable you to calculate the correct holiday pay as per the above Government guidance, referring to 52 weeks (up to 104 weeks) as required. Employers should no longer pay rolled up/accrual holiday entitlement within the hourly rate for casual work, such as 12.07%.

When should I pay holiday to a casual worker?

Given that you can direct when workers take holiday, you may wish to consider paying holiday pay at regular intervals such as at the end of each term (or half term). For example, this would mean paying 1.87 weeks holiday pay at the end of each term ($5.6/3=1.87$). This means you would only need to re-calculate the average weekly pay over the last 52 paid weeks at three times throughout the year, which is likely to be more administratively manageable. However, consideration should be given to those workers who request that outstanding leave is paid at a particular point, especially if they anticipate not undertaking any further work for you.

How do I pay holiday pay to my casual workers?

For EPM Payroll customers, we have removed all holiday pay accrual options from the variance options. Any holiday pay due to be paid to casual workers will need to be calculated using the guidance above, based on the minimum 52-week reference period calculation, and input the amount as a cash value.

The payments should be processed in line with your agreed frequency as communicated to your casual workers (e.g. termly, half termly or monthly).

Communication with casual workers

If you are not currently using a casual worker letter of engagement it would be advisable to begin doing so, so that you have documentation which makes clear to casual workers how they will accrue holiday, how you will calculate pay for holiday, and when this will be paid.

We will be updating our template/model casual worker letter of engagement, which can be adapted/modified for use according to your specific arrangements.

Casual workers who meet the definition of an employee

There are several options to consider if you wish to place any of your current casual workers on a contract of employment. Before placing an individual on a contract of employment, please consider the following points:

- As an employee they would be entitled to contractual benefits such as sick pay, contractual annual leave, contractual notice, and any other contractual benefits in place.
- For contracts of over 3 months, the employee will be automatically enrolled into the pension scheme if they meet the criteria. They will have the option to opt-out but must not be encouraged or expected to do so.
- As an employee they will accrue employment rights (such as the right to claim unfair dismissal).

In any event, if they meet the definition of an employee, then they could claim that they have accrued these rights even if they were classified and paid as a casual worker.

It's important to remember that there are different types of contracts of employment which you could use for your employees. The most common is a typical permanent or fixed-term contract, which will be applicable in most cases:

- **Permanent, or fixed-term, contract**

This will apply if the individual is working regularly (i.e. every week of term time) even if the number of hours worked vary. You may wish to consider setting up a permanent contract for a minimum number of hours usually worked, and then pay either additional hours as a temporary increase to the contract for a specified period (i.e. a term), or overtime when they work over this number in a particular week.

Alternative options which you may consider are:

- **Short-term, temporary, contract**

You may wish to consider placing the individual on a short-term, temporary, contract to cover a specific period of work. This is most likely to apply to roles such as Exam Invigilators. The contract is

likely to be on a 52-week (i.e. full time weeks) basis, as these individuals will not meet the definition of a term time only or part-year worker. You would need to calculate their entitlement to annual leave over the period of their contract, as you would with any 52-week worker, and either arrange for them to take this leave with pay or instruct EPM (or your Payroll provider) to pay as a lump sum at the end of their contract.

- **Annualised hours contract**

This is only applicable in circumstances where the individual is required to work a specified number of hours, at set times over the year (for example, a Clerk to Governors). Points to consider, in addition to those mentioned above, include keeping a log of what has been worked - if the employee were to leave, you would need to calculate whether they had been over or underpaid at that point.

What do we need to do about staff who have left us?

Failure to pay correct holiday pay is an unlawful deduction from wages. An individual must make a claim for this within 3 months of the last unlawful deduction (i.e., the last time that holiday pay was paid incorrectly, in this case), therefore, for individuals who have not worked for you (either casually or under a contract of employment), for more than 3 months, are likely to be time barred from making a claim against you (note: there are some limited circumstances where an Employment Tribunal may agree to extend the 3-month time limit).

For individuals who have left within the last 3 months, you may wish to automatically assess whether they are entitled to any additional pay because of the ruling and make the payment. Alternatively, you may wish to wait to see if they make a claim for the underpayment, in which case you would be required to pay any monies due and backdate where appropriate.

Questions

- **We pay our TTO staff more than 5.6 weeks statutory leave, does this affect us?**

Potentially. The ruling only applies to statutory leave (being the 5.6 weeks), so employers are still able to pro-rata contractual leave over and above the 5.6 statutory weeks for part-year workers (such as TTO staff). However, many Schools are likely to have some staff (often those with under 5 years' service) who receive less than 5.6 weeks annual leave/holiday pay in total once the calculation to pro-rata leave is applied.

- **How quickly do we have to implement the change?**

Technically, the legal decision is effective immediately. However, providing that employers are taking reasonable steps to resolve and aren't intentionally delaying action to avoid paying or to disadvantage their employees/workers, then it is unlikely to be problematic. Potentially, an employee or worker could raise a claim for any underpaid holiday at any point, but you can't do much more than assess the claim and take steps to resolve within a reasonable timeframe. There will be pressure if an employee or worker leaves as they will want to ensure they are not time barred.

- **How far back do we have to backdate payment?**

The effect of the Deduction from Wages (Limitation) Regulations 2014 is that, for claims presented on or after 1 July 2015, Employment Tribunals can't look back any further than 2 years from the date of the complaint when considering unlawful deductions. Therefore, for any workers who have not received the correct entitlement to annual leave, you should ensure that any corrections to annual leave are backdated for 2 years.

- **What is the definition of a genuine casual worker?**

See advice note > [*Atypical Workers and Different Types of Employment Contracts*](#)

- **How do we calculate holiday pay for a worker who is paid casually for work they undertake?**

The following Gov.uk link provides the best explanation and examples of the calculation to be used: [Calculating holiday pay for workers without fixed hours or pay](#)

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