EMPLOYMENT TRIBUNALS

Claimant: Mr M Rhodes

Respondent: Sharpe's Pottery Heritage and Arts Trust Limited

Heard: via Cloud Video Platform in the Midlands (East) Region

On: 26 and 27 May 2021

Before: Employment Judge Ayre (sitting alone)

Appearances
For the claimant: In person
For the respondent: Mr B Randle, counsel

JUDGMENT

1. The claimant was engaged by the respondent as a worker and not an employee.

2. The claimant's engagement by the respondent terminated on 4 July 2020.

3. The tribunal does not have jurisdiction to hear the claimant's complaints of breach of contract / wrongful dismissal as the claimant was not an employee of the respondent.

4. The claim for holiday pay fails and is dismissed.

REASONS

The Proceedings

1. By claim form presented on 11 September 2020, following a period of Early Conciliation lasting from 7 July 2020 to 7 August 2020, the claimant brought claims for holiday pay, notice pay and 'furlough pay'.

2. In essence, the claimant says that despite the termination of his employment or engagement with the respondent, which both parties say took effect on 4 July

2020, he should have been engaged until either 31 July 2020 (the date given on his P45 as his termination date) or the 30 November 2020, which is the date the claimant says he would have been dismissed had the respondent complied with the required consultation and notice periods in its Job Security Policy. The claimant alleges that, had he been employed through to the 30 July or 30 November 2020 he would have received additional holiday pay, furlough pay and notice pay.

3. The respondent defends the claim. It says that the claimant was engaged as a casual worker and was not an employee, that his engagement ended on 4 July 2020, and that no further sums are due to him.

4. Prior to the final hearing the claimant had objected to the attendance at the hearing of an observer, Mrs Forrest. The claimant's objection was based on the fact that Mrs Forrest had, until 2013, sat as a lay member of Employment Tribunals in the Midlands (East) region.

5. At the outset of the hearing the claimant withdrew his objection to the presence of Mrs Forrest as an observer. I explained to the claimant that I joined the Midlands (East) region in 2018, approximately 5 years after Mrs Forrest left the region, and that I have no recollection of ever having met or even heard of Mrs Forrest. In these circumstances I am satisfied that there is no real danger or even a possibility of bias arising as a result of Mrs Forrest observing the hearing.

6. On 23 April 2021 the claimant applied for strike-out of the response on the grounds of delay on the respondent's part in complying with case management orders. The claimant withdrew this application at the outset of the hearing.

7. The respondent had also, back in December 2020, applied for strike out of the claim and / or a deposit order. Mr Randle indicated that the respondent was not pursuing this application.

8. There was before me an agreed bundle of documents and witness statements which had been exchanged. The claim was therefore ready for trial.

9. The agreed bundle of documents ran to 356 pages. At the beginning of the second day of the hearing an additional two documents were, by agreement, added to it, namely the notes of an HR meeting at the respondent on 9 May 2017, and an excel spreadsheet headed "Policies and Procedures Register".

10. I heard evidence from the claimant and, on his behalf, from Mrs Gail Archer; and on behalf of the respondent from Mrs Nicola Lees. Mrs Lees was recalled to the witness stand to give evidence about the additional documents introduced at the start of day two of the hearing, and was cross examined by the claimant on those documents.

The Issues

11. The issues that fell to be determined at the hearing were the following :

a. Was the claimant an employee of the respondent or engaged by the respondent as a worker?

b. What was the effective date of termination of the claimant's employment / engagement? The respondent says it was 4 July 2020, the claimant says it was either 31 July 2020 or 30 November 2020.

c. Is some or all of the claim for holiday pay out of time?

d. Was the respondent's Job Security Policy in force at the time the claimant's engagement or employment was terminated and, if so, was the claimant entitled to rely upon it?

e. Is the claimant entitled to any additional sums by way of holiday pay, either:-

   i. In relation to the period up to 4 July 2020; and / or
   ii. In relation to the period from 5 July 2020 to either 31 July 2020 or 30 November 2020?

f. Has the respondent wrongfully dismissed the claimant?

g. Has the respondent made an unlawful deduction from the claimant's wages and / or breached his contract of employment by failing to pay him beyond 4 July 2020?

