



EMPLOYMENT TRIBUNALS

Claimant: Mr. A Janasiak
Respondent: Mr. P. Lukanty
Heard at: Mold On: 17th February 2017
Before: Employment Judge T. V. Ryan

Representation:

Claimant: Mr. Seriant, Solicitor
Respondent: Mr. West, Consultant
Interpreter: Ms. M. Kondej-Mateparae

JUDGMENT

JUDGMENT having been sent to the parties on 22nd February 2017 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

1. The Issues: The following issues were agreed with the parties at the outset although it was also agreed that the primary issue is the one at paragraph 1.1 below:
 - 1.1 During the period that the claimant worked driving the respondent's vehicles was his status that of employee, worker, or self-employed contractor? The claimant says he was an employee; the respondent says that he was a self-employed contractor.
 - 1.2 If the claimant was an employee at all material times did the respondent provide him with a written statement of employment particulars and, if so, when?
 - 1.3 If the claimant was an employee, or worker, did the respondent make unauthorised deductions from wages paid to him and if so how much was so deducted?

1.4 If the claimant was an employee, or worker, did the respondent make unauthorised deductions from wages by not paying sums due to be paid to him and if so how much was so deducted? This issue covers, amongst other things, the claimant's claim that he was entitled to be paid by the respondent an additional sum in respect of "stop overs" (overnight allowances when the claimant was resting but away from home).

1.5 If the claimant was an employee, or worker, did the respondent fail to pay to him accrued holiday pay on termination of employment or assignment and if so in what sum?

1.6 If the claimant was an employee did the respondent breach the claimant's contract of employment by terminating it without notice or did he give the claimant no less than the minimum statutory notice provided by s86 Employment Rights Act 1996; alternatively, was no notice of termination due to the claimant because of his conduct?

1.7 Mr West for the respondent confirmed that the claimant's calculations were agreed, subject to liability, save in respect of a claimed deduction of £625 said to be in respect of the claimant's absence from work during the period in question and whether two week's pay or four week's pay would be the appropriate award subject to findings in respect of paragraph 1.2 above. Judgment on liability having been given at the end of the hearing the respondent agreed all the calculations of quantum; there was no issue as to the sums payable by the respondent to the claimant in the light of the judgment on liability.

1.8 Is the claimant entitled to recover tribunal fees paid by him to issue these proceedings and for the hearing?

2. The Facts - I found the following facts:

2.1 The respondent is a haulier and he owns his own wagons. He employs a Transport Manager, Mr Tack (or he engages him under other arrangements not the subject of these proceedings and on which there was no evidence before me).

2.2 The respondent provides driven heavy goods vehicles for transcontinental haulage principally for one customer. The respondent's wagons are liveried in his business name and colours; the drivers are similarly liveried wearing uniform shirts to identify them to customers and the public as the respondent's drivers.

2.3 The respondent relies on Mr. Tack to arrange transport matters including legal documentation and instructions to drivers, obtaining and collating personal information and vehicle journey data from the drivers and seeing to their payment. The respondent has some personal dealings with the drivers but Mr Tack is the principal point of contact acting on the respondent's instructions. The claimant received from, and submitted to, Mr Tack job related documentation and information

and worked in accordance with instructions received from the respondent either directly or via Mr. Tack.

- 2.4 Mr Tack did not give evidence at this hearing. I heard evidence from both parties with, in the claimant's case, interpretation by Ms Kondej-Mateparae. Both parties use Polish as their first language; I am satisfied that there was no misunderstanding between them in their arrangements forming the background to this case.
- 2.5 The claimant is an experienced, licensed HGV driver. He had worked as an employee and as an agency worker at various times of his career.
- 2.6 The claimant, responding to either an advertisement for drivers or some knowledge he gained of vacancies for drivers with the respondent, telephoned him. They arranged to meet at a mutually convenient time, place and venue to discuss a working arrangement and to agree terms and a starting date. The claimant was available to work immediately; he did not ask for, or feel that he needed, time to make any business arrangements once payment terms and a start date had been agreed.
- 2.7 The respondent however told the claimant that he could only work if they did not refer to him as an employee, he registered for VAT and submitted a monthly invoice for the agreed regular payment (of £2,500 per month henceforth). At that time the claimant was not registered for VAT and it seems that he did not have the administrative support or acumen to either so register or to prepare the required invoices; he did not have the retained services of an accountant or lawyer.
- 2.8 The respondent assured the claimant that all the above arrangements would be taken care of for him; the claimant was not given a choice in this as to the said arrangements or choice of an accountant; he was not offered the opportunity to take advice and did not take any. Either Mr Tack or the respondent personally arranged for an accountant, Ms Elzbieta Woznicka, a close personal friend of Mr Tack's, to see to the claimant's VAT registration and to produce regular monthly invoices in the sum of £2,500 which were sent by her directly to Mr. Tack for him to authorise regular monthly payment. The claimant played no part in the registration process (save perhaps and presumably for signing some or other declaration which was prepared for him) or in the monthly issuing of invoices. The claimant did not know Ms Woznicka prior to these events; he did not chose her or decide to instruct her as his accountant; all of that was done for him as if of necessity by the respondent directly and via Mr. Tack on the respondent's behalf. Ms. Woznicka did not attend the tribunal as a witness.
- 2.9 The claimant just wanted to be paid for the work that he did. He drove and he got paid. If he wanted work from the respondent then he had no option but to go along with the respondent's plan. He had no other

work at the time and was not at that time in business on his own account.

