



EMPLOYMENT TRIBUNALS

Claimants: Mrs. B Pacholczyk (1)

Miss D Gil (2)

Respondent: LSB Employment Limited

Heard at: Video (CVP) Wales

On: 18th August 2022

Before: Employment Judge S. Evans

Representation

Claimants: In person

Respondent: Mr. L. Brake, Director of Respondent

Interpreter Ms. Antonina Leice

RESERVED JUDGMENT

1. The First Claimant's claim of entitlement to holiday pay is not well-founded and is dismissed.
2. The Second Claimant's claim of entitlement to holiday pay is not well-founded and is dismissed.

REASONS

Introduction

1. Throughout these reasons, Mrs. Pacholczyk is referred to as the "First Claimant" and Miss Gil is referred to as the "Second Claimant".
2. The First Claimant referred her matter to ACAS early conciliation on 22nd October 2021 and ACAS certificate R183562/21/40 was issued on 2nd November 2021.
3. The Second Claimant referred her matter to ACAS early conciliation on 22nd October 2021 and ACAS certificate R183602/21/68 was issued on 17th November 2021.

4. The First Claimant's ET1 was issued on 27th December 2021 and the Second Claimant's ET1 was issued on 28th December 2021. Both claims indicated a claim of entitlement to holiday pay. The Second Claimant's ET1 also raised a complaint that she did not receive a formal contract nor statement regarding her employment status and that she did not receive an update or a new contract before being placed on furlough.
5. The Respondent filed an ET3 in relation to each of the Claimant's claims, contesting the claims made by the First and Second Claimants.
6. The two claims were listed together for a final merits hearing before me on 18th August 2022.

The Issues

7. The parties agreed at the outset of the hearing that the issues for determination were:
 - whether each of the First and Second Claimant accrued entitlement to annual leave during the periods they were on furlough;
 - if they did, whether there was an entitlement to pay in lieu of annual leave accrued but untaken at the date of termination of their contracts with the Respondent.
8. There was also an issue between the parties as to the employment status of the claimants. The First and Second Claimants believe they were employees; the Respondent asserts that they were both workers.
9. Mr. Brake indicated that the reference in each of the ET3 forms to the payment of £100 to each of the First and Second Claimant was not relevant to the issues to be determined.

Procedure, documents and evidence heard

10. The interpreter's oath was taken by Ms. Leice at the outset of the hearing and all the proceedings were translated into and from the Polish language spoken by the First and Second Claimants.
11. Regular breaks were incorporated into the hearing. As no party was legally represented, the procedure to be followed and the issues to be determined were explained by me at the outset of the hearing and at regular points throughout the day.
12. The First and Second Claimants confirmed they were relying on the same submissions in each of their cases.
13. Despite a direction from the Tribunal that an agreed bundle of documents should be uploaded in advance of the hearing, no such bundle was produced and no witness statements were provided by any of the parties. All parties indicated that they had not understood the meaning of the direction.
14. The Tribunal took oral evidence from each of the First and Second Claimant and from Mr. Brake for the Respondent.

15. During the course of the hearing, the First and Second Claimants and Mr. Brake emailed a variety of documents to the Tribunal. These included payslips and written contracts signed by each of the First and Second Claimants. I instructed the parties that they should direct me to a particular document and explain its significance if they wished me to have regard to the contents of that document in reaching my decision.
16. Each party made oral submissions at the conclusion of the hearing. Judgment was reserved as there was insufficient time for me to review the evidence and make my decision on the day.

Findings of fact

17. The First Claimant entered into a written contract ("The First Claimant's Contract") with the Respondent dated 13th August 2019.
18. The Second Claimant entered into a written contract ("The Second Claimant's Contract") with the Respondent dated 6th June 2019.
19. The relevant clauses of the First Claimant's Contract and the Second Claimant's Contract for determination of the issues today are clauses 1, 2, 3, 6 and 7. Those clauses are identical in the First Claimant's Contract and the Second Claimant's Contract and the findings in paragraphs 20 – 27 below apply to both.

20. Paragraph 2.1 states:

"These Terms constitute the entire agreement between the Employment Business and the Agency Worker for the supply of services to the Hirer and they shall govern all Assignments undertaken by the Agency Worker. However, no contract should exist between the Employment Business and the Agency Worker between Assignments. These terms shall prevail over any other terms put forward by the Agency Worker."

21. "Assignments" are defined in paragraph 1 as:

"means 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."

