



EMPLOYMENT TRIBUNAL

Claimants: Ms. E Farley
Ms. Y Sunderland

Respondent: Reed Staffing Services Ltd.

Hearing: Final Hearing

Heard at: London Central ET (via CVP)

On: 2-3 July 2024 (4 July 2023 reserved for deliberations)

Before: EJ Tinnion

Appearances: For Claimants: Mr. M. Smith, Counsel
For Respondent: Mr. J. Allsop, Counsel

JUDGMENT

1. The Claimants' holiday pay claims based on statutory entitlements to annual leave arising under the Working Time Regulations 1998 in respect of periods beginning from 2 January 2023 are not well founded and are dismissed.
2. The Claimants' holiday pay claims based on statutory entitlements to annual leave arising under the Working Time Regulations 1998 in respect of periods ending on 1 January 2023 were presented out of time and are dismissed.

REASONS

Introduction

3. Following ACAS Early Conciliation, by ET1s presented in 2023 and 2024 Claimants Ms. Farley (No. 2217695/2023), Ms. Smith (No. 2216942/2023), Ms. Stevenson (No. 2200561/2024) and Ms. Sunderland (Nos. 2216943/2023, 2216944/2023) presented holiday pay claims under s.13 of the Employment Rights Act 1996 (**ERA 1996**) and Reg 30(1) of the Working Time Regulations 1998 (**WTR 1998**) against Respondent Reed Staffing Services Ltd (**RSS**), a labour supply agency. Ms. Smith and Ms. Stevenson's claims have been addressed in separate judgments. Unless indicated, a reference to the Claimants is to Ms. Farley and Ms. Sunderland. Before interest, the pleaded value of their claims is as follows:

Ms. Farley	£1,517.26
Ms. Sunderland (period Oct 2021 – Dec 2022)	£2,2679.72
Ms. Sunderland (period Jan 2023 – Sept 2023)	£924.52

4. Common to all claims is a dispute regarding the calculation of 'rolled up' holiday pay for temporary workers working for employment agencies like RSS under the Working Time Regulations 1998 (**WTR 1998**) in light of the Supreme Court judgment in Harper Trust v Brazel [2022] UKSC 21, in particular whether, when making that calculation, what must be included is (a) only those periods when the Claimants were actually working for RSS on assignment for an end-user disregarding all other periods during the term of engagement (RSS's position) or (b) whether other periods must also be included as well, including those periods when the Claimants (i) were not working for RSS (ii) were not contractually obliged to make themselves available to work for RSS (iii) were under no contractual duty to accept any work RSS offered them (iv) might be unavailable for any work RSS offered them (v) might be – and sometimes were - working for a different employer/ agency (and being paid wages and accruing a holiday pay entitlement from that third party at the time) (Claimants' case). The underlying legal basis of all four claims is identical.

Final hearing

5. The final hearing of the Claimants' claims was held on 2-3 July 2024 (**Final Hearing**). The following documents were relied upon at that hearing without objection:
- a. Farley – witness statement dated 11 June 2024
 - b. Farley – pp.125 bundle
 - c. Farley – Claimant written submissions
 - d. Farley – agreed chronology and statement of facts (Appendix 1 hereto)
 - e. Sunderland – witness statement dated 12 June 2024
 - f. Sunderland – pp.174 bundle
 - g. Sunderland – Claimant written submissions
 - h. Sunderland - agreed chronology and statement of facts (Appendix 2 hereto)
 - i. Joint Supplementary Bundle (pp.27)
 - j. loose documents:
 - i. RSS Terms and Conditions of Employment
 - ii. RSS staffing services employment contract
 - k. Mr. G. Beart (Respondent) witness statement dated 13 June 2024
 - l. Respondent skeleton argument

List of issues

6. A list of issues for all four claims was produced which went through five iterations before it was finally settled. That agreed list is attached as Appendix 3. Although the issues were agreed, the Tribunal does not accept the order the parties put those issue is necessary the best. The logical order is to address jurisdiction first (at least on a preliminary basis), then the statutory position under the WTR 1998, and only then - if the Claimants' construction of the WTR 1998 is preferred – to consider the effect of the Claimants' contracts.

