Ms Jane Hunt MP
Department of Business, Energy and Industrial Strategy
1 Victoria Street
London
SW1H 0ET
United Kingdom

1st September 2022

Dear Minister,

Industry concerns over Harpur Trust v Brazel judgment

The impact of the Harpur Trust v Brazel Supreme Court judgment around how to calculate holiday pay is significant and requires urgent action from government, as it overturns previous BEIS guidelines. We are writing to offer our support in determining what steps are necessary. In this letter, we offer two practical recommendations on a way forward.

For many years, agencies and other employers of workers with irregular working patterns have struggled to apply the Working Time Regulations, as this legislation is not designed to accommodate what are often termed as "non-standard" working patterns. In effect, the law is designed with one form of worker in mind – someone with a full-time, ongoing employment relationship.

But working patterns were never that simple. On any given day, there are approximately 1 million agency workers working on assignments in the UK. There are many more shift workers, part-time workers, zero hours workers and contractors in our labour market. All deserve their holiday pay – and compliance with the rules needs to be easy for their employers.

The standard government guidance, supported by ACAS for many years, recommended that employers use an accrual method, applying a calculation of 12.07% to time worked to determine annual leave for "non-standard" workers, and from this holiday pay can then be determined. This would mean that an agency worker who worked for 25 days on a given assignment would accrue 3 days of annual leave during this time.

This method provided clarity by giving a calculation which was broadly accepted by both employers and worker representatives. It is in the interests of everyone to ensure that employment legislation continues to provide clarity and employers are able to give workers their full benefits.

The decision in the case of Harpur Trust v Brazel, to remove this tried and tested method of calculating holiday pay for part-year workers, takes away any guidance on how to calculate holiday pay and has thrown up confusion on calculating holiday pay for all other non-standard working patterns.

BEIS updated its holiday pay guidance in 2020, following the Court of Appeal's decision in the same case – but no further updates have been made on the back of the Supreme Court decision.

The claimant in this case was employed on a permanent contract. The judgment concluded that '*the amount of leave to which a part-year worker under a permanent contract is entitled is not required by EU law to be, and under domestic law is not, prorated to that of a full time-time worker*.'

The BEIS Holiday pay – Guidance on calculating holiday pay for workers without fixed hours or pay makes no distinction for workers who are not engaged on permanent contracts - which causes problems as agency workers are commonly engaged on contract for services, rather than contracts of employment.

While the most recent judgment makes it clear that the 'Calendar Week Method' is the correct method to calculate holiday pay for part-year workers, rather than the 12.07% accrual method, this leaves

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employers of agency workers unclear on calculating leave. The BEIS holiday pay guidance points to BEIS holiday pay calculator, but this also acknowledges the difficulty for employers in calculating holiday pay.

When inputting details for an irregular hours worker, employers are told that:

"There are no regulations on how to convert the entitlement into days or hours for workers with irregular hours."

This means employers are left in a vacuum, and agencies are at a distinct disadvantage as there is uncertainty about the time or amount of work that a worker will do. It is always based on client demand and is not neatly predictable. To ensure that all employers can calculate holiday pay entitlement correctly, the legislation needs urgent clarification. Government guidance can provide that and mitigate certain employers being at risk of challenge and further litigation.

We would recommend that:

1. To provide immediate clarity, the government legislates and amends the Working Time Regulations to include the tried and tested accrual method (12.07%)
2. The government also legislates and amends the Working Time Regulations to provide a calculation method which accommodates all workers, including those with irregular working patterns for the long term.

The first recommendation provides an immediate and easy-to-implement solution. In the longer term, we believe the best is a review of the Working Time Regulations to ensure they provide the core rights they are designed to, but in a way which is easier for all employers to implement. We are working on proposals around this and can share our detailed thinking with your office later this autumn.

Ellie (ellie.goddard@rec.uk.com) in my office would be happy to arrange a meeting to discuss these issues in more detail.

Yours sincerely,

Neil Carberry
CEO
Recruitment & Employment Confederation

Registered in England

Company registered
Number 3895053

Dorset House
First Floor
27-45 Stamford Street
London SE1 9NT

020 7009 2100

info@rec.uk.com
www.rec.uk.com

CBI MEMBER