EMPLOYMENT TRIBUNALS

Claimant: **Mr D Perkins**

Respondent: **The Best Connection Group Ltd**

Heard at: **Cardiff by video** **On: 16 March 2021**

Before: **Employment Judge R Harfield**

Representation:
Claimant: In person
Respondent: Mr Darley

RESERVED JUDGMENT

It is the decision of the Employment Judge sitting alone that the claimant's claim for holiday pay does not succeed and is dismissed.

REASONS

Introduction and the issue to be decided

1. By way of a claim form presented on 7 October 2020 the claimant brings a claim for unpaid holiday pay. On his ET1 claim form he also ticked the box for an unfair dismissal claim. He identified on that claim form that his dates of employment were from 22 June 2019 to 30 September 2020 and that he was employed as an agency worker. He did not tick the box for disability discrimination.

2. In box 8.2 the claimant said his holiday pay claim was about not accruing holidays in the time he was on furlough. He also stated that he had contacted his branch manager about issues with social distancing at the place where he was working and that he would not return to that workplace until his concerns had been checked. He said he had lost out on a week's

worth of wages due to the cancellation of his shifts because no one at the respondent would go out and check his social distancing. The claimant also said that since the calculation of his shifts he had been diagnosed with anxiety and depression. He said that when he originally sent his sick note into the branch he was told that they did not pay him. He also referred to being sent his P45. He said the reasons in the accompanying letter were that he had asked for the P45 or that it had been 13 weeks since his last shift. He said neither of these things were true. He said he was seeking £261 in lost wages and £261 in accrued holiday pay.

3. The respondent filed an ET3 asserting that the claimant was a worker not an employee. The respondent said that on this basis, and also the claimant's lack of qualifying service, he was not eligible to bring an ordinary unfair dismissal claim. The holiday pay claim was also denied. The respondent's response form did not understand the claimant to be bringing any other complaints.

4. On 1 February 2021 Employment Judge Jenkins sent a notice and order to the claimant expressing the view that the Tribunal had no jurisdiction to consider the claimant's unfair dismissal claim due to him not having 2 years' service. The claim of unfair dismissal was to stand dismissed on 15 February 2021 unless before that date the claimant explained in writing why that part of the claim should not be dismissed. The claimant did not do so and therefore the unfair dismissal claim stood dismissed.

5. At least from the perspective of the Tribunal and the respondent this left the claimant's claim as being the holiday pay claim. Employment Judge Brace therefore issued some directions on 23 February 2021 to get that claim ready for this hearing. It was listed for a 1 hour hearing.

6. The claimant's witness statement for the hearing addresses his holiday pay claim but also referred to his mental health being affected due to lack of social distancing on his return to work from furlough, his allegation that the respondent had not checked out his concerns, that the respondent had refused to place him back on furlough, that he had not been offered two of the assignments that the respondent was alleging, that there was no support for his mental health and that he had been issued his P45 prematurely. I therefore sought to explore with the claimant whether he thought there were claims other than his holiday pay claim that the Tribunal was going to be dealing with, and bearing in mind that the unfair dismissal claim stood dismissed, as he had not objected to Judge Jenkins' notification.

7. The claimant referred to his schedule of loss [62-64]. This has as a heading in it "Discrimination arising from disability, indirect discrimination at work" and talks about being denied opportunities to work at other locations due to

discrimination against him raising concerns about how a lack of health and safety measures were affecting his mental health. The schedule of loss says that following this he was terminated without notice. The schedule of loss then includes claims for past and future financial losses and injury to feelings. The claimant also said to me that he had dyslexia and had been poorly treated in relation to this.

8. It was not obviously apparent to me, however, that the claimant had brought a disability discrimination claim. The box was not ticked in his ET1 form (although that is not necessarily determinative). There is a reference in the body of the form to the claimant having anxiety and depression albeit that appears to potentially read as being a reaction to social distancing concerns as opposed to, on the face of it, being an obvious allegation of disability discrimination. There is no mention of dyslexia that I can see.