12. The respondent admitted, at the outset of the hearing, that the claimant was engaged as a worker. The claimant told me that he was not pursuing a complaint for wrongful dismissal (notice pay) if I were to find that the effective date of termination of his contract was in July 2020 as he had received a week's pay in lieu of notice.

Findings of fact

13. The respondent is a charitable organisation which, at the relevant time, ran a museum and tourist information centre in Swadlincote. It is a small charity with very few employees. It also engaged a number of casual workers who would do paid work on an 'as and when required' basis, and volunteers.

14. The claimant worked for the respondent as a volunteer from 2014 when he was aged 14. In May 2019, aged 18, the claimant approached the respondent and asked if there was any part time paid work available over the summer period. He sent an email to Mrs Gail Archer, who was at the time the respondent's Tourist Information Manager, providing her with dates when he would be available to work, and asking if paid work was available.

15. Mrs Archer replied saying 'yes please' to the claimant's offer, explaining the hourly rate of pay and stating that "*if that is acceptable to you I would love to accept you as a casual member of the team and then the arrangement can be carried on when you have holiday time?"*

16. Mrs Archer subsequently wrote to the claimant setting out the dates that she had work for the claimant from within the available dates that he had provided to her. There was nothing in the exchange of emails between the claimant and Mrs Archer at that time that suggested that the claimant was to become an employee of the respondent.

17. Between 20 June 2019 and 7 September 2019, a period of 11 weeks, the claimant worked for a total of 273.50 hours for the respondent. The number of hours worked each week varied from 7.5 hours to 35.5 and the average number of hours worked each week was 24.86.

18. The claimant's role was Tourist Information Assistant and he reported to Gail Archer who was, at the time, Tourist Information Manager. Mrs Archer was later suspended and not at work between November 2019 and February 2020.

19. The claimant was paid £8.51 an hour for each hour worked. In addition, in accordance with the respondent's arrangements for casual workers, he was paid an extra 12.07% for each hour worked in respect of holiday pay.

20. The respondent's holiday pay arrangements were different for employees and casual workers. Employees receive an annual leave entitlement in their contract and are expected to take holiday during the holiday year. They are only paid holiday pay on the termination of their employment if they have accrued more holiday than they have taken.

21. In contrast, casual workers receive an additional 12.07% holiday pay on top of their hourly rate of pay and are paid holiday during the course of their engagement with the respondent.

22. The respondent's holiday year starts on 1 April in each year and ends on 31 March the following year.

23. During the 11 weeks that he worked for the respondent between June and September 2019 the claimant accrued holiday pay of £280.93 gross. That holiday pay was paid to him on 29th February 2020.

24. The claimant was not initially issued with a contract when he began doing paid work for the respondent in June 2019. At the time the respondent was in the process of updating its contracts. On 25 June Mrs Archer sent an email to the then Chairman of the respondent, Mr John Harrison, in which she referred to the "*most up to date version of our new contract*". She wrote to Mr Harrison that "*When you give the go ahead for use of the contract I will then adjust to suit both Marian – 1 day per week and Matthew – casual hours; as neither of them have a contract at present".*

25. On 26 June Mrs Archer sent a further email to Mr Harrison in which she referred to the claimant having "*a Casual post*", "*as and when required"*. These emails suggest that the intention was for the claimant to have a casual hours contract which was different to the contract issued to employees.

26. The last day that the claimant actually performed any work for the respondent was on 7 September 2019. He then went off to study medicine at university. When he returned from university he turned up at the respondent's premises, without any warning, on 18th December and asked whether there was any work available for him. Kim Coe, one of the respondent's trustees at the time, told him that no work was available. This was because the rota had already been filled for the holiday period with casual staff who had previously told the respondent that they were available for work.

