JB1

THE EMPLOYMENT TRIBUNALS

Claimant **Respondent**

Mr M Prystupa **v Iplan Umbrella Solutions Limited**

Heard at: London Central **On**: 23-24 February 2017

Before: Employment Judge Henderson (Sitting Alone)

Representation:
Claimant: Mr T Adu Jnr, FRU
Respondent: Ms S Chan, Counsel

JUDGMENT

The Judgment of the Tribunal is as follows:

1. **The claimant's unlawful deduction of wages claim under Section 13 of the Employment Rights Act 1996 succeeds and he is awarded the sum of £111.00.**

2. **The claimant's claim for unpaid holiday succeeds under the Working Time Regulations 1998 and he is awarded (as agreed by the parties) the sum of £3,427.69.**

3. **The total award is £3,538.69. This is a gross sum and the parties must make the appropriate payments for tax and national insurance**.

REASONS

1. This is a claim for unlawful deduction of wages under Section 13 of the Employment Rights Act 1996 (ERA) and for unpaid holiday pay under Regulation 14 of the Working Time Regulations 1998 (WTR).

2. The Hearing was originally listed on 6 February 2017 but at that hearing the respondent was not legally advised and was unable to proceed given the complexity of some of the issues with regard to the Working/Contractual relationship between the claimant and the respondent. This relationship continues.

3. Employment Judge Baty adjourned that hearing and relisted it for 23 and 24 February and identified the following issues for determination:-

    1. Was the claimant a worker within Section 230 (3) ERA and Regulation 2 WTR?

    2. Were the sums claimed by the claimant owed to him by the respondent?

Issues

4. At the commencement of the hearing on 23 February I clarified the outstanding issues for determination with the parties. The respondent was now legally represented by Ms Chan.

5. The respondent conceded that the claimant was a worker for the purposes of the unlawful deduction of wages and the holiday pay claims. The respondent did not accept that the claimant was an employee and maintained that there was not the requisite level of control or mutuality of obligations in the relationship. The respondent also accepted that it was the correct person to pay any sums owed to the claimant. In the light of this concession, I do not make any finding of fact in this case with regard to the claimant's status. Therefore, no determination of that issue has been made. I observe however that the respondent maintained during the hearing that the main contractual relationship with the claimant was governed by some, but not all, of the provisions of a document headed "*standard contract of employment"* and which referred throughout to "*employer"* and "*employee*". The respondent was unable to specify exactly which terms were applicable or how it would communicate to the claimant which of the clauses applied at any given time.

6. The respondent also conceded that it owed the claimant £3,427.67 in holiday pay dated back to 1 August 2014. The ET1 was issued on 31 July 2016 and therefore Section 23 (4A) ERA prohibits considering any deduction made more than two years prior to that date. This sum was accepted by the claimant. Again, as a result of this concession and subsequent agreement I do not have to make any findings of fact as regards the holiday pay. However, I note paragraphs 5 to 7 of Mr Iman's witness statement which

accepts that the respondent's practice of operating rolled-up holiday pay was not in compliance with the WTR.

7. It was noted that the claimant's Schedule of Loss included items which arose after 31 July 2016 and the issuing of the ET1. Such items cannot be considered in this hearing.

8. The remaining areas of dispute between the parties as set out in the claimant's Schedule of Loss were:-

    1. Underpayment for the claimant's work at Reiss Stores: the claimant says he should have received £8 per hour instead of £7.50, which for 540.5 hours makes a shortfall of £302.87.

    2. Double bookings: the claimant said that the practice was to pay 6 hours at the relevant client rate if a worker was double booked. This was not done for 6 February 2016 (at a rate of £10) and for 8 March 2016 at the rate of £8.50. The claimant claimed the amounts plus 12.07% for the rolled-up holiday pay – but as this has been corrected by the agreed payment set out above the total properly claimed under this head is £111.00.