9. I explained to the claimant that if he was seeking to pursue a complaint other than an ordinary unfair dismissal complaint or his holiday pay complaint that he says was within his ET1 form as presented then he would need to identify what that complaint was. Alternatively, if he was applying to amend his claim to add new complaints then he could do so, but he needed to make an application in writing again setting out the specific complaint he was seeking to add. It is not sufficient to try to amend a claim by the backdoor by including additional items in a schedule of loss. To be clear, the claimant is entitled to make an application to amend. Whether such an application would be granted by a Judge is a question not yet determined.

10. I explained to the claimant that we would not be able to deal with any other claims at that hearing, as it had only been listed for an hour, and the respondent would not have been properly prepared to deal with it, or the evidence all ready to go before the Tribunal. I expressed the view that it seemed to me that the holiday pay complaint was a stand alone complaint and I could potentially go ahead and deal with that in isolation at the hearing, and the claimant could then separately write to the Tribunal with any clarification or amendment application about the other claims he said that he was bringing. That way we could make use of the hearing time we had left. The parties agreed with that approach. I told the claimant that time limits are one factor that the Tribunal takes into account in deciding any application to amend, and therefore whilst it may be a good idea to take further legal advice, it was also a good idea to make any application to the Tribunal about any other claims the claimant was seeking to pursue as soon as he reasonably could.

11. I then proceeded to hear the evidence and submissions in relation to the holiday pay claim. I had before me a joint bundle of documents and I had written statements and heard oral evidence from the claimant and from Mr

Andrews for the respondent. I reserved my decision to be handed down later in writing due to there being insufficient time available to deliver an oral judgment.

12. The essential issue for me to decide in this case is whether the claimant accrued entitlement to holiday pay whilst on furlough. The claimant says that he did and therefore he should have been paid for this accrued but untaken holiday on the termination of his contract. The respondent's position is that a contract for services only existed between the claimant and the respondent when the claimant was on assignment with an end user client and not between assignments. The respondent's argument is that the claimant was not a worker for the purposes of the Working Time Regulations 1998 for the period when the claimant was on furlough and therefore the claimant did not accrue annual leave during that time.

Findings of fact

13. The claimant registered with the respondent in June 2019. The respondent is an employment agency placing temporary/ agency workers on assignment at various clients.

14. The claimant worked on various assignments which are set out at [51 -52 and 55 - 56] until the lockdown was announced in March 2020. The claimant's last shift on assignment was on or around 17 March 2020, as a driver's mate at Clearbe.

15. Mr Andrews explains in his witness statement that initially the respondent decided it was not able to furlough its temporary workers as it did not have the cashflow to make payments pending reimbursement by the Government, and because it was also not clear at that point whether workers would accrue holiday pay for the period of furlough.

16. Mr Andrews says that in May 2020 he was informed by his senior manager that they were able to furlough a small number of workers as they were now able to reclaim repayment of the furlough funds from the Government and because the Government had clarified that agency workers would not accrue holiday pay whilst furloughed if they would not normally accrue holiday pay between assignments. He says he was instructed to consider furloughing workers who had been working consistently on an assignment over a reasonable period and so he decided to include the claimant in the list.

17. On 22 May 2020 the claimant was sent a letter by email [68] which said that due to the claimant's long service and importance to their clients the claimant had been identified as a worker who was eligible to join the Coronavirus Job Retention Scheme. The letter said the claimant would be

designated as a "furloughed worker" which meant he could not work for the respondent and would receive a payment of 80% of his usual pay. He was told he could be able to work for other companies. The letter said that the purpose of the scheme was to retain his job so that he could return to it when the effects of Coronavirus recede and if he did not expect to return to his assignment, he should let them know. It said that if alternative work became available which he was happy to accept then the respondent may withdraw him from furlough, and he could return to assignments as normal. The effective date of furlough would be 11 May 2020. In the period between March and May 2020 the claimant did not work on assignment for the respondent. He was contacting them for work, but no assignments were offered. His previous assignment had therefore clearly come to an end. The claimant did work on assignment for his other agency, MPS during this time. He was then furloughed both by the respondent and by MPS.

