



EMPLOYMENT TRIBUNALS

Claimant: Ms K Nawrocke

Respondent: LSB Employment Limited

Heard at: Cardiff

On: 9 May 2022

Before: Judge MM Thomas

Representation

Claimant: Ms K Nawrocke, Litigant in Person

Respondent: Mr L Brake, Director of Respondent

RESERVED JUDGMENT

The Judgment of the Tribunal is that:

1. The Claimant's claim for holiday pay does not succeed and is dismissed.

Reasons

Issues

1. The Claimant's claim is for unpaid holiday pay. Originally in her claim form the Claimant claimed for unpaid holiday pay for the period from 1 September 2020 to the 30 September 2021. However, at the outset of the hearing she qualified that the unpaid holiday pay related to the months between and including June 2021 to October 2021, in total five months, during which time she was furloughed. In total, the Claimant claims holiday pay equating to 11 days of untaken holiday leave which she assesses in monetary terms at approximately £500 to £600.
2. The Respondent refutes the Claimant's claim. It asserts that under the terms of the Claimant's contract, that is a contract for services, there was no entitlement to holiday pay during the furlough period as she was not on assignment.

3. Alternatively, the furlough period was from 17 June 2021 to 30 September 2020, in total 15 weeks. The Claimant terminated her contract for services with the Respondent on 30 September 2021. Any holiday pay held to be owing is limited to that period. Further, holiday pay is not calculated on a monthly basis and is calculated on the basis of the number of hours worked in a week. I am referred to Section 7 of the contract for services.

Documents and Witnesses

4. The only documents before the Tribunal were the initial claim form (ET1) and the Respondent's response (ET3). In addition, the Respondent had filed a copy of the Claimant's signed contract for service. Neither party had filed or served any further documents.
5. Neither party was legally represented. The Claimant gave evidence through an interpreter in the Polish language. The interpreter's role in the proceedings was explained to her. The Respondent was represented by Mr L Brake, its company director, who gave evidence on its part. Also in attendance was Ms W Davis, the Respondent's accounts manager. Although initially it was indicated that Ms Davies would also give evidence, she did not. No further witnesses were called. Both witnesses gave evidence under oath.
6. The Claimant attended the hearing in person. Mr Brake and Ms Davis, attended remotely via video link.
7. I took time to explain to both parties the format that would be adopted for the hearing and what would be required of them. I reiterated what my role was. I also explained to the Claimant that the burden of proof was upon her to prove her claim and losses.
8. At the end of the hearing, I reserved my judgment, in the main, because it was by then late in the day.

Background

9. The Claimant's case is that she was employed by the Respondent from 1 September 2020 to the 30 September 2021 as an inspector and packer at Primepac Solutions based in Ebbw Vale.
10. In June 2021 she was furloughed. Her understanding was that the work she and her colleagues had been doing had come to an end, but that there would be further work for her and her colleagues after a period of two weeks. This did not happen, no further work was offered, and as a result she terminated her employment with the Respondent on 30 September 2021. In short, as she was employed, she was entitled to holiday pay for this period.

11. On the contrary the Respondent's states that the Claimant was never employed by it, as they were and are a recruitment Agency. The only contract in existence was a 'contract for services' not 'of service' ('the contract'). As such, the Claimant was an Agency worker.
12. The Claimant's placement, which Mr Brake refers to at hearing as her first assignment, was her job with Primepac Solutions. The Respondent states that assignment came to an end and as a result, she along with approximately 40 others were furloughed from then until 1 October 2021. In total, 15 weeks.
13. The Respondent asserts that under the terms of the contract for services no entitlement to holiday leave accrued if the Agency worker was not on assignment. Therefore, during furlough, as the Claimant was not on assignment, no holiday entitlement accrued and, on that basis, no holiday pay is owing.
14. My starting point is to determine the Claimant's employment status.

The Law

15. Section 230(1) of the Employment Rights Act 1996 defines an 'employee' as 'an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment'. S.230(2) provides that a contract of employment means 'a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing'.
16. In **Ready Mixed Concrete (South East) Limited v Minister of Pensions and National Insurance 1968 1 All ER 433** it was stated when considering the employment status of a person that the matter should be approached by looking at whether there was work for financial benefit, the degree of control, and the terms generally being consistent with employment rather than self-employment.
17. In short, control, mutuality of obligation and personal performance, before consideration of other factors may, depending on the circumstances, point towards, or away from a contract of employment. In **Hall (Inspector of Taxes) v Lorrimer 1994 ICR 218** it was held that what a court has to do is step back and look at the reality of the relationship. In **Carmichael and Another v National Power PLC 2000 IRLR 43**, it held that it is impossible to provide an exhaustive list of factors, but some will almost always, be present in a contract of employment
18. In **Montgomery v Johnson Underwood Ltd (2001)** the court made it clear that two factors should be treated as being the "irreducible minima" by way of legal requirements for a contract of employment to exist, mutuality of

obligation and control. However, a wide range of other factors may also be taken into account, and these can serve to displace the presumption of employee status that arises when the irreducible minimum is present.

