



# EMPLOYMENT TRIBUNALS

BETWEEN

**Claimant**

**AND**

**Respondent**

Mr C Baci

24.7 Recruitment Services Ltd

**HELD AT** Birmingham (by CVP)

**ON** 27 May 2021

**EMPLOYMENT JUDGE** Choudry

**Representation:**

**For the claimant:** In person

**For the respondent:** Mr Alistair Hobbs – General Counsel

**RESERVED JUDGMENT**

1. The claimant's claim for furlough pay until 3<sup>rd</sup> July 2020 is not well founded and is dismissed.
2. The claimant's claim for furlough payment in full for the week ending 26.6.20 is not well founded and is dismissed.
3. The claimant's claim for holiday pay accrued in the period prior to him being placed on furlough is not well founded and is dismissed.
4. The claimant's claim for holiday pay accrued during the period of his furlough from 24 March 2020 to 26 June 2020 is well founded and the respondent is ordered to pay the claimant the sum of £900.52 (gross) as calculated in the attached Annex. This payment is subject to tax and national insurance contributions.

## REASONS

### ***Background***

1. This has been a remote hearing via CVP. A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing.
2. By a claim form presented to the Tribunal on 4 September 2020 the claimant brought claims for holiday pay and arrears of pay following the termination of his contract by the respondent on 26 June 2020 as a result of insufficient work due to the COVID-19 pandemic. In total the claimant claimed £1,812.41 broken down as follows:
  - 2.1 £339.44 – 1 week’s furlough pay for the period 26.6.20 to 3.7.20
  - 2.2 £96.14 – arrears of pay for the week ending 26.6.20
  - 2.3 £393.38 – in respect of holidays for the period to 23.3.20
  - 2.4 £983.34 – in respect of holiday accrual during his period of furlough from 23 March until 3 July 2020.
3. The respondent is a recruitment agency.
4. At the hearing the claimant confirmed that he had made an error of calculation and he was, in fact seeking the sum of £1,598.25 broken down as follows:
  - 4.1 £339.44 – 1 week’s unpaid furlough pay for the period 26.6.20 to 3.7.20
  - 4.2 £96.98 – furlough payment in full for the week ending 26.6.20
  - 4.3 £398.47 – in respect of 34.44 hours holiday which remained unpaid
  - 4.4 £764.20 – in respect of holidays accrued during the period of his furlough

### ***Evidence and documents***

5. I heard evidence from the claimant. For the respondent I heard evidence from Ms Julie Hopkins (HR Advisor).
6. I was also presented with an agreed bundle of some 145 pages together an additional 3 pages consisting of the claimant’s November 2019 bank statement. During the course of the hearing I also considered various other documents which the claimant had submitted to the Tribunal on 4 April 2021.

### ***Issues***

7. The issues for the Tribunal to consider are as follows:

## **Holiday Pay**

- 7.1 When the claimant's employment came to an end, was he paid all of the compensation he was entitled to under regulation 14 of the Working Time Regulations 1998?

## **Arrears of pay**

- 7.2 Is the claimant entitled to any arrears of pay ?

## ***Facts on liability***

8. I make the following findings of fact:
- 8.1 The claimant starting working for DHL, Tyre-Fort site on 9 September 2017 through an agency called Blue Arrow.
- 8.2 With effect from 16 August 2019 the claimant's employment transferred to the respondent pursuant to the Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE regulations"). On the transfer the respondent sent to him a letter which is contained at page 66 of the bundle which stated: *"This letter sets out the main terms of your employment contract, as you are aware under TUPE your contractual status and length of service remain in place from your previous employment"*. The letter then proceeded to set out the claimant's job title (Counterbalance FLT Driver), original start date and other contractual terms. In relation to his annual leave entitlement the letter stated that this was *"in accordance with your contract of employment"*. The letter also stated *"I can also confirm that the date you will transfer to the employment of the 24.7 team will be 16 August 2019"*.
- 8.3 The claimant's hourly rate of pay was £11.57 (gross) working 37.5 hours per week. The respondent accepts that the claimant's holiday pay was calculated at the rate of 15.4% of the claimant's pay producing an annual holiday entitlement of 34 days.
- 8.4 Following the national lockdown the claimant and his colleagues were called into a meeting at 4pm on 23 March 2020 and sent home. He was subsequently placed on furlough with effect from 24 March 2020 although a copy of the letter confirming this was not presented to me. The evidence of Ms Hopkins was that the claimant was placed on furlough receiving 80% of earnings calculated on a mean average of the earnings the claimant had earned weekly for the proceeding 16 weeks prior to the pandemic.
- 8.5 The evidence of Ms Hopkins for the respondent was that the claimant was employed as a "flexible employee" and I was shown a Flexible Employee Handbook for Blue Arrow dated November 2018 ("the Handbook") which I was informed by the respondent contained the terms under which the claimant was employed by Blue Arrow. The Handbook states that it forms part of an employee's terms of employment.

- 8.6 The Handbook provides that the holiday year was 1<sup>st</sup> April to 31<sup>st</sup> March. The Blue Arrow handbook refers to a holiday entitlement of 5.6 normal working weeks (28 days if the normal working week is 5 days). Further holidays could only be taken to the extent they had been accrued by continuous work.
- 8.7 The Handbook contains no definition of “Flexible Employee”.
- 8.8 The evidence of Ms Hopkins was that as a flexible worker the claimant’s entitlement to holiday pay was reliant on the accrual of hours worked and that holiday pay accrues at 15.04% per day, payable at the point in which holiday leave is requested. This was over and above the statutory minimum and was accepted as amounting to the 34 days holiday entitlement which the claimant asserted he was contractually entitled to.
- 8.9 Pages 25 and 26 of the Handbook contains Terms of Employment between Blue Arrow Limited and its Flexible Employees (“Terms of Employment”). The Terms of Employment state:
- “This document gives details of the terms and conditions upon which you are employed by the Company, as at the date of your first assignment. It contains the initial employment particulars required by the Employment Rights Act 1996...Further relevant provisions are included in the Flexible Employee Handbook (a copy of which is issued with this document). Your terms and conditions of employment are contained in the application form completed by you, this document and in the Flexible Employee Handbook except where it is stated therein that certain provision are not contractual. These documents constitute the entire contract between you and the Company.”*
- 8.10 Clause 2 of the Terms of Employment provides an undertaking from the respondent to use reasonable endeavours to allocate the signatory suitable assignments and as a minimum guarantees that the signatory will be offered at least 336 hours of work on assignment over the course of any 12 month period. This amounted to full time hours of 35 hours per week. However, the claimant worked 37.5 per week, Monday to Friday resulting in 7.5 working hours per day.
- 8.11 Clause 5 of the Terms of Employment state :
- “You are employed by the Company under a contract of service. The Company undertakes to pay you in respect of work done by you, whether or not the Company is paid by its Client in respect of that work. The Company is acting in relation to you as an employment business as defined by the Employment Agencies Act 1973 and is prohibited (by s 13(1)(a) of the Act from charging you a fee in relation to the work-finding services provided to you”.*
- 8.12 Clause 5 of the Terms of Employment contradict the wording contained elsewhere in the Handbook where it refers to the an individual’s terms and conditions of employment and providing

- compliance with s1 of the Employment Rights Act 1996 pointing towards a contract of employment and not a contract for service.
- 8.13 I note that the Terms of Employment were not signed by the claimant. During his evidence the claimant had no recollection of receiving the Handbook and indicated that he had not signed the Terms of Employment. Based on the contractual documentation before me and the evidence I have heard I find that the claimant was employment under a contract of employment and not a contract of service.
- 8.14 On 18 June 2020 the claimant was sent a letter by the respondent which stated, inter alia:
- “Due to the impact of the Covid 19 pandemic on the Automotive sector we do not believe that there will be any requirement for agency staff for the foreseeable future at either of the locations in the Midlands, we are therefore ending assignments with these clients with immediate effect, we have also had to take the decision to end the period of furlough as of Friday 26<sup>th</sup> June 2020. After the above date, we will attempt where possible to offer you assignments if you wish with similar roles and within a reasonable travelling distance”.*
- 8.15 The claimant was given statutory notice to terminate and the respondent informed the claimant that where possible they would continue to offer the claimant other assignments should they become available.
- 8.16 On 1<sup>st</sup> July 2020 the claimant received a letter advising him that he was being transferred under the TUPE regulations to the respondent's in house payroll and that his terms of employment were not affected by this change.
- 8.17 On 9 July 2020 the claimant received the following text from the respondent:
- “Dear Worker, If you are due a final Furlough claim, the period will covers between 15/06 to 03/07 and will be paid on 17/07”.*
- 8.18 As the claimant had not received his final furlough payment he took the text to mean that he would be paid until 3 July 2020.
- 8.19 The evidence of Ms Hopkins was that all Coronavirus Job Retention Scheme furlough payments were calculated on the number of days in the claim period. The final claim that the claimant was included in was from 15 June 2020 to 26 June 2020 (12 days). 12 days times by the claimant's daily rate of £50.59 equated to £607.08. The claimant was paid £607.10 for this period.
- 8.20 On 31 July 2020 the claimant received 18.09 hours holiday pay in the sum of £208.26 gross (£201.70 net). The claimant confirmed that this payment was paid to him when the payroll changed in July 2020.
- 8.21 On 6 November 2020 the respondent paid the claimant the sum of £772.31 gross (£668.97 net). I was shown a wage slip for this payment (week 31) which describes this payment as Holiday for 50.61 units. The claimant accepts that he received this payment but

he said in his evidence that when he enquired what this payment related to do he was told by one of the respondent's managers (Ryan McKenzie) that he assumed it was for a bonus for the previous year. The claimant says that he did not receive the pay slip relating to this payment and it was only when he checked his bank statement that he saw the payment. I am satisfied on the evidence before me that the sum of £772.31 gross (£668.97) represented a payment for the claimant's accrued holidays up to the date he commenced furlough and that this payment was not in respect of any bonus.