18. In June 2020 the claimant's furlough with MPS came to an end. On 20 July 2020 the claimant's furlough with the respondent came to an end as he was offered, and accepted, an assignment at DFS. The claimant's entitlement to holiday pay after 20 July 2020 is not in dispute in these proceedings and therefore I do not need to make findings of fact in this judgment about what happened on the claimant's return to work and the termination of his engagement with the respondent. I also do not want to make findings of fact without hearing all the evidence which could potentially then affect any further claim that the claimant seeks to bring.

19. When furlough came to an end and when the claimant's relationship with the respondent ended the claimant tried to see payment of holiday pay, and in particular, accrued holiday pay for the period the claimant was on furlough. The advice the claimant had received from the Citizens Advice Bureau is that he should continue to build up holiday entitlement on furlough [87]. He also relied on extracts from the Government website. This says:

> *"Workers on furlough*
>
> *Workers have the right to build up ("accrue") holiday entitlement while they're on temporary leave ("furloughed") because of coronavirus (COVID-19). They can also take leave while on furlough."*
>
> *"Agency workers*
>
> *Agency workers with "worker status", including those who use an umbrella company, have their usual holiday entitlement when on furlough.*

Their employer can claim a grant to help cover the cost of their wages.

Holiday entitlement for those without worker status remains the same and depends on their contract."

20. The claimant sent extracts from guidance and from Citizens Advice through to the respondent. The claimant also says that when he was furloughed by another agency they allowed him to accrued holiday pay when on furlough and he sent those comparative documents through to the respondent.

21. Mr Redfern, the payroll manager emailed the claimant on 18 August 2020 [112] with a different snapshot taken from the Gov.uk website. This said:

"*The CJRS does not alter the position as to whether or not agency workers, including those working through an umbrella company, are entitled to accrue holiday under the Working Time Regulations and/or under their contract.*

Accrual of holiday during furlough

Where holiday rights exist under the regulations, they remain unchanged when workers are on furlough. Where agency workers are engaged under a contract of employment which sets out their entitlement to holiday, that is 5.6 weeks or more in accordance with the regulations, their contract will continue to operate as before and they will continue to accrue holiday on furlough as they would normally when between or otherwise not working on assignments.

Some agency workers on a contract for services may not be entitled to the accrual of holiday or to take holiday under the Working Time Regulations while on furlough because they are not workers or treated as workers under those regulations when between assignments or otherwise not working on assignments. *Contracts may nevertheless include holiday provisions which will continue to operate in the same way as they did prior to the furlough period."*

22. The respondent relied on the part I have emphasised in bold text. The claimant continued to try to challenge the point, but the respondent refused to alter their position saying that it was the company stance on advice from their Legal Department [104]. The claimant also issued a grievance on 23 August 2020 [126] complaining (in relation to holiday pay) that he was being deprived of his working rights including holiday pay accrued since March 2020, that he had not received equal treatment as an employee when compared against his other agency MPS.

23. The claimant in his witness statement for this hearing asserts that he was an employee of the respondent throughout. He says that he should therefore accrue holiday pay under the first section of the guidance the respondent refers to relating to agency workers engaged under a contract of employment. The claimant in his oral evidence accepts that prior to furlough, when not working on assignment for the respondent (for example when on assignment with MPS) he did not accrue holiday with the respondent. He also accepted that there were occasions on which he refused assignments with the respondent. For example, illness or childcare reasons. He said the respondent was his main agency and that he used MPS as a filler when assignments were not available with the respondent. The evidence from Mr Andrews was that an agency worker had the choice whether to accept an assignment or not and if they could not accept a job because, for example, they were already on assignment with another agency, then that was just the nature of the game. He said there were occasions on which the claimant was not available for assignments because of sickness, childcare or the job location.

Written Terms of Engagement

24. The written terms of engagement signed by the claimant include the following:

"The Assignment" means the period during which the Temporary Worker is working under the supervision, direction and control of the Client."