27. There was no evidence before me to suggest that the claimant complained at the time about the fact that no work was available, although on 2nd January 2020 he complained to Mr Harrison about what he described as "*aggression in a public place that could have brought the Trust into disrepute"* by Ms Coe. Indeed, the claimant accepted in his evidence that the respondent was not under any obligation to provide him with any work.

28. The claimant suggested that he was obliged to accept work if it was offered to him, but there was no evidence to support this assertion. The only time the claimant did any paid work for the respondent was in the summer of 2019. That work was done at his request, and on dates that he had offered, which were dates that it suited him to work, and which were accepted by the respondent. Contrary to the claimant's assertion, I find that he was not obliged to accept work when it was offered to him.

29. In addition, Mrs Lees gave evidence, which I accept, that the respondent's casual workers were allowed to swap shifts between them.

30. In August 2019 a new Centre Manager joined the respondent, and she became the claimant's manager. In February 2020 the claimant contacted the Centre Manager via email. He told her that he was on a zero hours contract that was set up to take into account times when he was unable to work for the respondent.

31. On 18 February 2020 the claimant sent an email to Mr Harrison, the chairman of the respondent, in which he wrote: "*…I acknowledge that hours may or may not be available…"*. Three days later the claimant sent another email to Mr Harrison including the following: "*I look forward to receiving offers of hours (should they be available)…*". Mr Harrison replied : "*Your Line Manager is the Centre Manager who will be responsible for offering you with any work when you are available and sign-off your timesheets. Your availability from 3 to 25 April is noted."*

32. These emails clearly demonstrate that both parties understood that the respondent was not under any obligation to offer the claimant any work. That was the reality of the situation. The claimant himself referred to being on a zero hours contract, and made no complaint when work was not offered to him. The claimant did not hesitate to complain about other things, such as the alleged aggression by Ms Coe, but made no complaint about not being offered any work. Indeed, for much of the time that the claimant now claims to have been employed by the respondent he was not available to work as he was at university.

33. The claimant was also free to work elsewhere and there was no restriction on him doing so. In February 2020 the claimant began working for two other organisations. He worked for Nurse Plus as an agency worker and for HB Leisure as a fixed term zero hours worker.

34. The respondent provided the claimant with an original contract, which he signed and returned. There was no copy of that contract in evidence before the Tribunal. The claimant had not kept a copy and the respondent had not been able to find a copy.

35. There was, however, in the bundle, a document headed 'Contract of Employment' with the claimant's name on it ("the Contract"). The Contract gave the claimant's job title as "*Swadlincote Tourist Information Assistant – Casual*" and, in relation to hours of work said that "*If you are a casual member of staff your agreed working week will be varied hours, generally of 7.5 hours per day, excluding meal breaks…. Your working days will be varied each week…*" . In relation to termination of employment the Contract states that periods of notice are in accordance with the statutory provisions, but that 1 months' notice 'would be appreciated'.

36. The Contract was unsigned and undated. It contained a number of provisions relating to paid holiday, probationary period, performance and development reviews and pension scheme which were not applied to the claimant.

37. I find, on the evidence before me, that the Contract was sent to the claimant, either by Mrs Archer in or around June 2019, or by the chairman Mr Harrison in February 2020. It matters not, for the purposes of my decision in this case, when the contract was sent to the claimant or by whom.

38. The Contract that was sent to the claimant was the wrong one, and was sent to the claimant by mistake. The respondent admitted that, at the time, all of its contracts, including those for casual workers, were headed "Contract of Employment" and that this was an error.