22. Paragraph 2.2 states:

"During an Assignment the Agency Worker will be engaged on a contract for services by the Employment Business on these Terms. For the avoidance of doubt, the Agency Worker is not an employee of the Employment Business although the Employment Business is required to make the Deductions from the Agency Worker's pay. These Terms shall not give rise to a contract of employment between the Employment Business and the Agency Worker, or the Agency Worker and the Hirer. The Agency Worker is supplied as a worker and is entitled to certain statutory rights as such, but nothing in these terms shall be construed as giving the Agency Worker rights in addition to those provided by statute except where expressly stated."

23. Paragraph 3.1 states:

“The Employment Business will endeavour to obtain suitable Assignments for the Agency Worker performing the agreed Type of Work. The Agency Worker shall not be obliged to accept any Assignment offered by the Employment Business.”

24. Neither the First nor the Second Claimant gave evidence that they were obliged to accept any Assignment offered nor that they were subject to any control by the Respondent during the period of an Assignment.

25. Paragraph 6.3 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.”

26. Other than during periods on furlough, neither the First nor the Second Claimant gave evidence that they received any payment from either the Respondent nor the Hirer when they were not working on Assignment.

27. Paragraph 7 addresses provisions relating to annual leave entitlement. Paragraph 7.1 sets out the entitlement to 5.6 weeks leave per Leave Year. Paragraph 7.2 states:

“Entitlement to payment for leave under clause 7.1 accrues in proportion to the amount of time worked by the Agency Worker on Assignment during the Leave Year.”

Paragraph 7.6 provides that “ the amount of payment which the Agency Worker will receive in respect of periods of annual leave taken during the course of an Assignment will be calculated in accordance with and paid in proportion to the number of hours which the Agency Worker has worked on Assignment.”

Under paragraph 7.9, there is provision that “upon termination of the contract between the parties the Agency Worker will be entitled to a payment in lieu of any untaken leave where the amount of leave taken is less than the amount accrued in accordance with clause 7 at the date of termination.”

28. The First Claimant and the Second Claimant each gave evidence to confirm the signature on each of the contracts was theirs. They both testified that, although they signed the contract at the beginning of their relationship with the Respondent, they did not receive a copy of the contract until 4 March 2022. Each Claimant said they had been left alone in a room to sign a number of documents.

29. I find that the First Claimant voluntarily signed the contract of service on 13th September 2019 and that the Second Claimant voluntarily signed her contract of service on 6th June 2019. Each Claimant is bound by the terms

of their contract. The contracts had a cover sheet dealing with opt out provisions with regard to the Working Time Regulations. Those cover sheets were also signed by the First Claimant and the Second Claimant and bore an attestation, in English and in Polish, that the signatory understood the contents. There was no evidence led that the First or Second Claimant had requested an interpretation of the provisions nor that they had asked for an explanation at the time. The contracts were validly executed.

30. I am not required to make a finding of fact as to whether a copy of the contract was provided to each Claimant on signature as no cause of action arises. That is however something that the Respondent should provide to each worker.
31. The First Claimant was placed on furlough from 12th March 2021 for 2.5 weeks and again from 15th June 2021 to 30th of September 2021.
32. The Second Claimant was placed on furlough in March 2021 and then returned to work before being put back on furlough from mid-June 2021 to the end of September 2021.
33. Neither the First or Second Claimant were asked to sign or agree to any changes to their contract when they were placed on furlough.
34. During their time on furlough, the claimants received furlough pay.
35. Both the first Claimant and the Second Claimant received holiday pay in lieu of accrued annual leave when they ended their contracts with the Respondent in October 2021. This pay related to the leave accrued during the time that they worked on Assignment in 2021. They did not receive any payment in relation to annual leave for the periods when they were on furlough.

The Law

36. I was not referred to any statutory provision or case law but take into account the definition of an employee as set out in s.230 (1) and (2) Employment Rights Act 1996. An employee is someone who works under a contract of employment which is defined as a contract of service.
37. I also consider the common law principles established to assist with the determination of employment status, including an analysis of whether there was a mutuality of obligation between the parties, whether personal service was required, the degree of control that the engaging party had over those engaged and all other relevant factors. I remind myself of the need to reflect on whether the words of a written contract represent the reality of the relationship.
38. Part II of the Working Time Regulations 1998 sets out rights and obligations concerning working time. Under Regulation 13 and 13A those rights include an entitlement to annual leave and additional annual leave respectively. Taken together, Regulations 13 and 13A establish an entitlement to 5.6 weeks annual leave.
39. The right to annual leave concerns “working time”. Regulation 2 defines this, in relation to a worker, 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”.