"These terms constitute a contract for services between TBC and you. They govern each and every assignment undertaken by you. However, no contract shall exist between TBC and you between Assignments."

"For the avoidance of doubt, these terms shall not give rise to a contract of employment between you and TBC. You are engaged as a worker, not an employee, although TBC is required to make statutory deductions from your remuneration."

"In the event that you decline to accept any offer of work or do not attend work for any reason, no contract shall exist between you and TBC"

"You acknowledge that it is the nature of temporary work that there may be periods when no suitable work is available. You agree that the suitability shall be determined solely by TBC and that TBC shall incur no liability towards you should no suitable work be found in the categories specified in your signed application form"

"Subject to any statutory entitlement you will not receive payment from TBC or its clients for any time not spent on assignment whether in respect of holidays, illness or absence for any other reason"

"You are entitled to a maximum of 28 days paid leave each year. Entitlement to paid leave accrues in proportion to the amount of time worked continuously by you on an Assignment during the leave year. When you wish to take any accrued leave to which you are entitled, you must notify TBC in writing of the dates of your intended absence. The amount of notice which you are required to give is at least twice the length of the period of leave that you wish to take. The minimum leave you can take is 0.5 days. More information on leave can be found in the Temporary Worker Handbook.

"Leave year" is the year used for calculating entitlement to leave and starts on 1st March. You must take leave in the leave year, or you may lose the entitlement, and if you have been paid you must take the leave."

"Non of the provisions of the clauses regarding the statutory entitlement to paid leave shall affect your status as a worker, who is not an employee."

"You are not obliged to accept any assignment offered to you by TBC but if you do so, during every Assignment the following rules will apply…" (requirements are then set out for matters such as being directed by the Client's staff and observing their rules).

"If you are unable for any reason to work on an Assignment you should inform your contact at TBC or if not possible, the client at least one hour before you are due to start work."

"TBC or its Client or you may, without notice, and without liability, end an assignment at any time."

Relevant legal principles

25. The Coronavirus Job Retention Scheme or indeed Government guidance does not of itself create legally enforceable rights in the employment tribunal.

26. A claim for payment for accrued but untaken holiday pay claim can be brought as an unauthorised deduction from wages claim under the Employment Rights Act or under the Working Time Regulations 1998. Under Section 13 of the Employment Rights Act 1996 a deduction from wages can occur when the total amount of wages paid on any occasion by an employer to a worker is less than the total amount of wages properly payable on that occasion. "Wages" can include holiday pay. Case law has

established that for a sum to be "properly payable" to the claimant, the claimant had to have a legal (albeit not necessarily contractual) entitlement to the sum. In the context of holiday pay, in practical terms this means that a failure to pay holiday pay due under a contract or due under a statutory entitlement can be brought as an unauthorised deduction from wages claim. Alternatively the statutory claim can be brought directly under the Working Time Regulations.

27. Regulations 13 and 13A of the Working Time Regulations 1998 provide workers with a statutory entitlement to paid annual leave. A worker is defined under Regulation 2 as an individual who has entered into or works under (or where employment has ceased, worked under) –

    (a) a contract of employment, or
    (b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual.

28. Regulation 2 also says "any reference to a worker's contract shall be construed accordingly."

29. "Working time", in relation to a worker is defined as –

    (a) Any period during which he is working, at his employer's disposal and carrying out his activity or duties,
    (b) Any period during which he is receiving relevant training, and
    (c) Any additional period which is to be treated as working time for the purpose of these Regulations under a relevant agreement.

30. The definition of "working time" goes on to say that "work" shall be construed accordingly."

31. Regulation 13 provides that a worker is entitled to 4 weeks' annual leave in each leave year. Regulation 13A provides an entitlement to an additional 1.6 weeks, subject to a maximum overall of 28 days in a leave year. Entitlement to paid leave cannot be replaced by a payment in lieu except where the worker's employment is terminated. Regulation 14 sets out the method for calculating a payment in lieu of accrued and undertaken holiday pay on termination of employment. Regulation 30 gives a worker a right to complain to the employment tribunal of a failure to pay an amount due under Regulation 14.