39. The Contract that was sent to the claimant was not applied in practice by either party.

40. I find that the intention of both parties, at the relevant time, was that the claimant be engaged as a casual worker. This is evident from:-

a. The original email by Mrs Archer to the claimant on 28 May in which she referred to him being '*a casual member of the team';*

b. An email sent by the claimant to Ms Ballam Jones on 10 February 2020 in which he refers to being a "*casual employee*". The claimant admitted in evidence that he was not aware of the distinction between employees and workers;

c. A further email sent by the claimant to Ms Ballam Jones on 10 February 2020 in which he wrote "*my contract was a zero hours contract* and was

set up as such…to take into account times when I was unable to work for you";

d. An email from Mr Harrison to Ms Ballam Jones dated 7 February 2020 in which Mr Harrison wrote "*My understanding was that Matthew Rhodes was a casual worker having the same status as, for example, Lindsay";*

e. The fact that the claimant only worked for the respondent when it suited him, and did not carry out any work for the respondent for some 9 months, between 7 September 2019 and the 4 July 2020 when his engagement was terminated.

41. The behaviour of both parties in practice was consistent with the claimant being engaged as a casual worker. The respondent was not obliged to offer the claimant any work, and the respondent was not obliged to accept work if it was offered. There were no fixed or guaranteed hours of work, and the claimant was free to work elsewhere.

42. The claimant argued that his engagement by the respondent was governed by a document headed 'Job Security Policy', which he said formed part of his contract. There was however no mention of the Job Security Policy in the Contract. The Job Security Policy itself states that it applies to "*all employees*" and there is no mention of it applying to casual workers.

43. Ms Lees gave evidence that the Job Security Policy had been prepared in draft and had not been brought into force. I was shown a 'policies and procedure register' which listed the policies and procedures of the respondent. The entry for the Job Security Policy showed the 'approved' and 'review' dates as blank, in contrast with the other policies listed in that document.

44. The minutes of an HR meeting on 19 May 2017 show that the JSP was discussed and questions were asked as to whether a Job Security Policy was required. The minutes record , in relation to the Job Security Policy that "*Further discussion with Chair required*". Although this comment also applied to the Capability Policy and Sickness Absence Policy, which were subsequently approved, the nature of the Job Security Policy was very different. It is an extremely generous policy, and one that is more consistent with a large and / or public sector employer, rather than a small charity with very limited finances.

45. The Job Security Policy has never been applied by the respondent in practice, whether to the claimant or to any other worker or employee. The Policy was a draft which was not brought into force.

46. There was no evidence before me that the claimant was told by Gail Archer that the Job Security Policy applied to him – on the contrary she said that she could not recall discussing it with him.

47. In mid-March 2020 the respondent closed its museum and Tourist Information Centre due to the national lockdown. On 20 March the respondent made the decision to furlough its entire museum staff. The claimant was placed on

furlough and paid furlough pay from then until the termination of his employment. His total furlough pay was £1,082.66.

48. The respondent subsequently decided that it could no longer afford to retain its entire bank of casual workers as it would not need as many casual workers going forward. On Monday 29 June the respondent wrote to the claimant terminating his engagement:-

"*Due to the circumstances of the pandemic it is unlikely that we will be needing your services for the foreseeable future. Therefore I will be taking you off our books on 4 July and you will receive a P45 shortly after that...*"

49. As a gesture of goodwill the claimant was paid one week's pay in lieu of notice. He was also paid £130.86 holiday pay on 30 September 2020. This payment was in respect of holiday pay accrued during the period when he was on furlough.

50. The claimant accepted in evidence that his contract with the respondent came to an end on 4 July 2020. I find that the claimant's engagement with the respondent terminated on 4 July 2020.

The Law

51. Section 13 of the Employment Rights Act 1996 ("**the ERA**") provides that:-

"*(1) An employer shall not make a deduction from wages of a worker employed by him unless –*

(a) The deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or
(b) The worker has previously signified in writing his agreement or consent to the making of the deduction….

(3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion.