“Relevant agreement” is also defined in Regulation 2 as “ a workforce agreement which applies to [a worker], any provision of a collective agreement which forms part of a contract between him and his employer, or any other agreement in writing which is legally enforceable as between the worker and his employer”.

Conclusions

40. The First and Second Claimant did not advance any argument as to the relevance of whether they were employees. I do however find that they were not employees of the Respondent. The wording of the written contract of each of the First and Second Claimants is clear. Clause 2.2 expressly states that the contract is a contract for services (rather than a contract *of* service as required for employee status) and that the Agency Worker is not an employee of the Employment Business. Focussing just on the written document, it is clear that neither the First Claimant nor the Second Claimant was an employee of the Respondent.
41. Taking account of all the circumstances, including whether the written provision reflected the reality of the relationship, I find that the First Claimant and the Second Claimant were not employees of the Respondent. There was no evidence put forward to suggest there was a mutuality of obligation and no evidence to show that the Respondent had any control over the Claimants during their Assignment. The “irreducible minimum” recognised by case law as essential to the status of an employee, was therefore missing from this relationship.
42. It is accepted by the Respondent, and recorded in clause 2 of the contract, that the First and Second Claimants were workers.
43. As workers, under the Working Time Regulations 1998, they were entitled to 5.6 weeks annual leave during their “working time”. It is not in dispute that the First and Second Claimants accrued entitlement to annual leave when they were working on an Assignment. It is also not in dispute that they were paid in lieu of that accrued entitlement when they ended the relationship with the Respondent.
44. As to the time when the First and Second Claimants were on furlough, I find that no entitlement to annual leave under Regulation 13 and 13A Working Time Regulations 1998 arises as the period on furlough was not working time. The impact of Clause 2.1 of the contract is that no contract existed between the Respondent and the First and Second Claimants between Assignments. When the First and Second Claimants were on furlough in March 2021 and again between June and September 2021, they were not performing services for the Hirer as required by the definition of “Assignment” in clause 1 of the contract.

45. Whilst on furlough, the First and Second Claimant were not on Assignment. Therefore no contract existed during furlough between the Respondent and the Claimants. As there was no contract, there was no “working time” as defined in Regulation 2 of the Working Time Regulations 1998. The First and Second Claimant were not working, nor at their employer’s disposal and carrying out their activity or duties and it was not a period during which they were receiving relevant training. No evidence was adduced of any workforce agreement or other agreement in writing between the First and/or Second Claimant and the Respondent stating that furlough was to be treated as working time for the purpose of the Working Time Regulations. Indeed the Claimants were concerned that they had not been asked to sign any variation of contract at the beginning of furlough. The time on furlough did not fall within the definition of working time. As such, no statutory entitlement to annual leave arose whilst the First and Second Claimants were on furlough.
46. Turning to whether the First and/or Second Claimant had any contractual entitlement to annual leave whilst on furlough, I find that they did not. Clause 2 of the contract expressly states that there is no contract between the parties between Assignments. The periods on furlough were between Assignments as the Claimants were not performing services for the Hirer as required by the definition of “Assignment” in clause 1 of the contract. During the periods on furlough therefore the provisions of clause 7 of the contract, relating to annual leave, were not engaged and there was no contractual entitlement to annual leave. As no annual leave was being accrued whilst the First and Second Claimants were on furlough, there was no entitlement to pay in lieu of leave accrued but not taken when their relationship with the employer ended.
47. The First and Second Claimants believed that, as they were in receipt of furlough pay, they were also entitled to annual leave. This erroneous assumption, on the facts, was compounded by other people giving the Claimants information about the experience of other agency workers, in other organisations, who were on furlough. However, each individual’s entitlement will depend upon their rights both under contract and the Working Time Regulations and will be fact specific.
48. In the case of the First and Second Claimant, the intervention of furlough did not change the terms of their contract identified above. It remained the case therefore that they had no contractual entitlement to annual leave during any period when they were not on an Assignment. The periods on furlough were times when they were not on Assignment. Additionally, the time on furlough was not “working time” for the purpose of the Working Time Regulations 1998 as explained above. Consequently, no annual leave was accrued, by contract or under the Working Time Regulations 1998 in those periods when the First and Second Claimants were on furlough. As a result, there could not be an entitlement to pay in lieu of accrued leave on termination of their contracts and, accordingly, the claims are dismissed.

Employment Judge **S Evans**

Date 23rd August 2022

RESERVED JUDGMENT & REASONS SENT TO THE

PARTIES ON 24 August 2022

FOR EMPLOYMENT TRIBUNALS Mr N Roche