Discussion and Conclusions

Contractual position

32. The terms and conditions signed by the claimant are clear that the claimant does not accrue any contractual entitlement to holiday when not on assignment. The claimant accepted in evidence that prior to furlough when he had gaps between assignments for the respondent he did not accrue an entitlement to paid holiday. The claimant did not argue that the written terms of engagement did not reflect the reality of the contractual arrangements in place or agreed by the parties in terms of the accrual of holiday between assignments.

33. To be placed on furlough the claimant accepted the terms outlined by the respondent in their letter. This included that he could not work for the respondent whilst on furlough. By its fundamental nature the claimant therefore was not on assignment whilst on furlough. There was no separate agreement reached between the parties that the claimant would accrue entitlement to holiday when on furlough. I therefore do not find that whilst on furlough the claimant had a *contractual* right to accrue paid holiday entitlement.

The statutory position under the Working Time Regulations 1998

Employee?

34. The classic description of a contract of employment or a contract of service is set out within the judgment of MacKenna J in *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* [1968] 2 QB 497. In short, 3 conditions were set out:

(a) the employee agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for the employer;

(b) The employee agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient degree to make that other "master";

(c) The other provisions of the contract are consistent with it being a contract of service.

35. In *Clark v Oxfordshire Health Authority* [1998] IRLR 125(CA) a bank nurse who had worked for 3 years with only 14 weeks off during the period was found not to be an employee because there was no obligation on the employer to provide work and no obligation on the nurse to accept it. There was no mutuality of obligation.

36. In *Autoclenz v Belcher* [2011] IRLR 823 Lord Clarke added the propositions that:

    (d) there must be an irreducible minimum of obligation on each side to create a contract of service;

    (e) If a genuine right of substitution exists, this negates an obligation to perform work personally and is inconsistent with employee status;

    (f) If a contractual right, such as for example a right to substitute, exists, it does not matter that it is not used. However, he also endorsed the proposition that if the reality of the situation is that no one seriously expects that a worker will seek to provide a substitute, or refuse the work offered, the fact that the contract expressly provides for these unrealistic possibilities will not alter the true nature of that relationship. But if the clauses genuinely reflect what might realistically be expected to occur, the fact that the rights conferred have not in fact been exercised will not render the right meaningless;

    (g) the question in every case, is what was the true agreement between the parties. The relative bargaining power of the parties must be taken into account in deciding whether the terms of any written agreement in truth represent what was agreed. The true agreement will often have to be gleaned from all the circumstances of the case.

37. I do not find that the claimant entered into or worked under a contract of employment with the respondent. The claimant in evidence accepted that there were occasions on which he did not accept assignments with the respondent. I do not find that there was an obligation on the claimant to accept assignments. I also do not find there is any evidence of an expectation or agreement the claimant would be working a regular defined pattern (so as to find, for example, there was mutuality of obligation between the parties between assignments). Indeed, the whole principle of agency work runs counter to this. I therefore do not find that the true agreement between the parties included the irreducible minimum mutuality of obligation such as to found a contract of employment.

Worker?

38. The respondent accepts that the claimant was a worker within the meaning of the Working Time Regulations whilst on each individual assignment with an end user client but denies that the claimant was a worker between assignments, including when on furlough.

39. The Supreme Court in Uber BV and others v Aslam and others [2021] UKSC5 said that to be a worker within the meaning of the Working Time Regulations there are 3 elements:

(a) A contract whereby an individual undertakes to perform work or services for the other party;
(b) An undertaking to do the work or perform the services personally;
(c) A requirement the other party to the contract is not a client or customer of any profession or business undertaking carried on by the individual.

40. The dispute in this case is about (a); whether on furlough, the claimant had entered into or was working under a contract with the respondent to perform work or services for the respondent (albeit ultimately delivered to the end user client).