Findings of fact

7. Detailed chronologies and statements of fact for Ms. Farley and Ms. Sunderland (Appendices 1-2) were agreed by the parties. On that basis, the Tribunal adopts those chronologies and facts *in toto*. The Tribunal provides a brief narrative summary below, but the detailed facts of this case are to be found in those documents.
8. RSS provides labour supply services, including the placement of temporary and permanent workers in the UK education sector through its 'Reed Education' division.
9. Ms. Sunderland began working for RSS in 2018. In the period relevant to her claims (1 October 2021 to 22 September 2023) Ms. Sunderland worked under the terms of two contracts with RSS: first, an employer/employee employment contract – the “**Contract of Service**” - the terms of which the Tribunal has seen; and second, from the period beginning 2 January 2023, an employer/worker contract – the “**Contract for Services**” – the terms of which the Tribunal has also seen.
10. Ms. Farley began working for RSS in September 2022. In the period relevant to her claims (19 September 2022 – 6 October 2023) Ms. Farley worked under the same two contracts as Ms. Sunderland: first, a Contract of Service in respect of the period ending on 1 January 2023; and second, from 2 January 2023 a Contract for Services.
11. It is not in dispute that during the periods both before and from 2 January 2023, RSS calculated and paid both Claimants' annual leave holiday entitlements on a rolled-up basis based on a calculation of a weeks' pay under s.222 of the Employment Rights 1996, not s.224. It is also not in dispute that both Claimants had the status of employees prior to 2 January 2023 and workers from 2 January 2023 when working on RSS assignments for the purposes of all relevant statutes and regulations (Employment Rights Act 1996, National Minimum Wage Act 1998, WTR 1998, etc.).

Jurisdiction: Part 1

Issue #8 (Jurisdiction re: deductions made on/before 1 Jan 2023)

12. For ease of reference, unless indicated, references herein to deductions of holiday pay are to be taken to include a reference to underpayment of holiday pay as well.
13. Law. The rules on time limits for unauthorised deductions from wages claims under s.13 of ERA Act 1996 are set out in s.23 of that Act. The basic rule is set out in s.23(2) to the effect that a complaint must be made within a period of 3 months beginning with, in the case of a complaint relating to a deduction by the employer, the date of the payment of the wages from which the deduction was made. Where there has been a series of deductions or payments, it is sufficient for the purposes of s.23(3) that the complaint be made within 3 months of the date of payment of wages from which the last deduction in the series was made.
14. Similarly, under Reg 30(2) of WTR 1998, the Tribunal may not consider a complaint under those regulations unless it is presented (a) before the end of the 3 month period beginning with the date on which it is alleged that the exercise of the relevant right should have been permitted or the payment made except (b) where the Tribunal

is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of 3 months, in which case the Tribunal shall consider the complaint if it is presented within such further period of time as the Tribunal considers reasonable.

15. Where a claim is for more than one deduction, it is a question of fact whether those deductions form a series of deductions or not – series is an ordinary word which has no particular legal meaning. There are two key questions: first, is there a sufficient similarity of subject-matter; second, is there a sufficient frequency of repetition.
16. Analysis. It is not in dispute that the Claimants' claims for holiday pay entitlement to which accrued during the period starting on 2 January 2023 were presented in time, RSS not suggesting otherwise in either ET3. The dispute is whether the Claimants' ET1s also presented timely claims in respect of the earlier series of deductions they allege RSS made regarding holiday pay from 2021 (Ms. Sunderland) and 2022 (Ms. Farley) up to 1 January 2023, the last day on which the Claimants were still working under their respective Contracts of Service.
17. The Tribunal's decision is that the earlier deductions (up to 1 January 2023) and the later deductions (from 2 January 2023) formed one continuous series of deductions. The Tribunal bases that finding on the following:
 18. First, during the two periods the relevant wages and holiday pay payments were made by the same employer to the same employee (from 2 January 2023 worker) based on the same method of calculating holiday pay.
 19. Second, the change in each Claimants' contract on 2 January 2023 from a contract of service (ie, an employer/employee contract) to a contract for services (ie, an employer/worker contract) made no difference, and effected no change, to the method RSS used to calculate the Claimants' holiday pay or the frequency of those payments, which continued to be paid in arrears shortly after the work was done. This is consistent with what RSS assured the Claimants in 2022 before the change.
 20. Third, the Tribunal notes para. 8(c) of the Respondent's skeleton did not put forward a basis for suggesting the series of deductions in the earlier periods and later periods did not form part of one continuous series of deductions from beginning to end.
 21. Fourth, looked at overall, the Tribunal is satisfied, and finds, that there was sufficient similarity of both subject-matter and frequency of repetition in respect of both Claimants' wages/holiday pay for there to have been, in each Claimant's case, one overall series of deductions.
22. The finding above is without prejudice to the issue of when the last unauthorised / unlawful deduction in that series of deductions was made, for which see paras. 65-66 below.