2.10 Mr Tack prepared, or had prepared, for the respondent a document called "Contract Agreement" This document appears at pages 13-17 of the bundle of documents prepared by the respondent for this hearing (R1); it is a pro forma draft without any driver's personal information. It refers to the respondent as "Main Contractor" and any driver (unnamed in the draft) as "Contractor".

2.10.1 Clause 1 refers to s.1 Employment Rights Act 1996 (ERA) and the requirement to provide "particulars of the Contractor's employment" as set out in a schedule attached.

2.10.2 The first Clause 2 states that the Contractor's "permanent full-time employment with the Main Contractor" will commence on a date which has been left blank on this document.

2.10.3 In the second clause 2 (sic) the Contractor "agrees to be employed on the terms and conditions set out in this Agreement".

2.10.4 Clause 17 states that "the Contractor agrees to devote full-time efforts, as an (sic) Contractor of the Main Contractor, to the employment duties and obligations as described in this Agreement".

2.10.5 Clause 30 provides for "Termination of Contract" by stating "Where there is just cause for termination, the Main Contractor may terminate the Contractor's employment without notice , as permitted by law".

2.10.6 This document also contains reference to "Compensation" for "services rendered" which are to be set out in an attached schedule, provisions relating to holidays (which require submission of a form requesting them, accrual to a maximum of 20 paid days each year, and payment of accrued but untaken holidays following termination of the contract), conflicts of interest, non-solicitation, confidential information, modification and termination.

2.11 The respondent said in evidence that he gave a copy of such a document to the claimant with the blank spaces completed with the claimant's information ready for him to sign and return. I find that he intended that the controlling terms and conditions set out in that document would govern their relationship and he intended to treat the claimant in all respects as if he were an employed driver save that

payment was to be made under the cover of an invoice as if the claimant was self-employed. The respondent did this for his own tax reasons and to avoid having to honour an employer's duties and obligations to an employee while maintaining maximum control over him.

2.12 The respondent may have given the claimant an incomplete draft copy of a document like that at pages R1 13 – 17, or some written information consistent with it, amongst other papers but I do accept his evidence that he gave a personalised completed copy ready for signature and including the claimant's personal information and personally agreed terms. He says that the claimant did not return or sign it; I find that there was no final version completed ready for signature. The claimant did not give any such signed document to either the respondent or Mr Tack. The claimant did not sign any document at any time authorising any deductions from his pay by the respondent in any circumstances. I do not believe the respondent's evidence that he has in his office today a copy of the draft he says that he gave to the claimant (one not made available to the tribunal), that is one that has been filled in for the claimant and contains agreed details such as the claimant's name, start date, the date of commencement of any period of continuous employment, and scale or rate of pay but which is unsigned. The respondent did not give to the claimant a document or more than one document personal to him containing the information required to be set out in a document or documents to satisfy in full the requirements of s.1 (3) & (4) ERA. The respondent did however make clear orally that he expected the claimant to work to terms consistent with the provisions quoted above.

2.13 Having considered the respondent's evidence, including under cross examination, and with reference to the documents provided I concluded that he was not credible, cogent, consistent or reliable generally. The claimant was all those things. I preferred the claimant's evidence. The respondent failed to produce to the tribunal, and therefore to disclose to the claimant, a whole series of documents that might have corroborated his evidence and which he must at some stage have had in his custody and control; instead he produced incomplete documents that were contrary to his evidence and case; he was not a credible witness. Amongst the respondent's documents are documents giving details of payments made to the claimant through HSBC Bank (R1 PAGES 1 – 4) on which he, or someone on his behalf, has obscured the word "wages"; the respondent admitted on questioning that the redacted word is "wages" (because he said that he was "not sure that it was important"); I find that there had been a deliberate attempt at erasure or concealment of the true nature of the payment so that the tribunal would somehow be misled.

2.14 The respondent, or Mr. Tack on his instructions, gave to the claimant the document at pages 93 - 94 of the claimant's bundle of documents produced for this hearing (C1). This document contains

detailed strict and controlling instructions to the claimant. It states the expectation that drivers will work on “5/6 days pattern” including Saturdays, normal days being of 15 hours’ duration. The respondent required the claimant to comply with these written instructions as a condition of work and payment for that work. The instructions are prescriptive and allow for no discretion on the part of the claimant in the way in which he provided his service. These instructions were routinely issued by or on behalf of the respondent to his drivers.