52. Section 23 of the ERA gives workers the right to present complaints of unlawful deduction from wages to an Employment Tribunal. In accordance with section 23(2) of the ERA:-

"*Subject to subsection (4), an employment tribunal shall not consider a complaint under this section unless it is presented before the end of the period of three months beginning with –*

(a) In the case of a complaint relating to a deduction by the employer, the date of payment of the wages from which the deduction was made…

(4) Where the employment tribunal is satisfied that it was not reasonably practicable for a complaint under this section to be presented before the end of the relevant period of three months, the tribunal may consider the complaint if it is present within such further period as the tribunal considers reasonable."

53. The right to bring a complaint of breach of contract before the Employment Tribunal is set out in the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 ("**the Order**").

54. Article 3 of the Order states that:-

"*Proceedings may be brought before an employment tribunal in respect of a claim of an employer for the recovery of damages or any other sum (other than a claim for damages, or for a sum due, in respect of personal injuries) if –*

…(c) the claim arises or is outstanding on the termination of the employee's employment."

55. Section 230 of the Employment Rights Act 1996 (ERA 1996) provides the definition of employee, employment and worker as follows:

"(1) In this Act "employee" means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.

(2) In this Act "contract of employment" means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing.

(3) In this Act "worker" (except in the phrases "shop worker" and "betting worker") means an individual who has entered into or works under (or, where the 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;

and any reference to a worker's contract shall be construed accordingly.

(4) In this Act "employer", in relation to an employee or a worker, means the person by whom the employee or worker is (or, where the employment has ceased, was) employed.

(5) In this Act "employment"—

(a) in relation to an employee, means (except for the purposes of section 171) employment under a contract of employment, and

(b) in relation to a worker, means employment under his contract;

and "employed" shall be construed accordingly…"

56. Regulation 14 of the Working Time Regulations 1998 (WTR") sets out the right to compensation for annual leave on the termination of employment. I do not consider it necessary to set out that regulation in full here. The time limit for bringing claims for breach of Regulation 14 is three months from the date on which the payment should have been made or, within such further period as the Tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months (Regulation 30 WTR).

57. I was referred by the parties to a number of cases which I have considered in reaching my decision. The following cases are of particular relevance:-

a. *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance [1968] 2 QB 497*, in particular the judgment of McKenna J which set out the conditions required for a contract of service, namely that:"(i) The servant 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 his master. (ii) He 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. (iii) The other provisions of the contract are consistent with its being a contract of service."

b. *Autoclenz Ltd v Belcher [2011] ICR 1157* (re affirmed in *Uber BV v Aslam [2021] ICR 657*) in which Lord Clarke confirmed the following:
a. "the courts have held that the employment tribunal should adopt a test that focuses on the reality of the situation where written documentation may not reflect the reality of the relationship" (para 22);
b. In the employment context, it is too narrow an approach to say that a court or tribunal may only disregard a written term as not part of the true agreement between the parties if the term is shown to be a sham (para 28); and
c. The Tribunal should consider what was actually agreed between the parties, "either as set out in the written terms or, if it is alleged those terms are not accurate, what is proved to be their actual agreement at the time the contract was concluded: (para 32).

c. *Carmichael v National Power Plc [1999] 1 WLR 2042* which considered that the mutuality of obligation to personally perform work offered and pay remuneration is the "irreducible minimum … necessary to create a contract of service": Lord Irvine confirmed that mutuality of obligation in this sense requires an obligation on an employer to provide work and an obligation on the other party to undertake it; without such mutual obligations there was no contract of service (contract of employment).

d. *Windle v Secretary of State for Justice [2016] ICR* 721 in which it was held that the absence of any mutuality of obligation between

assignments may be a relevant factor which suggests that there is no contract of employment during the periods of work.

Conclusions

Employment status

58. I am satisfied on the evidence before me that the relationship between the claimant and the respondent was one of worker and was not an employment relationship. The respondent was not obliged to offer work to the claimant, and the claimant was not obliged to accept work if it were offered, or indeed to work for the respondent at all. For most of the period during which the claimant was engaged by the respondent he did not carry out any work for them. In fact the claimant only worked for the Respondent for 11 weeks, at times that suited him. After he went to university in September 2019 he didn't work for the respondent at all. No work was offered to the claimant at any point during the 9 months leading up to the termination of his engagement.

59. The claimant was free to work for other employers and did so. He made no complaints when he was not offered any work either in the Xmas holidays in 2019 or in the Easter holidays 2020. This is consistent with a zero hours contract under which both parties understood that work did not have to be offered to the claimant.

60. The fact that that the claimant was furloughed is not in my view evidence that the claimant had employment status. The Coronavirus Job Retention Scheme makes clear that workers can be furloughed as well as employees. The claimant was fortunate to benefit from that scheme as there was no obligation on the respondent to place the claimant on furlough.

61. Similarly, the fact that the respondent paid the claimant a week's notice, as a gesture of good will, is not indicative of employment status. The respondent should not be penalised with a finding of employment status because it chose to treat the claimant more generously than it was required to.

62. The claimant was paid holiday pay as a casual worker, rather than as an employee. It is unfortunate that the Contract contained the words 'contract of employment' but the reality of the relationship between the parties was not consistent in my view with a contract of employment. The written Contract did not therefore reflect either the intention of the parties, or the reality of the situation. In line with the approach set out in the *Autoclenz* case, I have in my decision focused on the reality of the situation as the written documentation does not reflect the true relationship between the parties in this case.

63. A relationship as part of which the claimant worked for the respondent for just 11 weeks and then didn't work for approximately 9 months until his engagement was terminated is not consistent with employment status, and particularly so when the claimant worked for other employers (without any limitation on his ability to do so) during this period.

64. There was, therefore, no mutuality of obligation between the parties as the respondent was not obliged to offer work or the claimant to accept it.

65. For these reasons I find that the claimant was not an employee of the respondent, but was engaged by the respondent as a worker.

Breach of contract claim

66. Claims for breach of contract can only be brought in the Employment Tribunal in accordance with Article 3 of the Order if they arise or are outstanding on the termination of an employee's employment. A claimant must therefore establish that s/he is an employee in order to pursue a complaint of breach of contract in this jurisdiction.

67. The Employment Tribunal does not have jurisdiction to consider the claims for breach of contract because the claimant was not an employee of the respondent. The claims for additional furlough pay and notice pay therefore fall away.

68. In any event, I find that the Job Security Policy did not apply to the claimant. It was not part of his contract. A draft Job Security Policy was produced but was not brought into force and has never been applied by the respondent in practice. I accept the respondent's evidence on this issue.

Date of termination of claimant's engagement

69. The claimant admitted in his evidence that the date of termination of his contract was 4 July 2020. This evidence was consistent with the respondent's evidence and the documentation before me, in particular the respondent's letter dated 29 June 2020 stating that the claimant was being taken off the respondent's books on 4 July.

70. The claimant's argument that his engagement terminated on 31 July 2020 because that was the termination date given in his P45 is not persuasive. The date contained within a P45 is not determinative of the date of termination. That date was in my view an error, linked to the fact that the pay slip for July was processed on 31 July.

71. The claimant also argued, in the alternative, that the Job Security Policy extended his period of engagement. I find that it did not. The Job Security Policy was a draft policy that had not been brought into force. It did not form part of the claimant's contract.

72. In any event, the Job Security Policy states explicitly that it applies to employees. The claimant was not an employee of the respondent. Accordingly the Job Security Policy did not extend the claimant's period of engagement. JSP did not apply so did not extend C's period of engagement by R.

Holiday pay

73. The claimant was paid a total of £411.79 holiday pay - £280.93 was paid in February 2020 and £130.86 on September 2020. The holiday pay was calculated in accordance with the method used by the respondent to calculate holiday pay for casual workers, namely the '12.07%' basis. He was paid all holiday to which he is entitled in respect of the period to 4 July 2020.

74. The claimant's claim for holiday pay was split into two elements:-

a. Holiday pay during the period of his engagement to 4 July 2020; and
b. Holiday pay during the additional period of time that the claimant says he should have been employed, through to 30 November 2020 or, in the alternative, 31 July 2020

75. The second element of this claim falls away in light of my findings above that the date of termination of the claimant's engagement was 4 July 2020.

76. The claimant commenced early conciliation on 7 July 2020. Any complaint for holiday pay in respect of the period prior to 8 April 2020 is, therefore, on the face of it out of time. As the respondent's holiday year ended on 31 March 2020, any claim for holiday pay in respect of the 2019/2020 holiday year is out of time. There was no evidence before me to suggest that it was not reasonable practicable for the claimant to present a claim for holiday pay within 3 months of the end of the 2019/2020 holiday year and I am therefore not willing to extend the time limit for a claim for holiday pay in respect of the period prior to 8 April 2020.

77. In any event, I am satisfied that the claimant was paid the holiday pay to which he was entitled in respect of the 2019/2020 holiday year. The claimant worked for 273.50 hours at £8.51 an hour. He was paid 12.07% holiday in respect of his earnings, which comes to £280.93. I accept the respondent's submission that the 12.07% basis provides a worker with 5.6 weeks' annual leave a year, on the basis of a standard working year of 46.4 weeks (52 weeks minus 5.6 weeks). 5.6 weeks is 12.07% of 46.4 weeks.

78. Even if the claimant's claim for holiday pay for the period prior to 8 April 2020 were in time, therefore, I find that he is not entitled to any additional holiday pay, as he has been paid all of the holiday pay that he accrued during that period.

79. In relation to the period after the 8 April 2020, the claimant did not carry out any work for the respondent, and his only earnings were furlough pay. His total furlough pay was £1,082.66. 12.07 % of £1,082.66 is £130.68. The claimant was paid holiday pay of £130.86 in respect of this period, so no further sums are due to him.

80. For the above reasons the claim for holiday pay fails and is dismissed.

81. Turning now to the specific issues identified at the start of the hearing as falling to be determined:

a. Was the claimant an employee of the respondent or engaged by the respondent as a worker?

   I find that the claimant was engaged by the respondent as a worker, for the reasons set out above.

b. What was the effective date of termination of the claimant's employment / engagement? The respondent says it was 4 July 2020, the claimant says it was either 31 July 2020 or 30 November 2020.

   I find that the effective date of termination of the claimant's engagement by the respondent was 4 July 2020 for the reasons set out above.

c. Is some or all of the claim for holiday pay out of time?

   The claim for holiday pay for the period prior to 8 April 2020 is out of time.

d. Was the respondent's Job Security Policy in force at the time the claimant's engagement or employment was terminated and, if so, was the claimant entitled to rely upon it?

   I find that the Job Security Policy was not in force at the time the claimant's engagement was terminated, and that the claimant was not entitled to rely upon it.

e. Is the claimant entitled to any additional sums by way of holiday pay, either:-

   i. In relation to the period up to 4 July 2020; and / or
   ii. In relation to the period from 5 July 2020 to either 31 July 2020 or 30 November 2020?

   I find that the claimant is not entitled to any additional sums by way of holiday pay in respect of either period.

f. Has the respondent wrongfully dismissed the claimant?

   I find that the Tribunal does not have jurisdiction to consider a claim for wrongful dismissal as the claimant was not employed by the respondent.

   In any event, the respondent has not breached the claimant's contract.

g. Has the respondent made an unlawful deduction from the claimant's wages and / or breached his contract of employment by failing to pay him beyond 4 July 2020?

   No. The claimant's engagement with the respondent terminated on 4 July 2020 and he is not entitled to any payments after that date.

82. For the above reasons, the claims fail and are dismissed.

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Employment Judge Ayre

3 July 2021

Sent to the parties on:

9 July 2021

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For the Tribunal:

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