Working Time Regulations 1998

Issue #5 (Farley entitlement to holiday pay before doing work for RSS)

23. Ms. Farley's Claim Calculation Schedule in her bundle [97-98] included 9 rows at the beginning starting at the week beginning 29 July 2022 (row 1) and ending at the week beginning 23 September 2022 (row 9) in which she accepts she did no work for RSS. Ms. Farley's calculation of her outstanding holiday pay included that period.
24. In cross-examination, she was referred to those rows, and it was put to her that she was claiming for those first 9 weeks when she was not entitled to. Ms. Farley replied "*I accept I am not entitled to any holiday pay until 19 September 2022 – it clearly was a mistake on the calculation*", and accepted it would be wrong for her to claim holiday pay before then.
25. Having conceded she was not entitled to accrue holiday pay before her first assignment for RSS, the Tribunal makes a finding to that effect. In light of that concession, the Tribunal does not need to determine whether clause 2 of her Contract of Service prevented the accrual of holiday pay prior to the start of her first assignment, and declines to do so – the issue is obiter.
26. That still leaves open the question when Ms. Farley's first day working for RSS was. There is contradictory evidence on that issue: para. 3 of her witness statement says 30 September 2022; in cross-examination, she said she was "pretty sure" it was 19 September 2022; the relevant RSS payslip (her first) does not record the dates she worked, just the fact she was paid for 25.67 hours (likely 3 days) work on 23 September 2022. On the balance of probabilities, the Tribunal finds that her first day/date of work for RSS was 19 September 2022 as (i) it was put to her that it was an agreed fact that her employment started on 19 or 20 September 2022, and (ii) she replied (without challenge) she was pretty sure it was 19 September.

Issue #6 (Whether Farley annual leave entitlement in period up 1 Jan 2023 should be calculated in accordance with Reg 15A WTR 1998 or as per Harper Trust v Brazel)

Issue #7 (Whether Farley and Sunderland's annual leave entitlement for services in period from 2 Jan 2023 until date of lodgements of ET1 in 2023 should be calculated in accordance with Reg 15A WTR 1998 or as per Harper Trust v Brazel)

27. It is convenient to address the position in relation to Ms. Farley first. It is common ground that during the period 19 September 2022 – 6 October 2023 Ms. Farley was always an RSS 'worker' for the purpose of Regs 13 and 13A of WTR 1998 hence entitled to 5.6 weeks leave in each leave year (on and subject to the other terms of the WTR 1998).

Period 19 Sept 2022 – 18 Sept 2023 (Farley)

28. As Ms. Farley's employment by RSS began on 19 September 2022, the Tribunal finds that Ms. Farley's 'first year' of employment began on 19 September 2022 and ended on 18 September 2023, with her second year starting on 19 September 2023.

29. Applying Reg 15A(1) of WTR 1998, during her first year of employment the amount of leave Ms. Farley could take in exercise of her annual leave entitlement under Regs 13 and 13A of WTR 1998 was limited to the amount deemed to have accrued in her case at that time under Reg 15(2A) less the amount of leave (if any) that she had already taken during that year.
30. Applying Reg 15(2A) of WTR 1998 (in relevant part), for the purpose of Reg 15A(1), Ms. Farley's leave entitlement was deemed to accrue over the course of her first year of employment at the rate of one-twelfth of the amount specified in Regs 13(1) and 13A(2) of WTR 1998 on the first day of each month of that year.
31. The decision in Harper Trust v Brazel [2022] UKSC 21 does not require a different outcome. The claimant in Harper Trust – a music teacher working for a school - began her employment in 2002. Her holiday pay claim did not relate to her first year of employment but to deductions from her pay relating to periods between January 2011 and June 2016. It was not argued in Ms. Brazel's case – because there was no basis to argue - that during the period relevant to her claims her holiday pay entitlement should be calculated in accordance with Reg 15A.
32. Paras. 38-45 below address the issue raised in Issue #4 – whether Ms. Farley and Ms. Sunderland's pay for the purpose of determining the amount of a week's pay under Reg 16(1) of WTR 1998 should be calculated in accordance with s.222 or s.224 of ERA 1996.