    3. Overtime of one hour on 10 March 2016 of £11.21.

    4. Unlawful deduction of employer costs (as described in the "contract of employment") from the claimant's wages between 9 June 2014 to 22 August 2016, totalling £2,540.40. However, I note that if I find in the claimant's favour on this point I could only take into account such deductions up to 30 July 2016.

Conduct of the Hearing

9. I heard evidence from the claimant and from Abul Iman, Head of Payroll Services for the respondent. Both witnesses had written witness statements which were adopted by them as their evidence in chief. I found both witnesses to be credible and generally honest. I was also presented with an agreed bundle of documents and page references in these Reasons are to that bundle.

Findings of Fact

10. I will only make such findings of fact are as relevant to determine the issues set out above.

<u>Background</u>

11. The respondent is an umbrella company set up to provide payroll services to employers in a tax-efficient way. In the claimant's case, the respondent was instructed by Andrews International (also known as Entourage) who sent the claimant to act as a security guard to a variety of their clients. In fact, Mr

Iman had never met the claimant until the Tribunal Hearing on 6 February 2017. The claimant accepted that his main contact was with Entourage and that he received his instructions as to where he was to work from them.

12. The claimant was approached by Entourage and had an interview with Justina Mental and commenced work in June 2014. He had been offered a choice, which he accepted was a free choice, of being employed by Entourage directly or working under an umbrella contract with the respondent company. The latter option was more tax effective and meant more money in his pocket. He was told it was best for him and he noted that most of his colleagues worked under this type of contract, so he accepted.

13. The claimant said he was given the registration form (at pages 39-41) which he signed, but that he was not given a copy of the standard contract of employment (at pages 97-111). He said that the check-list (on page 39) did not show the contract as ticked. He accepted that he signed the confirmation which said that he had read, understood and accepted the terms of the standard contract, but he had done that because he wanted to start work.

14. Mr Iman had not been involved in recruiting the claimant and he accepted that it was possible the claimant had not seen the contract at the relevant time. His own practice would be to give all the documents at the same time but he could not say for sure that the claimant had been given the contract at that stage. I find on the balance of probabilities, that the claimant did not have a copy of the contract as at June 2014.

15. The claimant said he only received the contract in or around April 2016 after he had various issues with his pay and he specifically asked for a copy. Again Mr Iman very honestly could not say for sure whether this was correct or not and I accept the claimant's evidence on this point.

The Contract

16. I do not make any finding of fact as regards the claimant's employment status. However, I do note that the fact that the respondent relies on some but not all of the contractual provisions in the document called "the contract of employment" is confusing. Mr Iman accepted this in his evidence and very honestly said he had no answer to the question of how the claimant was supposed to know which terms did and which did not apply.

Basic Pay

17. Mr Iman said this was always the National Minimum Wage or more recently, the Living Wage. Commission was the total time sheet pay – namely the hours worked for the client at the relevant rates – i.e. what the end-user client paid, less employer costs. Mr Iman confirmed that the employer costs were only ever employer's national insurance contributions and the Iplan profit margin (their administration costs) of £9.99 per week.

18. In response to questions about his payslips, the claimant was also referred to a document headed "Understanding your Pay Advice" (at page 127).

19. The respondent's method of calculating pay is to take the total timesheet pay and deduct from this employer's national insurance contributions and the Iplan profit margin and other miscellaneous items. This then gave a sum due to the worker and from this sum was deducted income tax and employee's national insurance contributions – pension was not relevant in this case.

The Payslips

20. I asked Mr Iman to take us through a payslip, using page 43 for August 2014 as an example. He accepted that there was no breakdown of basic pay and commission but simply a heading called "pay and allowance". He believed that there was enough information to enable this to be calculated. Mr Iman was able to do this but I note that he is someone with considerable financial experience and ability, and I find it would not be reasonable to expect a worker to do the same without some assistance.

Reiss Rates

21. I was referred to various payslips which showed that the rates shown for work at the different Reiss sites varied. The claimant accepted that this would be the case for different sites but did not accept that it should be the same for the same store.

