Wolferstans Update Harpur Trust v Brazel

At the end of the summer the Supreme Court ruled in the above case that employees who only work for part of the year (e.g. term-time workers or zero hours workers) are entitled to 5.6 weeks of holiday pay like employees that work all year round. This will potentially impact any employer with term time employees, zero hours employees or other atypical working arrangements which involve employees being employed for a full year, but working only for part of that year. Employers should confirm without delay whether they have any holiday pay liability as a result of this case, develop a plan to mitigate historic risk and change arrangements to ensure future compliance.

Facts

The case involved a music teacher that only worked during school terms and had a zero hours contract. The employee was deemed to take annual leave during the school holidays and from 2011 onwards, in line with ACAS guidance at that time, the employer would calculate her earnings at the end of each term, take 12.07% of that figure and pay the applicable hourly rate for that number of hours as holiday pay. The employee argued that she should instead have had her holiday pay calculated by taking an average of her earnings (from 6 April 2020 the reference period used should be 52 weeks), which would have resulted in a higher amount of holiday pay.

The Supreme Court agreed with the Court of Appeal and the Employment Appeal Tribunal that the employee was correct. It held that the amount of leave the employee was entitled to did not need to be pro-rated so that it was proportional to that of a full-time employee. The court acknowledged that this may create odd results, where a part-year employee's holiday pay represents a higher proportion of their annual pay than that of a full-time employee. However, the court found that whilst those with an atypical working pattern may benefit from this approach, it was not so absurd as to justify the wholesale revision of the holiday pay calculation set out in the legislation.

Impact

The impact of this case is that employers should no longer be using the 12.07% holiday pay calculation for employees, which has been common practice for those on zero-hours contracts.

In addition, it means that the holiday pay for employees that work for only part of the year will be proportionally higher than that of an employee that works full time. As an example, if an employee without fixed hours is employed for a whole year but only works for 20 weeks in that year and is paid £100 for each week they work, they will accrue the full 5.6 weeks of holiday entitlement and be entitled to £560 as holiday pay (the equivalent of 28% of annual pay). Whereas an employee that works all year round would work for 46.4 weeks a year and take the remaining 5.6 weeks as holiday. If they also earned £100 per week, their holiday pay would also be £560, but this would be the equivalent of 12.07% of annual pay.

Employers often pro-rate the holiday entitlement for employees that only work for part of the year so that their holiday entitlement reflects how much work they have performed. The Supreme Court

has now found that this is the wrong approach and employees' holiday pay entitlement is based on how long an employee is employed for within a year, rather than how much work they perform in that time. If an employee starts or leaves part-way through a holiday year, then you can still pro-rata this calculation.

Employers will need to check whether this decision impacts any of their employees, whether they need to take steps to change holiday pay practices and consider if it is necessary to make repayments (back pay) to employees that have been underpaid for their annual leave as a result of the 12.07% holiday pay calculation.

In simple terms…….all employees are entitled to 5.6 weeks holiday pay, so if you are currently using the 12.07% calculation for TTO staff with variable hours, or any casual/zero hours staff, they are being paid incorrectly. Furthermore, if you are paying TTO staff, employed for 39 weeks, less than 44.6 weeks' pay, they are being paid incorrectly. The expectation from the Unions is that you will consult with them, start paying staff correctly and agree a sum for back pay. We are aware that other Trusts (outside of the region) have negotiated 2 or 4 weeks back pay per employee. Alternatively, if you start paying the employees correctly, there is an argument that this starts the clock running for the time limit for pursuing a claim – in these circumstances, if you pay your staff correctly for 3 months, they will then be out of time to purse a claim.

The calculation you would need to do is as follows:

Conduct an audit as to how many casual/TTO/zero hours staff you employ. You will then need to go back and calculate 52 weeks' pay (excluding weeks with £0 pay) for each member of staff that is casual/TTO/zero hours. You must go back until you have 52 weeks, with pay, so you will likely have to go back 60+ weeks. You can go back up to 104 weeks to get to 52 weeks with pay if you need to. If you have someone who has not had 52 weeks of pay yet then you will just need to take the highest figure that you can, using the past two years.

You then add all of these weeks together and divide them by 52 (or the highest number of weeks that you could get) and this is then your average weekly pay for that employee. You multiply this figure by 5.6, and this is what that member of staff needs to be paid in a year for their holiday pay. It is up to you/whatever is agreed between you and them as to the frequency at which you pay this figure. You could make partial payments each term/quarter/every 6 months. For zero hours or casual staff, you will need to recalculate it each time as it could change. We would expect your payroll provider to come up with something to help calculate this at some point.