Period 19 Sept 2023 – 15 November 2023 (Farley)

33. This period occurred during Ms. Farley's second year of employment. As Reg 15A of WTR 1998 only applied to her first year, it did not apply to this period.
34. During this period, under Regs 13(1) and 13(A(1)) of WTR Ms. Farley continued to be entitled to 5.6 weeks annual leave in her leave year. Under Reg 13(3)(a) of WTR 1998, Ms. Farley's leave year began on the calendar date provided for in a relevant agreement (which in this case would be her Contract for Services). Para. 21 of that contract stated her leave year began on 1 January (para. 26 of Ms. Farley's previous Contract of Service also provided that for the purpose of Reg 13 of WTR 1998 each leave year began on 1 January). In this period, the Tribunal accepts Ms. Farley's annual leave entitlement (and entitlement to be paid for such leave under Reg 16(1)) must be calculated on a basis consistent with the decision and approach approved in Harper Trust.
35. The Respondent's skeleton set out 6 reasons why it submitted Ms. Farley and Ms. Sunderland (and the other two Claimants') holiday pay claims were not governed by the Harper Trust decision: (i) each Claimant was an agency worker engaged via RSS for the end-user, unlike the direct contractual relationship Ms. Brazel had with her school (ii) they were not part-year workers in the same way Ms. Brazel was (iii) the Claimants were free to engage in other work while registered with RSS and/or could choose to do that work in preference to work RSS offered them, unlike Ms. Brazel (iv) each Claimant was free to end an assignment at any time for any reason, unlike Ms. Brazel (v) unlike Ms. Brazel the Claimants were free to take leave at an time of their choosing (vi) each Claimant enjoyed the flexibility that accompanied temporary

working

36. The Tribunal accepts these are important distinctions. The fundamental problem it has accepting their relevance is that no legal basis, based on the terms of the WTR 1998 and/or case law considering those terms, has been put forward which would allow these distinctions, even if true, to make a difference to the analysis or the outcome. As the Supreme Court noted in paras. 4 and 47 of Harper Trust, “*the issue is one of statutory interpretation.*” The Tribunal rejects the Respondent’s submission because it is not supported by the terms of any Regulation in WTR 1998 cited to the Tribunal by the Respondent or any case authority which has addressed the issue.

Period 1 Oct 2021 – 22 Sept 2023 (Sunderland)

37. The wording of Issue #6 related to Claimants Ms. Farley and Ms. Smith only. The wording of Issue #7 related to all Claimants but only in relation to the period from 2 January 2023 until the date of the relevant ET1. The substantive issue the parties need the Tribunal to address relating to the calculation of Ms. Sunderland’s annual leave entitlement in the period relevant to her ET1 claims – which the Tribunal finds to be 1 October 2021 to 22 September 2023 - is whether it should be calculated on a basis consistent with the decision and approach approved in Harper Trust or not. Ms. Sunderland’s employment by RSS began in 2018, so there is no question but that by 2021 Ms. Sunderland was no longer in her first year of employment and Reg 15A of WTR 1998 did not apply. For the reasons already given in relation to Ms. Farley’s claim, the Tribunal holds that her annual leave must also be calculated on a basis consistent with the decision and approach approved in Harper Trust. In brief, RSS has not satisfied the Tribunal that there is any proper basis not to do so.

Issue #12 (Does rolled-up holiday pay that has already been paid to Farley and Sunderland represent the full extent of their entitlement such that any further right to claim is extinguished by Reg 16(5) of WTR 1998)

38. Reg 16(1) of WTR 1998 provides that a worker is entitled to be paid in respect of any period of annual leave to which he is entitled under Reg 13 and 13A at the rate of a week’s pay in respect of each period of leave. Reg 16(2) of WTR 1988 provides that ss.221-224 of ERA 1996 shall apply for the purpose of determining the amount of a week’s pay for the purpose of Reg 16 subject to the modifications set out in Reg 16(3) and the exception in Reg 16(3A).

39. The dispute between the parties which will either decide this issue (or else assist the parties to determine for themselves whether Ms. Farley and Ms. Sunderland have been paid their full statutory annual leave pay entitlement or not, applying the other findings and holdings of this judgment) is whether the formula set out in s.222(2)-(4) or s.224(2)-(3) should be applied to that calculation. Paras. 13-19 of the Respondent’s skeleton argue s.222 is to be applied, the Claimants argue for s.224.

40. The Tribunal notes this issue was not decided by Harper Trust: in that case, at least by the time the case reached the Supreme Court, it was not in dispute that s.224 applied. The question raised on appeal in Harper Trust, which the Supreme Court decided against the appellant, was whether Ms. Brazel’s part-year worker leave entitlement must be pro-rated to take account of the weeks not worked so as to

comply with the so-called ‘conformity principle’ founded in EU law (see summary at Harper Trust, para. 4). That position was not taken by either side in this case.