41. The Supreme Court in Uber said that applying the test of worker status under the Working Time Regulations is a matter of statutory interpretation and is not necessarily defined or constrained by what any written terms may say. They approved the approach in Carmichael v National Power Plc [1999] 1WLR 2042 (where tour guides employed on a casual as required basis were found not to have a contractual relationship with the employer when not working as guides) that status needed to be determined by looking at (a) the language of the correspondence/documents, (b) the way the relationship operated and (c) the evidence of the parties as to their understanding of it. The Supreme Court said those principles should be applied even if there is a formal written agreement. It was said it does not mean the formal written agreement is ignored. The conduct of the parties and other evidence may show the written terms were understood and agreed to be a record of the parties' rights and obligations to each other. A Tribunal should apply the statutory language but also needs to view the facts realistically and keep in mind the purpose of the legislation.

42. In Uber the drivers did not argue they were performing services under an "umbrella" contract i.e., there was a continuing obligation on them to work throughout. The argument was about whether there were periods of time during which the drivers were workers employed under a worker's contract with Uber (for example when driving Uber customers, or when they had the driver app switched on). The Supreme Court held that to be a worker in those periods there had to be an obligation to do some amount of work, even if the worker has the right to turn down some work. It held on the facts that Uber drivers when logging into the app were considered to be going on duty and under a general obligation to accept work if offered, even if they could refuse an individual trip request. So an Uber driver when logged onto the app was during that period of time a worker. They had entered into a contract with Uber to perform services for Uber during that time they were logged on the app. It was accepted in Uber that an individual could be a worker during some periods, and not during others.

43. I have considered whether it could be said that the claimant was a worker throughout the time he had a relationship with the respondent (including

when there were gaps between assignments), such that it could be said that he remained a worker whilst on furlough. Was there any contractual obligation in existence concerning the provision of work or services which the claimant was undertaking to personally perform, including when there were gaps in assignments?

44. Here, I am satisfied on the evidence before me that there was no contract subsisting between the parties when the claimant was not on assignment. The evidence of how the arrangements operated and the parties understanding of it matched the written documents. The claimant did not accrue holiday entitlement when not on assignment and he never sought to challenge or claim that except during the furlough period (including the period between March and May 2020 when he was not on assignment). There was no obligation on the claimant to accept assignments and he did on occasion reject them. There was no obligation on the respondent to offer assignments. There was no other exchanges of promises or consideration in the gaps between assignments from which a contract to personally perform work or services for the respondent could be inferred. I cannot find that there was any contract subsisting between the parties when on a gap between assignments that related to the claimant providing work or services to the respondent. I am satisfied on the facts of this case that the claimant was only a worker within the meaning of the Working Time Regulations 1998 when actually working on assignment.

45. I have also considered whether that position changed when the claimant was on furlough. Here, I do not find that the claimant had, when specifically on furlough, entered into or was working under a contract whereby he undertook to do or perform personally any work or services for the respondent. The furlough arrangement with the respondent was the antithesis of that: it was a condition of the furlough arrangement that he could not work for them during furlough. The claimant's previous assignment with the respondent had come to an end in March. The furlough letter also said that if alternative work became available in the future it remained the case that it was up to the claimant whether to accept the assignment or not. Looking at all the evidence, I do not find that the claimant was agreeing that he was obliged to accept some minimum future assignment on condition of being entitlement to furlough pay. On the facts, I therefore do not find that during furlough the claimant had entered into a contract whereby he was undertaking to do or perform personally any work or services (including in the future) for the respondent such as to, during that time, make him a worker for the purposes of the Working Time Regulations 1998.

46. The Government guidance or how the claimant's other agency conducted themselves or the fact the claimant was being paid under the furlough

scheme does not ultimately determine the legal test that I have to apply. I therefore do not uphold the claimant's holiday pay claim and it is dismissed.

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Employment Judge R Harfield
Dated: 22 June 2021

JUDGMENT SENT TO THE PARTIES ON 23 June 2021

……
FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS Mr June 2021