

Employment Tribunal awards contractor furloughed holiday pay



An Employment Tribunal (ET) ruling emerged last month that could have significant repercussions for recruitment agencies, umbrella companies and end clients that fail to pay annual leave.

In [Miss K Healy v Start People Limited](#), the contractor successfully defeated her recruitment agency for withholding holiday pay during furlough, with the agency ordered to pay Miss Healy 10 days' accrued holiday.

The agency's defence was that it relied on the [UK Government's own website](#) to justify its refusal to pay annual leave. The guidance states: "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." Using this guidance as a basis, the agency's position was that furlough meant the claimant's contract did not require her to be paid holiday pay between assignments.

However, Tribunal Judge Shore found that line of defence to be irrelevant, concluding "The key point is that furlough does not affect the terms of the worker's contract. I find that on the facts presented and agreed by both sides, the claimant's assignment at the end client did not end, as she was placed on furlough."

The ruling could be a significant case for contractors who have been subject to similar mistreatment. Following the decision, many will now be optimistic about their chances of victory at tribunal and may be more encouraged to speak out if they have suffered holiday pay abuses.

Guidance v law: furloughed holiday pay

The crucial point is of course furlough, and whether holiday pay should have accrued and been paid. In normal circumstances, the matter is distinctively unambiguous. However, many would argue that the announcement of the [Coronavirus Job Retention Scheme \(CJRS\)](#) made the matter somewhat of a grey area. "There was so much confusion around the application of furlough for umbrella companies and the allocation of holiday pay, among other things," explains [Professional Passport](#) CEO, Crawford Temple.

He continues: "There were many interpretations of the rules as well as conflicting guidance and this high degree of uncertainty, together with the potentially significant costs if the rules were applied incorrectly, has resulted in the sector unfairly receiving bad press."

But while the guidance may be a grey area, Martyn Valentine of [The Law Place](#) notes that "there was only ever going to be one winner" in this latest ruling. He develops on this point, stating, "The Coronavirus Job Retention Scheme is merely guidance, so entitlement to paid annual leave in respect of the Working Time Regulations 1998 continues to apply irrespective of the CJRS and, therefore, holiday pay is owed."

"However, if a worker wishes to commence a claim in the Employment Tribunal the ACAS Code of Practice must be followed. It is essential

contractors follow the statutory grievance procedure which involves writing a letter to the agency or umbrella company which is ostensibly the employer. Simply issuing a claim in the tribunal is not correct,” adds Valentine.

So, while there was some ambiguity, the facts of the matter are clear-cut. And, if agencies and umbrellas were in any doubt, there was also a relatively simple solution, as Temple explains: “We sought to obtain clarification from HMRC on the matter and we were left to conclude that holiday pay should be accrued in addition to the furlough payments, making this a real cost to the provider.”

Some umbrellas abusing furlough to hold contractors to ransom

Whether or not the guidance was clear, the exploitative practices exhibited by some umbrella companies regarding holiday pay has rightly come under fire of late, not least because of the recent [BBC Moneybox programme revealing an FCSA umbrella withheld thousands of pounds of holiday pay from contractors](#).

This latest ruling therefore serves as a potent reminder that the CJRS may be being used as a means of underpaying or exploiting contractors. [Orca Pay Group](#) CEO, Robert Sharp, has reason to suggest it could be.

“A case that dates from last May recently came to light again where a group of contractors had not received their accrued holiday pay and, when they approached the umbrella in question, were told that paying holiday pay – which they are lawfully entitled to might I add – would put the umbrella company out of business. As a result, they were given an ultimatum: either get your holiday pay and your furlough will be cut or forget about your holiday pay and continue receiving your furlough.”

Not just that, though. Sharp explains that the group of contractors were then made to sign non-disclosure agreements (NDAs), which prevented them from speaking out about the abuses. Otherwise, the umbrella in question would again cut their furlough.

“We knew about this when it happened last year, but the issue came up again recently. So, we asked the contractors whether the umbrella company had tried to repay the accrued holiday pay now that some of the financial difficulties of the pandemic have eased, and each one of them said no.”

“Fortunately, we have received the NDAs and the chains of communication from the contractors and have since passed them onto the relevant authorities to investigate further. However, until there is regulation in the umbrella industry it feels as though instances like this will continue to happen.”

How could the ruling impact non-compliant parties?

The latest ruling could impact non-compliant parties in myriad ways. Most notably, it demonstrates that should a contractor take an agency, umbrella company or end client to the ET for withholding furloughed holiday pay, the Judge will have a similarly straightforward decision-making process.

If more workers start demanding their annual leave as a result, the cases could soon snowball for some agencies and umbrellas, notes Valentine: “If a company has existing cash flow problems and then has multiple judgements ruled against it in the ET, for example, it could easily lead to insolvency or liquidity difficulties in a rather short space of time.”

There could be wider repercussions, too. “We are aware that HMRC is reviewing companies’ arrangements and we will only really know its intentions for the application of these rules once cases start to emerge. If HMRC applies the rules in line with this judgement, many umbrella companies will now be feeling uncomfortable with their application of the rules,” comments Temple.

Indeed, should the withholding of annual leave be deemed deliberate, those parties found guilty could have more problems than just money.

According to Valentine, there are reasonable grounds for the Serious Fraud Office to investigate what is happening to the missing holiday pay money. He adds that it is a “point worth exploring” if there are also grounds to investigate and possibly invoke criminal charges against directors of companies if they are found to be responsible for causing their company to act in an unlawful manner.

Contractors urged to speak out – now

While the *Miss K Healy v Start People Limited* ruling is good news for contractors, further research is now required to ascertain the extent and the scale of the furloughed holiday pay issue.

As a result, contractors are being urged to speak out about the holiday pay mistreatment they have been subject to by umbrella companies, recruitment agencies, and end clients. Under the [Public Interest Disclosure Act 1998](#), whistleblowers cannot suffer any detriment if they breach confidentiality, providing they make a “protected disclosure”, of which reporting an unlawful act classifies.

If said contractors believe the mistreatment to be a deliberate act of fraud or evasion, they are also urged to report them to the [Serious Fraud](#)

[Office \(SFO\)](#).

Assessing the ruling and the prospect of holiday pay abuses within the industry, ContractorCalculator CEO Dave Chaplin has the final word:

“As far as the Judges are concerned, furloughed holiday pay is an open-and-shut case. It should have accrued and been paid; it is as simple as that. I’m appalled by some of the stories we are hearing about.”

“However, it is contractors that hold the keys to the locks if anything is to change. To start with, they should speak to The Advisory, Conciliation and Arbitration Service – it’s a free service offering impartial advice. Once they’ve spoken to ACAS, they should then consider applying to the ET to claim their rightful money back, which this latest ruling should give them the confidence to do. But as Martyn says, to do so they must first follow the statutory grievance procedure.”

If any contractors wish to contact ContractorCalculator about their experiences, they are encouraged to use our [whistleblowing portal](#) where they can speak out either anonymously or known.

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