41. The Tribunal’s decision is that s.224 of ERA 1996 applied in both Ms. Farley and Ms. Sunderland’s case in relation to the periods both before and from 2 January 2023 and therefore that the correct method of calculating the value of each Claimant’s ‘week’s pay’ is to apply the formula set out in s.224(2)-(3). Its reasons for that decision are as follows:
42. First, s.221(1) of ERA 1996 states s.222 of ERA 1996 applies where there are normal working hours for the employee when employed under the contract of employment in force on the calculation date. Before 2 January 2023, the relevant contract of employment in place for both Ms. Farley and Ms. Sunderland was the Contract of Service. On its plain terms, that employment contract did not provide for any ‘normal’ working hours for the employee. What clause 3 of that contract committed RSS to doing was to offer the employee a minimum of 336 hours of work on assignment during the course of each full 12 month period for so long as the contract was not terminated. From 2 January 2023, the Claimants’ contractual relationship with RSS was governed by the Contract for Services. Nothing in the terms of that contract provided for any ‘normal’ working hours for the worker concerned. The date of calculation makes no difference to this analysis.
43. Second, s.222 of ERA 1996 states s.222 applies if the employee is required under the contract of employment in force on the calculation date to work during normal hours on days of the week, or at times of the day, which differ from week to week or over a longer period so that the remuneration payable for, or apportionable to, any week varies according to the incidence of those days or times. On their plain terms, neither the Contract of Service nor the Contract for Services required the employee/worker to work during normal hours on days of the week or at times of the day which differed from week to week. That was certainly a possible outcome, but it was not an outcome required under the terms of either contract. Again, the date of calculation makes no difference to this analysis.
44. Third, s.224(1) of ERA 1996 states s.224 applies where there are no normal working hours for the employee when employed under the contract of employment in force on the calculation date. Neither the Contract of Service nor the Contract for Services contained any normal working hours for the employee/worker concerned, and that situation would pertain regardless of the calculation date used. It follows that s.224 applied on its face.
45. It is not in dispute that the rolled-up holiday pay RSS paid the Claimants was based on the formula set out in s.222(2)-(4) of ERA 1996, not s.224(2)-(3). On that basis, the Tribunal declines to find that the rolled-up holiday pay paid to the Claimants satisfied the full extent of their statutory entitlement under WTR 1998.

Claimants' contracts

Issue #2 (Whether cl. 3 of the Contract of Service prevented Ms. Farley and Ms. Sunderland from accruing annual leave between assignments)

46. Clause 3 of the Claimant's Contract of Service provided:

3. *Reed will endeavour at all times during the currency of this contract of employment to allocate the Employee to suitable Assignments and as a minimum guarantees to the Employee that he/she will be offered by Reed at least 336 hours of work on Assignment during the course of each full 12 month period for so long as this contract of employment has not been terminated, the first such period commencing on the commencement date of the Employee's first Assignment at a rate at least equivalent to the then current national minimum wage. For Employees who work part time this guarantee shall be pro-rated based upon a 35 hour week. For the avoidance of doubt there is no entitlement to any particular number of hours on Assignment in any period less than 12 months. The provisions of the Apportionment Act 1870 shall not apply to this contract of employment. Save as provided for herein Reed does not guarantee that there will always be a suitable Assignment to which the Employee can be allocated. The Employee accepts that there may be times when no suitable Assignments are available. In those times Reed has no obligation to pay the Employee. Unless there is good cause, the Employee will be required to accept suitable Assignments offered by Reed. Refusal of an offer of suitable work by the Employee without good cause may result in the termination of the Employee's employment.*

47. Clauses 25 and 27 of the same Contract of Service provided (in relevant part);

25. *The Employee is entitled to paid annual leave pursuant to the Working Time Regulations 1998 ("the Regulations"), and has no other entitlement to payment for holidays (including bank/public holidays) or for absence due to sickness or injury other than any entitlement there may be to Statutory Sick Pay.*
26. ...
27. *The Employee is entitled to paid annual leave in accordance with the Regulations ...*

48. The construction of a contract is a question of law. As can be seen, clause 3 contains numerous terms, not just one. In the Tribunal's judgment, none of the terms in clause 3 prevented the employee (at the time this contract was in force, Ms. Farley and Ms. Sunderland) from accruing annual leave between assignments. That is not what any of those terms state or imply. Clause 25 gave the employee an express right to paid annual leave pursuant to the WTR 1998 (a right somewhat otiosely repeated in the first sentence of clause 27). Thus if and to the extent that WTR 1998 gave Ms. Farley and Ms. Sunderland a statutory right to accrue annual leave between assignments in the period up to (and including) 1 January 2023, clauses 25 and 27 of the Contract of Service extended that statutory right to the status of an express contractual right.

