New holiday ruling threatens to heap further misery on the already embattled care sector

The Court of Appeal has this month delivered a judgment which could have huge ramifications for care providers employing zero hours staff on permanent contracts, with estimates suggesting that hundreds of thousands of employees working in the sector could be effected.

First things first…what is a zero hours contract?

A zero hours contract **(ZHC)** is a contract under which staff *'agree to be available for work as and when required, but have no guaranteed hours or times of work'*. ZHC's are also often referred to as 'casual' or 'bank' contracts. ZHC's have attracted a lot of negative media attention in recent years, with people claiming they offer little job and income security, with large corporations such as Sports Direct facing the brunt of criticism due to their widespread use of ZHC's.

The care sector is one sector in which ZHC's remain prevalent given that they allow employers to organise work into short and fragmented visits, allow flexibility and do not oblige employees to offer a minimum number of hours to staff employed under ZHC's. Indeed, research shows that 69% of all domiciliary care providers only offer ZHC's, with a further 88% not paying for breaks between clients.

What was this case about?

The case (*The Harpur Trust v Brazel & Unison*) was heard recently in the Court of Appeal. Mrs Brazel was a music teacher employed by Harpur Trust under a permanent contract of employment. Mrs. B was paid an hourly rate for the hours she worked, as and when required; she had no set hours. Mrs B did not work during the school holidays and her and the Trust agreed that she take any annual leave during the school holidays. Mrs B was paid holiday 3 times a year, once at the end of every term. The Trust paid Mrs B 12.07% of her earnings from the preceding term.

Calculating holiday in this way remains very common for workers employed under ZHC's and can be referred to as 'rolled up holiday'. Mrs B alleged that she was receiving lower holiday pay than was permitted under law. She argued that her holiday pay should be calculated by working out her average weekly pay for the 12 weeks before her holiday, multiplying it by 5.6 weeks (the maximum amount of annual leave allowed under law) and then paying her one third of this sum at the end of every term.

What did the Court decide?

Mrs B was successful in her claim. The Court of Appeal held that those employees who do not have guaranteed hours (such as those employed on permanent ZHC's) are entitled to receive 5.6 weeks paid annual leave at their average pay in the 12 weeks immediately before their holiday. Holiday can no longer be pro-rated (i.e. paying 12.07% of hours worked over a year) for permanent employees working under ZHC's.

Why does this effect care providers?

The Court of Appeal's ruling means that employers in the care sector (and other sectors) can no longer legally calculate holiday using the rolled up holiday pay method (12.07% of hours worked over a year) for employees working under permanent contracts of employment. Therefore, employees engaged under permanent ZHC's are entitled to receive 5.6 weeks (28 days) paid annual leave per year at their average weekly wage in the 12 weeks prior to their holiday *regardless* of the amount of time they work.

The ruling could have massive cost implication for providers who have permanent ZHC employees.

However, before you become too worried, the devil in this judgment really is in the detail.

You will note from the above that there is a consistent reference to 'employees' and not 'workers'. This distinction is very important. There are 3 types of employment status in UK law that a person falls into. These 3 types are:-

(1) Employee
(2) Worker
(3) Self-employed

A person's employment status defines the rights and responsibilities that an employee has at work, and therefore determines what is required from the employer. Employees generally have the most employment rights, with those who are self-employed having the least. Workers are a 'hybrid' of the other two status', having more rights that someone who is self-employed but less rights than an employee. For instance, workers have rights to national minimum wage, statutory sick pay and rest breaks but not to statutory redundancy pay, unfair dismissal (after 2 years) and statutory minimum notice.

A worker is someone who undertakes work personally as part of a contract. They generally have to carry out the work themselves. Typically workers include casual workers, ZHC workers, agency workers, freelancers and seasonal workers.

Now this point is key…this latest judgment does *not* expressly apply to workers; only employees employed under permanent ZHC's. Therefore, it is likely that the rolled up holiday (12.07%) approach to holiday is still lawful for workers employed under ZHC's, where such arrangements are transparent and set up appropriately.

What should I do?

The first step is to urgently review your holiday pay arrangements and whether you do indeed employ employees under ZHC's. If you do, you could not face claims from your workforce as a result of this decision.

Care Providers (and any other employers) effected by this case should contact me for further advice and support.

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Lloyd Clarke is a Partner of Attwells Solicitors LLP and a health and social care expert, regularly advising care clients on legal issues facing the sector, as well delivering talks on issues affecting the sector at both regional and national events. If you are a care provider who requires legal advice or assistance with the issue of holiday or any other issues affecting your business generally, please do not hesitate to contact him on 01206 236761 or lloyd.clarke@attwells.com.