22. Mr Iman was referred to payslips (at pages 45 and 46) which showed adjustments made to the total timesheet pay. He could not say what these related to as he took instructions from Andrews International. He accepted that mistakes were made from time to time, but believed that these were corrected and this can be seen from the adjustments. I accept Mr Iman's evidence on this point. However, I was not shown any satisfactory evidence to demonstrate the level of hours worked by the claimant at the alleged incorrect rates at the Reiss Stores.

Double Booking

23. The claimant said that at his initial interview he had been told that if he accepted work at a particular site but if when he arrived there, there had been a double-booking he would receive 6 hours' pay at the agreed client rate. Mr Iman accepted that this had been the practice up to around August 2016. I was referred to payslips which showed this and I find that this was the established practice.

24. The claimant claims that he was not paid on two occasions in February and March 2016. Mr Iman was taken to copies of text exchanges between Andrews/ Entourage and the claimant on both these occasions (at pages 71 and page 80). He agreed that this showed that the claimant had been offered

and had accepted the jobs. This would meant that he should get 6 hours' pay for each occasion.

25. It was pointed out that the claimant had been paid 14 hours for the Queen Street job in his payslip (at page 79E). The claimant explained that he had worked 14 hours on 8 March but not on 9 March, when there was the double -booking. I accept the claimant's evidence on this point.

Overtime

26. This related to an incident on 10 March 2016. It was the claimant's day off. He was rung at 6pm by Andrews/Entourage and asked to go to a job as a matter of urgency. He was told he would receive 6 hours' pay if he worked from 6pm to midnight. The claimant had to get ready and travel to the job on Albert Embankment. He arrived at 8pm and stayed until 1am. He was paid for 6 hours but he said he worked one hour extra and he is owed for this amount. Mr Iman could not assist as he said his instructions had come from Andrews, he had no knowledge of the discussion with the claimant. I accept the claimant's evidence on this matter.

27. However, I do not agree with the claimant's interpretation of what he was promised. He received 6 hours' pay for 5 hours work. I accept there was an element of inconvenience to him but I heard no evidence of any specific negotiation or agreement for a pay allowance for this inconvenience. If anything, there may have been some allowance in the extra hour's pay he received.

Conclusions

Double Booking

28. I find the claimant is owed £111.00 by the respondent.

Overtime

29. On the basis of my findings of fact, the claimant has not discharged the burden of proof to show that he is owed any sum under this head.

Reiss Rates

30. I find that the claimant has not shown on the balance of probabilities that there were regular and persistent mistakes in the Reiss pay rates, such as to substantiate his claim for 504.5 hours' pay at a reduced rate.

Deductions

31. This issue turns on a close analysis of the payslips and how they are calculated and also on Sections 13(1) and (2) ERA.

32. I have accepted Mr Iman's evidence that the only deduction in employer costs related to employer's national insurance contributions and the Iplan profit margin. Mr Iman could not explain why this was a statutory requirement but Ms Chan submitted that this was irrelevant. She said that the wages "properly payable" to the claimant were the basic pay and commission as set out in the contract and described as "pay and allowances" in the payslip.

33. The employer costs were deducted prior to the calculation of these wages. The only deduction from the "properly payable" wages was employee's national insurance contributions and income tax which could not be disputed.

34. The respondent has not helped the situation by the convoluted and confusing documentation and the Byzantine method of calculating pay and deductions and by the layout of the payslip. However, I do accept Ms Chan's analysis of how the wages were ultimately calculated and I find that there have been no unlawful deductions. That said: I can sympathise with the claimant's confusion on this matter.

35. On the basis of this finding, I do not need to consider Section 13(1)(b) ERA as to whether the claimant had previously signified his consent to deductions in writing. Nor do I need to consider Mr Adu's submissions with regard to the deductions clause in the contract of employment.

Summary

36. The claimant is awarded the following: £3,427.69 holiday pay plus £111.00 for double-booking. This makes a total of £3,538.69. This is a gross sum and the parties must make the appropriate payments due for tax and national insurance contributions.

Employment Judge Henderson
10 March 2017