Issue #1: (Whether clause 3 of the Contract for Services prevented Ms. Farley and Ms. Sunderland from accruing annual leave between assignments)

49. Clause 3 of the Contract for Services provided:

3. *For the avoidance of doubt, this Contract will not remain in force during any periods between assignments, and you will only be paid whilst in Assignment (including any periods of paid leave).*

50. The Claimants' submissions (Farley paras. 37-39, Sunderland paras. 59-61) accept that if clause 3 of the Contract for Services is valid, the Claimants' claims must fail:

37 *Accordingly, the main issue for whether the Harper Trust case applies to the Claimant's circumstances is whether she has a continuing contract throughout the year.*

38. *Clause 3 of the Contract for Services states that the contract will not remain in force between assignments.*

39. *We accept that if this clause is valid, then the claim must fail.*

51. The Claimants conceding this point, the Tribunal does not need to – and therefore has not - decided that issue, and takes this concession at face value. Given that concession, the Claimants must accept that - if valid and effective - clause 3 had the effect of preventing them from accruing annual leave between assignments during the period which began on 2 January 2023 (no-one suggested the Contract for Services or clause 3 of that contract had retrospective effect). That is the next issue the Tribunal will address.

Issue #3 (Should either/both of these clauses be disapplied in accordance with the principles in Uber BS v Aslam)

52. Given the Tribunal's conclusion this issue does not arise in relation to clause 3 of the Contract of Service, but does arise in relation to clause 3 of the Contract for Services.

53. In considering whether clause 3 of the Contract for Services should be 'disapplied', it is important to note that neither Claimant alleges they entered into the Contract for Services, the terms of which bound them and RSS and governed those parties' contractual relationships when working for RSS from 2 January 2023, because of duress, mistake, or misrepresentation. Nor do the Claimants challenge the validity of any term of the Contract for Services other than clause 3. The basis of their challenge to clause 3 is therefore narrow, based solely upon what they contend to be the effect of applying the decision and ratio of Uber BV v Aslam [2021] UKSC 5 to the facts of this case.

54. Law. In Uber BV, the issue the Supreme Court had to decide was whether an ET had been entitled to find that drivers whose work was arranged through Uber's phone app worked for Uber under workers' contracts and so qualified for the NMW, paid annual leave and other workers' rights, or whether (as Uber contended) those drivers worked for themselves as independent contractors under contracts with passengers

using Uber as their booking agent (Uber BV, para. 1).

55. By reference to its decision in Autoclenz Ltd. v Belcher [2011] UKSC 41 (Lord Clarke giving the leading judgment), the Supreme Court confirmed the following principles:

- a. in the employment context, there may be reasons other than a mistake in setting out the contract terms why the written terms of the contract do not accurately reflect what the parties actually agreed (para. 61);
- b. in the employment context, it is too narrow an approach to say a court may only disregard a written term as part of the true agreement between the parties if the term is shown to be a 'sham' (ie, the parties had a common intention that the term should not create the legal rights and obligations which the term gives the appearance of creating) – the court should consider what was actually agreed between the parties either as set out in the written terms or, if it is alleged that those terms are not accurate, what is proved to be their actual agreement at the time the contract was concluded (para. 62);
- c. the relevant bargaining power of the parties must be taken into account in deciding whether the terms of any written agreement in truth represent what was agreed (para. 63);
- d. critical to understanding the Autoclenz case was that the rights asserted by the claimants were not contractual rights but created by legislation – the task for the ET in that case was to determine whether the claimants fell within the definition of a 'worker' in the relevant statutory period so as to qualify for those rights irrespective of what had been contractually agreed, not to identify whether, under the terms of their contracts, Autoclenz agreed the claimants should be paid the NMW or receive paid annual leave (para. 69);
- e. in determining whether an individual falls within the definition of a worker, the terms of a written contract are not to be treated as the starting point (para. 76);
- f. all the relevant statutes and statutory regulations conferring rights on workers contain prohibitions against 'contracting out' – those anti-avoidance provisions apply to any provision in an agreement which can be seen, on an objective consideration of the facts, to have as its object excluding or limiting the operation of the legislation (paras. 79-80);
- g. the right way to ascertain the true agreement between the parties is to consider (a) the written documents, including any purported contract (b) the way in which the relationship operated in practice (c) evidence of the parties as to their understanding of it (para. 84);
- h. there is no presumption that a contractual document contains the whole of the parties agreement, nor is there an absolute rule that terms set out in a contractual document represent the parties' true agreement just because an individual signed it (para. 85);