- 8.22 The claimant claims 66.05 hours of holiday pay unpaid for the furlough period in the sum of £764.20 on the basis of the 547.25 hours he would have worked during the period of his furlough from 24 March 2020 to 3 July 2020. He calculates this based on a holiday accrual of 12.07% of hours worked (66.05 hours) times by his hourly rate of £11.57.
- 8.23 The respondent accepts that no payment has been made in respect of holidays which may have accrued during the furlough period.

***Applicable law***

9. The Coronavirus Job Retention Scheme or indeed government guidance does not of itself create legally enforceable rights in the employment tribunal.
10. 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.
11. Regulation 2 also says “any reference to a worker’s contract shall be construed accordingly.”
12. “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.

13. The definition of “working time” goes on to say that “work” shall be construed accordingly.”
14. 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.
15. The government guidance on holiday pay during Furlough in relating to agency workers states:

**“Furloughed agency workers**

*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.*

**Taking holiday leave and receiving holiday pay during furlough**

*Agency workers who have worker status can take holiday they are entitled to under the regulations or their contract of employment while on furlough. Where a furloughed agency worker takes holiday, the employer who has placed the agency worker on to furlough may continue to claim the grant from HMRC. The grant can cover up to 80% of the worker’s wage cost, with the employer liable for holiday pay above this figure.*

*Employers have the flexibility to control when a worker is able to take leave, through the notice periods covered in Taking holiday. This is the same for agency workers, and employment businesses may refuse a worker to take leave provided this is permitted by the Working Time Regulations and the agency worker's contract.*

*Agency workers may be able to carry holiday into future leave years as covered in the next section”.*

### **Submissions**

16. In his submissions Mr Hobbs accepted that there was no written contract for the claim and that the claimant was not paid for his holidays accrued during the furlough period as in his submission holidays only accrue when the claimant is on assignment and as the claimant was not on an assignment during the furlough period then no holidays accrue. He also accepted that the claimant was not paid the balance of his holiday pay in respect of the holidays he accrued up to the date of going on furlough until November 2020 as it was only after the claim was received that the respondent realised its error.

### **Conclusions**

17. In reaching my conclusions I have considered all the evidence I have heard and considered the documents in the bundle to which I have been referred by the parties. I also considered the oral submissions made by the claimant and on behalf of the respondent.
18. Based upon my findings above I am satisfied that the claimant's period of furlough came to an end 26 June 2020. I do not accept the claimant's assertion that the sending of the text on 9 July 2020 had the effect of extending his furlough period to 3 July 2020. The use of the word "if" makes it clear that if there are any outstanding payments then they will be paid on 17 July 2020. The text also provides the dates the payment may cover. It was a generic text sent to individuals on furlough advising them of the date of the next payroll and what period the payroll would cover. It was not intended nor does it constitute an extension to the claimant's period of furlough. As such, I am satisfied that the claimant is not entitled to the sum of £339.44 in respect of 1 week's unpaid furlough for the period 26.6.20 to 3.7.20.
19. Given that the claimant's furlough ended on 26.6.20 he is only entitled to be paid furlough up to that date and not the full week. As indicated by Ms Hopkins in her evidence furlough payments were calculated on the number days in the claim period. The claimant's furlough ended on 26 June 2020 and he is only entitled to be paid



until this date. As such, he is not entitled to the sum of £96.98 in respect of furlough pay for the full week of 26.6.20 i.e. until 28 June 2020.

20. Turning to the issue of holiday pay accrued prior to the claimant commencing furlough, I am satisfied on the evidence before me that the claimant received the balance of his accrued holiday up to 23 March 2020 in November 2020 and that this payment was not for any alleged bonus. The payment of 50.61 hours equates to the balance of his holiday and is identified as such on his wage slip. The respondent accepts that this was not paid until after the claim was issued when the respondent realised its mistake.
21. In relation to holiday accrual during the furlough period I do not accept the respondent's argument that the claimant was on a flexi contract and only accrued holidays based on the hours worked. No signed contract was presented to the Tribunal and the claimant confirmed to me that he did not sign any such contract. On the contrary, the claimant was presented with more than one TUPE letter indicating that he was an employee working under a contract of employment whose terms and conditions were protected. As such, I do not accept that the claimant worked under a contract of service. I am satisfied that he worked under a contract of employment and is, therefore entitled to accrue holidays for the period of furlough based on his full rate of pay and hours of work.
22. As such, the claimant is entitled to the holiday pay which would have accrued during the period of his furlough namely 24 March 2020 to 26 June 2022. I calculate this to be £900.52 (less tax and national insurance contributions) as per the attached Annex.

**Employment Judge Choudry**  
**Signed By 10 April 2022**

**Annex**

**Period of holiday accrual: 24 March 2020 to 26 June 2020 (“furlough period”)**

69 days (number of working days in furlough period) x 7.5 hours (claimant’s daily hours) = 517.5 hours (total working hours in the furlough period)

517.5 hours x 15.04% (claimant’s holiday accrual rate) = 77.83 hours (holiday accrued during furlough) x £11.57 (claimant’s hourly rate) = £900.52