19. In **Firthglow Ltd v Szilagy** (2009) EWCA Civ98, (2009) IRLR 365 and **Autoclenz v Belcher** [2011] UKSC 41 the Court emphasised the need of the Tribunal to investigate the true intentions of the parties when entering into the contract, and as to whether the words of the written contract, represented those intentions. The Court further stated that what has happened through the course of the contract was very important as the parties may have varied (either expressly or impliedly) the agreement.
20. In summary, no single factor is in itself conclusive, the Tribunal should consider all aspects and it is the overall impression that is important (**Hall**).

The facts and my findings

21. The Claimant believed herself to have been an employee of the Respondent. She had not realised that the contract, that she confirms that she signed, was a contract for services as opposed to one of service.
22. In oral evidence, the Claimant stated that when she first met with the Respondent's recruiter, she was presented with a number of documents to sign, not just the contract, but also tax, contact forms and other documents. She states that at the time she did not fully understand the contents of the forms because of limitations in her English language but nevertheless, she signed all the documents and returned them to the Respondent.
23. On the contrary, the Respondent asserts that the relationship was never that of employer and employee. It is an Employment Agency, it places its Agency workers with various companies/businesses. It accepts that the Agency workers have worker status, but no more. I am referred to the contract.
24. Although I have every empathy for the Claimant, the onus was upon her to ensure that the documentation she signed was documentation that she understood. The fact that she did not appreciate the nature of the contract she was entering into, is not a fault that I find can be revisited on the Respondent. The assertion is that potentially an interpreter should have been provided however, there is no legal requirement for the Respondent to do so. Significantly, the Claimant does not state that when she signed the contract she indicated or advised the Respondent that she had any difficulties understanding what was set out therein. Equally, the Claimant does not identify that she has any cognitive or intellectual difficulties which would have been a bar to her being able to understand its contents, or would have put her at any other disadvantage. Further, she does not identify that there was any pressure upon her to sign the contract on the date that she did. I

therefore, attach very little weight to her now assertion that she did not understand what she was signing or the impact of it.

25. Further, I also find the Claimant's oral evidence inconsistent in regard to her understanding of the contract that existed between herself and the Respondent. The Claimant knew that the work she did for Primepac was not work that the Respondent had any control over. On a day to day basis her work was allocated, monitored, controlled and supervised by Primepac Solutions. I asked her specifically to clarify as to what happened if she was off as a result of illness. Her evidence was that she was not paid sickness pay but that she would use holiday entitlement, or take unpaid leave. Similarly, when the assignment ended in June 2021 and she was furloughed, although in contact with the Respondent, she was also in direct contact with Primepac Solutions to find out as to when the next assignment would commence. In short, the Claimant's acceptance of the non payment for absences as a result of illness, and the complete lack of control over her actual work by the Respondent, I would state at this juncture, I find is not consistent with that of a person who perceives herself to be an employee.
26. As to the contents of the contract, from the outset it makes it very clear that it is a contract for services. Within the '*definitions*' it identifies what is meant by '*assignment*'. It defines it as meaning '*assignment services to be performed by the Agency worker for the Hirer for a period of time during which the Agency worker is supplied by the employment business to work temporarily for and under the supervision and direction of the Hirer*'. The Claimant is identified as the '*Agency worker*' and the Respondent as the '*Employment Business*'. The terms, the Agency worker's obligations, remuneration and annual leave are addressed in sections 2,4, 6 and 7 of the contract.
27. Turning first to Section 2. In short, in section 2.1 it confirms that the terms set out in the contract constitute the complete terms of agreement between the parties. Section 2.2 goes on to state that the contract is one for services, and confirms that the Agency worker is not an employee, or that the terms give rise to a contract of employment between the Agency worker and the Respondent. It identifies that for the purposes of the contract, the Agency worker is supplied as a worker and is entitled to the statutory rights arising in such a capacity.
28. Section 3 sets out the Agency workers obligations and that the Agency worker is not obliged to accept any assignment offered.
29. In summary, in the first instance, in regard to employment status, I find that there was not an employer employee relationship, nor had there been any intention by the Respondent to create the same. The Respondent is an Employment Agency. In short, its role is to recruit the Agency worker and

introduce the worker to the Hirer for placement, in this instance, Primepac Solutions.

30. That this was the nature of the relationship is borne out by the contract signed, and also is reflected in the nature of the contractual relationship that existed. In regard to the contract, as previously stated, albeit I empathise with the Claimant, the onus is on her to ensure she understands what she is signing. In regard the nature of contractual relationship, that is, that it was a contract for services, I find this is also borne out by what actually happened on a day to day basis. The Claimant worked where she was placed by the Respondent, which was at Primepac Solutions. When she worked at Primepac Solutions she was completely under its control. Primepac Solutions dictated the terms of her work, what she did and how she did it. When that assignment came to an end, the Claimant waited for the Respondent to provide another assignment. Further, that she was an Agency worker is consistent with how the Claimant was treated when she was off ill, as provided for under the terms of her contract, she was not paid.
31. In conclusion, I find that the Claimant was not an employee of the Respondent, and her contract with the Respondent was not a '*contract of service*' but a '*contract for services*'.

Holiday entitlement

32. On the basis of the above finding, I now turn to the issue in this claim, the Claimant's claimed holiday entitlement in the furlough period.
33. It is not an issue that the Claimant had worker status. As such, holiday entitlement falls for consideration under both the Working Time Regulations 1998 ('WTR 1998'), the statutory entitlement, and also as set out within the contract. Under the WTR 1998 a worker is entitled to a minimum of 5.6 weeks annual leave in each leave year. The Claimant's contractual entitlement is the same. In short, as set out within section 7 of the contract the Claimant was entitled to 5.6 weeks annual leave. The leave year is identified to run from 1 January to the 31 December.
34. It is not in dispute that the Claimant has previously been paid holiday pay however, this is because, as contended by the Respondent, she had always been on assignment. The disputed issue is whether that entitlement continued to accrue during the furlough period.
35. For the purposes of this decision, I have considered the Claimant's holiday entitlement first, pursuant to her contract and second, statutorily.

Contractual entitlement

36. Paragraph 7.6 refers to annual leave accruing during the course of an assignment and being calculated in accordance with, and paid in proportion to, the number of hours which the Agency worker works on assignment. Similarly, paragraph 7.9 sets out what happens on termination of the contract by either party, and the Agency worker's entitlement to payment in lieu of untaken leave.
37. In section 2.1 of the contract it states that '*no contract shall exist between the Employment Business and the Agency worker between assignments*'.
38. Section 6 of the contract deals with remuneration. I refer in particular to paragraph 6.3 of the same which states, '*subject to any statutory entitlement under the relevant legislation referred to in clause 7 and 8 below and any other statutory entitlement, the Agency worker is not entitled to receive payment from the employment business or the Hirer for time not spent on assignment, whether in respect of holidays, illness or absence for any other reason unless otherwise agreed.*
39. The terms of the contract are clear. I find that under the terms of the contract, that no contract existed between the Respondent and the Claimant when the Claimant was not on assignment. If not on assignment, no entitlement to holidays accrued and therefore, no entitlement to holiday pay arose. In summary, when the Claimant was furloughed from the 17 June 2021 until she terminated her contract with the Respondent on 30 September 2021 she was not on assignment. As such, no holiday entitlement accrued and therefore no contractual entitlement to holiday pay arose.

Statutory entitlement

40. It is not an issue that the Claimant had 'worker' status for the purposes of the contract (paragraph 2.2).
41. I refer to the WTR 1998 and in particular to the definition provided in regard to '*working time*', and the contents of Regulations 13 and 13A.
42. Regulations 13 and 13A set out the Claimant's entitlement to annual leave and additional annual leave which as previously stated, reflect the Claimant's contractual leave entitlement.
43. The issue is, irrespective of my finding in relation to the Claimant's contractual holiday entitlement, whether, statutorily, there was an entitlement. In short, whether an entitlement to holidays accrued during the furlough period when the Claimant was not on assignment under the WTR 1998.
44. I refer to Regulation 2 of the WTR 1998 which defines what is meant by '*working time*'.

“working time”, in relation to a worker, means—

- (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*

45. The evidence from the parties is that when the Claimant was furloughed, she was, along with the forty other Agency workers because the assignment had come to an end, and there was no further assignment for them. Both parties had hoped a further assignment would subsequently arise however, that did not materialise.
46. In short, at the time, the Claimant was not on assignment. She was not working. In the contract, when not on assignment, no contract exists between the Agency worker and the Employment Business, that is between the Claimant and the Respondent.
47. For the purposes of the WTR 1998, working time has a very specific definition, it envisages a contract in existence during which time the worker is undertaking work, at the employer's disposal and carrying out activities or duties. These are not the circumstances of this case. As such, I find, that under the WTR 1998, that is, statutorily, that during the furlough period as the Claimant was not on assignment, no contract existed between her and the Respondent, and as such, no entitlement to holidays accrued, and therefore no entitlement to holiday pay.

Conclusion

48. I appreciate and accept that the contractual agreement/ arrangements between the Claimant and the Respondent became confused by the impact of the Coronavirus Job Retention Scheme and in particular, the fact that the Claimant was entitled to a payment under the furlough scheme nevertheless, that is not a matter for the Tribunal. In short, as explained at the outset, I am bound by the law and what the law states and as such, it is on the basis of the relevant law and legal tests that I make my determination.
49. In conclusion, I find that at the time that the Claimant was furloughed, that is from the 17 June 2021 to when she terminated her contract with the Respondent on the 30 September 2021, she was not on assignment, therefore, no entitlement to holidays accrued, and as such, no holiday pay is outstanding.

Case No: Case No: 1601907//2021

Employment Judge Thomas

Date 11 May 2022

Reserved judgment & REASONS SENT TO THE PARTIES ON 18 May 2022

FOR THE EMPLOYMENT TRIBUNALS OFFICE Mr N Roche