- i. any terms which purport to classify the parties' legal relationship or to exclude or limit statutory protections by preventing the contract from being interpreted as a contract of employment or other worker's contract are of no effect and must be disregarded (para. 85);
 - j. the fact that an individual is entirely free to work or not, and owes no contractual obligation to the person for whom the work is performed when not working, does not preclude a finding that the individual is a worker, or indeed an employee, at the times when he or she is working (para. 91).
56. For the reasons stated below, the Tribunal's decision is that the Claimants have not shown that clause 3 of the Contract for Services is invalid and/or ineffective.
57. First, because it is the Claimants who contend clause 3 of the Contract for Services is not valid in an otherwise valid contract, the burden of proof on this issue rests on them.
58. Second, the key issue in Uber BV was whether Uber drivers had 'worker status' when driving passengers booked through the Uber app (or making themselves available for such work) (Uber BV, para. 1). In this case, there is no dispute that the Claimants enjoyed 'worker' status when working on assignments booked through RSS from 2 January 2023, and were entitled to all statutory entitlements (NMW, sick pay, annual leave, etc.) arising from that status during those particular periods of time.
59. Third, what is central to the resolution of this dispute is whether the Claimants were also RSS 'workers' during those periods of time from 2 January 2023 when the Claimants (i) were not working with an end-user arranged through RSS (ii) were not contractually obliged under any term of the Contract for Services to make themselves available to work for RSS (iii) were under no contractual duty to accept any work RSS offered them (iv) might be unavailable for any work RSS offered them (eg, because they were on holiday abroad) (v) might be – and sometimes were - working for a different employer/agency (and being paid wages and accruing a holiday pay entitlement from that third party at the time). Cf Uber BV, para. 91:

91. *Equally, it is well established and not disputed by Uber that the fact that an individual is entirely free to work or not, and owes no contractual obligation to the person for whom the work is performed when not working, does not preclude a finding that the individual is a worker, or indeed an employee, at the times when he or she is working: see eg McMeechan v Secretary of State for Employment [1997] ICR 549; Cornwall County Council v Prater [2006] EWCA Civ 102; [2006] ICR 731. As Elias J (President) said in James v Redcats (Brands) Ltd [2007] ICR 1006, para 84:*

“Many casual or seasonal workers, such as waiters or fruit pickers or casual building labourers, will periodically work for the same employer but often neither party has any obligations to the other in the gaps or intervals between engagements. There is no reason in logic or justice why the lack of worker status in the gaps should have any bearing on the status when working. There may be no

overarching or umbrella contract, and therefore no employment status in the gaps, but that does not preclude such a status during the period of work.”

92. *I agree, subject only to the qualification that, where an individual only works intermittently or on a casual basis for another person, that may, depending on the facts, tend to indicate a degree of independence, or lack of subordination, in the relationship while at work which is incompatible with worker status: see Windle v Secretary of State for Justice [2016] EWCA Civ 459; [2016] ICR 721, para 23.”*
60. Fourth, on that issue, the Tribunal finds that during those periods of time from 2 January 2023 when the Claimants were not working on assignment for RSS, the Claimants were not RSS ‘workers’. During that period of time, the Claimants were free to choose whether or not to make themselves available for work offered by RSS, and were free to choose whether or not to accept any assignments RSS offered them. Neither Claimant suggested otherwise in their witness statement.
61. Fifth, central to the decision in Uber BV – at both ET level and at the Supreme Court – was the ET’s finding of an inconsistency between the contractual position of Uber drivers based on a reading of the terms of the relevant contractual documentation and the reality on the ground, which suggested a considerable measure of subordination to and control by Uber. In this case, the Tribunal finds there was no similar inconsistency – during those periods from 2 January 2023 when the Claimants were not working on assignment for RSS, they were free both ‘contractually’ and in reality to spend their time as they saw fit, to work for RSS clients only when they chose to, and to make themselves available for other work from other employment agencies or employers (which they did). Although the Tribunal heard no detailed evidence, it takes judicial notice of the fact there are many teacher supply agencies throughout the UK, and infers it is a competitive market in which the Claimants had a genuine choice who to work for and when (in marked contrast to Uber London drivers – Uber BV, para. 136).
62. Sixth, the Tribunal rejects the Claimants’ case that the terms of clause 3 of the Contract for Services were an artificial attempt by RSS to circumvent the statutory protection afforded by the WTR 1998. The Tribunal infers the intended effect of clause 3 was its actual effect – in the period between assignments in 2023, to give RSS and the Claimants complete freedom to choose whether to work together again or not.
63. Seventh, the Tribunal rejects the Claimants’ case that “*Clause 3 is nonsensical. A contract cannot simply terminate at the end of an assignment and then self-resurrect at the beginning of the next assignment*” (Farley written submissions, para. 47). In Carmichael v National Power plc [1991] 1WLR 2024 (cited with approval in Uber BV at paras. 84-85 and 126), the House of Lords overturned the Court of Appeal and affirmed an ET’s finding that tour guides were not employees based upon an exchange of letters. In a unanimous judgment, Lord Irvine stated:

“The industrial tribunal held that their case “founders on the rock of absence of mutuality,” that is that, when not working as guides, they were in no contractual

relationship of any kind with the C.E.G.B. The tribunal made this finding on the basis of (a) the language of the March 1989, documentation; (b) the way in which it had been operated; and (c) the evidence of the parties as to how it had been understood. For reasons I will amplify later, this was in my judgment the correct approach. In substance it held that the documents did no more than provide a framework for a series of successive ad hoc contracts of service or for services which the parties might subsequently make; and that when they were not working as guides they were not in any contractual relationship with the C.E.G.B. The parties incurred no obligations to provide or accept work but at best assumed moral obligations of loyalty in a context where both recognised that the best interests of each lay in being accommodating to the other.”

64. For substantially similar reasons, the Tribunal has reached the same conclusion in this case: what the Contract for Services did was provide a framework for a series of successive ad hoc contracts for services which RSS and the Claimants might make from 2 January 2023, and when the Claimants were not working on assignment for RSS they were not in any contractual relationship with RSS. During those periods from 2 January 2023 when the Claimants were not working on assignment for RSS, no party had an obligation to provide or accept work, albeit in a context where RSS and the Claimants would recognise that their best interests lay in being accommodating to the other to the extent practicable. The Tribunal finds it is not “*nonsensical*” for the Contract for Services to have had this ‘framework’ effect. The Tribunal accepts RSS may not have complied with its statutory obligations respecting those periodic assignments in this period, eg, issuing a P45 after the end of each discrete assignment, conducting a fresh DBS check before starting each new assignment, but declines to find that this means the ‘reality’ was not as suggested in clause 3 of the Contract for Services. If RSS has breached its statutory obligations in respect of any of those assignments and enforcement action is taken, it will have to face the consequences.

Jurisdiction: Part 2

65. Because (a) the Claimants accepted that their holiday pay claims must fail if clause 3 of their Contracts for Services is valid (b) the Tribunal has held that the Claimants have not established that clause 3 is invalid and/or ineffective in respect of the period in which those contracts were in effect from 2 January 2023, it logically follows that (c) the Claimants’ holiday pay claims in respect of holiday pay entitlement which accrued in the period beginning 2 January 2023 must fail.

66. If the Claimants’ holiday pay claims in respect of the period from 2 January 2023 fail, that has the consequence that the last unauthorised deduction / unlawful underpayment of rolled-up holiday pay for holiday pay entitlement to which accrued in the period up to (and including) 1 January 2023 and paid then or shortly thereafter by way of rolled-up holiday pay were not presented in time. In circumstances where the Claimants accept those claims could have been presented in time, it follows that the Tribunal lacks jurisdiction over the claims relating to this period.

67. These outcomes decide Issue #13 (what further sum if any is due to each Claimant excluding interest).

Issue #14 (Are the Claimants entitled to interest on any sums due?)

68. Given the outcomes reached above, this issue does not arise for decision. If that is incorrect and a decision is required, the Tribunal would not have awarded interest on any sums awarded because (a) the WTR 1998 do not provide for interest (b) the Tribunal's power to award interest under s.24 of the Employment Rights Act 1996 covers compensation for any financial loss sustained by the Claimants which was attributable to a complaint, requiring evidence of any actual loss sustained. Connor v Chief Constable of South Yorkshire Police [2023] EAT 42, para. 26. In this case, there was no such evidence.

Signed (electronically): Employment Judge Tinnion

Date of signature: 24 September 2024

Date sent to parties: 30 September 2024

For the Tribunal: