



Brachers Bitesize

Holiday pay case law update

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Presented by:

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Today's session

- 01** Summary: what is new?
- 02** Key case law developments
- 03** Tricky areas

Presenter



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Abigail joined Brachers' Employment team in 2011. She has represented several NHS Trusts in cases covering unfair dismissal (including constructive dismissal), unlawful deduction from wages, discrimination and whistleblowing.

Abigail advises on a broad range of day-to-day workplace issues, both contentious and non-contentious, and is regularly called upon to give advice on settlement agreements.

She also provides training for employers, focussing on providing practical guidance for businesses.

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Holiday pay: what's new?

Case law developments

- Recent developments have highlighted main risks for holiday pay claims:
 1. Wrong categorisation of individuals
 - *Uber v Aslam*
 2. Underpaying holiday pay
 - *Dudley Metropolitan Borough Council v Willetts and Others*
 - *East of England Ambulance Service NHS Trust v Flowers [2019]*
 3. Carrying forward untaken annual leave
 - *Sash Windows*
 - *Smith v Pimlico Plumbers*

Holiday pay: what's new?

Change to reference period

- Change to reference period for calculating holiday pay for workers without normal hours, piece workers and shift workers
- Recommendation from the Good Work Plan
- Reference period extended from 12 to 52 weeks in respect of holiday pay due on or after 6 April 2020
- The Employment Rights (Employment Particulars and Paid Annual Leave (Amendment) Regulations 2018

Uber BV v Aslam and Others [2018]

Worker status

- Uber drivers classed as workers and not self-employed – entitled to holiday and sick pay
- Significant liability for historic holiday back pay
- Important to assess arrangements in place, particularly if engaging self-employed contractors

Dudley Metropolitan Borough Council v Willetts and Others

Should voluntary overtime be included in holiday pay?

- Evolution of case law – non-guaranteed overtime must be included in calculating holiday pay
- Question of voluntary overtime not directly dealt with
- EAT in 2017 – *Dudley Metropolitan Borough Council v Willetts and Others*
- Holiday pay should correspond to “normal” remuneration so as not to discourage workers from taking annual leave
- Court of Appeal approved *Willetts* in *Flowers v East of England Ambulance Service*

Flowers v East of England Ambulance Service

Should voluntary overtime be included in holiday pay?

- Article 7 Working Time Directive – pay which is “normally received” to be paid during periods of holiday
- Intrinsic or direct link required between payment claimed and the work a worker is **required** to carry out
- Voluntary overtime must be paid if carried out over a sufficient period of time on a regular or recurring basis

Flowers v East of England Ambulance Service

What do these cases mean?

- Voluntary overtime should be taken into account when calculating holiday pay
- Arguments around overtime holiday pay likely to involve regularity and predictability of any voluntary overtime
- Question of fact
- Audit approach to ensure compliant with Court of Appeal ruling.

Smith v Pimlico Plumbers [2022]

Background - right to paid holiday in UK

- 5.6 weeks paid holiday under the Working Time Regulations 1998
 - 4 weeks European Working Time Directive leave
 - 1.6 weeks leave under domestic law
- Holiday pay claims can be brought:
 - Under s.23 ERA 1996 as an unlawful deduction from wages
 - Under 30(1)(b) WTR 1998 for unpaid holiday pay
 - Under Regulation 14 WTR as a separate claim for payment in lieu of unpaid holiday on termination of a contract

Smith v Pimlico Plumbers [2022]

Background

- Mr Smith held to be a worker – in principle entitled to 5.6 weeks' paid leave
- He had taken leave but not been paid for it
- He claimed for pay for holiday taken but not paid under WTR and unlawful deduction from wages under ERA
- Relied upon case of *King v Sash Window Workshop*
- ECJ in *King* – provided for payment on termination for any periods of untaken annual leave accrued during employment, where the worker has been discouraged from taking that leave because it would have been unpaid

Smith v Pimlico Plumbers [2022]

Carry over of annual leave

- Ruling in *King v Sash Windows* allows a worker to claim for untaken leave during the whole period of the engagement
- Mr Smith had taken the holiday but not been paid for it
- *Smith* concerns the carry over of the right to be **paid** for annual leave from one holiday year to the next
- A worker will only lose the right to paid leave when the employer has given the worker the opportunity to take paid annual leave, encouraged them to do so, and informed them that the right would be lost at the end of the leave year
- If employer does not do so – the right carries over and accumulates. Crystallises on termination

Smith v Pimlico Plumbers [2022]

What does this case mean?

- Implications for gig economy workers
- No back stop
- *Smith* did not address the situation where workers have been given the right to paid holiday but the employer has underpaid them.
- Possibly the next development?
- Only applies to four weeks' paid holiday entitlement under EU legislation

Brazel v Harpur Trust

Holiday for part-year workers

- Claimant employed on a permanent zero hours contract
- Part-time worker in two senses:
 - Did not work a full working week
 - During school holidays, did not work for Harpur Trust at all (a “part-year” worker)
- Mrs Brazel paid three equal payments for holiday at the end of each term calculated at 12.07% of her earnings at the end of each term in line with ACAS guidance
- Standard working year – 46.4 weeks (52 weeks less 5.6 weeks)
5.6 weeks = 12.07% of 46.4 weeks.

Brazel v Harpur Trust

Holiday for part-year workers

- Claimant argued that 12.07% approach not compliant with calculation required by WTR 1998
- Argued she should be entitled to 5.6 weeks' paid leave and holiday not pro-rated, despite not working the full year
- Court of Appeal agreed with Mrs Brazel – holiday should be calculated at the end of each term based on average earnings over last 12 paid weeks
- Resulted in higher rate of pay for part-year workers

Brazel v Harpur Trust

What does this case mean for employers?

- As it stands - no legal basis to pro-rate 5.6 weeks' holiday entitlement for part-year workers
- Applies to permanent contracts
- Those working a small part of the year could be entitled to a high proportion of their annual earnings in holiday pay
- Supreme Court decision awaited
- Claims will be limited to unlawful deductions made in the past two years
- Consider your arrangements and potential exposure

Common Tricky Areas

- Use of “rolled up” holiday pay
- Calculating holiday pay for zero hours workers
- Paying in lieu of accrued annual leave for employees on long-term sick leave

About Brachers' Employment team

Our [Employment and HR team](#) take pride in delivering employment law and HR services that are tailored to your needs. We are dedicated to listening and learning about your business to understanding the challenges you face, your ambitions, and how to retain, your key asset, your people.

We are one of the largest employment and HR teams in the South East, working alongside businesses with 60,000 employees in the region.

Free online consultation

If you have any questions arising from the session, please take advantage of our [free 30-minute consultation](#) with Abigail Brightwell, or another of the Brachers' Employment team for an initial discussion on your needs and to find out how we can help.

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