2.15 The claimant drove for the respondent subject to the terms and conditions referred to at paragraph above and based on the respondent treating him in all respects (bar payment) as set out in the respondent’s draft statement of terms and conditions referred to. The claimant complied with the working instructions given to him as to journeys, customers, loads, and hours. Those instructions were either given by the respondent directly or more usually by Mr Tack. The claimant wore the respondent’s livery; he drove the respondent’s liveried wagons. In consideration of all of that the respondent regularly paid to the claimant £2,500 per month. At paragraph 6 of the claimant’s statement he sets out a list of fifteen factors concerning the working arrangements that made him consider he was an employee and I accept the truth of each of those matters listed at paragraph 6 a – o.

2.16 The respondent made deductions he says were in respect of a road traffic accident but has not proven that any money was due from the claimant in respect of it. He has ostensibly made a deduction from the claimant’s pay in respect of an alleged absence from work but has not proved that the claimant was so absent or that he was entitled to deduct such sums from the claimant’s pay. In all the respondent deducted the sum of £1,153.84 from wages paid to the claimant.

2.17 The respondent says that the working relationship ended following a road traffic accident said to have involved the claimant in July 2016. The respondent says that this caused him to dismiss the claimant. He said that he had documents from his insurance broker concerning the said accident but he did not produce them as they were not important. The claimant on the other hand says that he was not involved in any such accident. Whether he was or not I find that the claimant worked on until 23rd August 2016 when he found that he had reached or was reaching the limit of his permitted driving hours for that day and he contacted the respondent to confirm that he could not finish that day’s work; the respondent summarily terminated the relationship at that point during the conversation; the claimant was told to leave the vehicle where it was as the respondent was sending a relief driver. These were the circumstances and this was the reason for the claimant’s dismissal and not any alleged accident.

2.18 The respondent has not disclosed any documents or produced any corroborative evidence regarding the alleged road traffic accident or the claimant’s driving hours and the respondent’s engagement of a

relief driver on 23rd August 2016. These events ought to have relevant documentation. Again, the respondent's evidence was not clear, consistent, credible and reliable whereas the claimant's evidence was. I preferred the latter. The working relationship between the respondent and the claimant was summarily ended by the respondent because the claimant confirmed that he could not complete his shift without breaching legal restrictions on drivers' working hours. The claimant's conduct was lawful and appropriate; it was not misconduct or conduct that breached the contract that subsisted between the parties.

2.19 On 23rd August 2016 when the claimant informed the respondent that he could not complete his shift within his prescribed hours he was told that the respondent was sending a relief driver. It did not occur to the claimant that he could provide a substitute; the respondent did not ask him to do so. This is entirely consistent with the respondent's rules, requirements and expectations at R1 pages 13 – 17 and C1 pages 93-94. The documentation, oral communications and the events of 26th August 2016 do not bear out the respondent's contention that the claimant could provide a substitute driver. He was not allowed to do so when the opportunity arose on that date. In his oral evidence the respondent conceded that if the claimant had been ill he, the respondent, would have obtained and used another driver. The claimant did not have the right to substitute a driver; he was required to provide personal service throughout the duration of the relationship between the parties.

2.20 The respondent did not pay the claimant's wages for three days and for forty one hours agreed to be payable at double the usual rate (July 2016) in the sum of £1,274.09. The respondent did not pay to the claimant his accrued holiday pay on termination of employment; he had accrued 10 (rounded up from 9.74) days' untaken holidays by that date.

2.21 There was no agreement between the parties as to four weeks notice of termination and there was no specific agreement that the respondent would pay him an overnight allowance or "stop out" payment in addition to £2,500 per month. The claimant did not agree to, let alone sign in advance for, any deductions from his pay.

3 The Law:

3.1 The definitions of an "employee" and "worker" are set out at s.230 ERA. An employee is a person who works under a contract of employment being a contract of service whether written or oral, express or implied. Key to the status of "employee" is the requirement to provide personal service under the control of an employer where there is a mutuality of obligation between the parties. The basic obligation of the employer is to provide work and/or payment for work and the obligation on the employee is to perform that work or at least to be ready, able and willing to perform the work provided and in the

manner and to the specification of the employer, under its control. Similarly, a worker is required to provide personal service but the parties have fewer obligations, rights, and responsibilities vis a vis each other. A self-employed person provides services and not service, and the recipient of those services is an independent user, client or customer; in such a relationship the provider of the service receives an instruction as to what is required but has a general discretion, subject to matters of general legal obligation and good customer relations, and as to whether and how best to provide the contracted services; a self-employed contractor is not obliged to offer its services nor is the user/client/customer obliged to engage it.

3.2 A tribunal, when deciding on a person's status at work, ought discern the actual contractual terms and ought not imply terms save where it is essential to make the relationship workable and to make sense of it.

3.3 An employee is entitled to receive a written statement of employment particulars within two months of commencement of employment (s.1 ERA) and it must comply with the requirements of s.1 (3) and (4) (subject to ss (5)). Failure to so provide shall give rise to entitlement to present a claim to the tribunal. The tribunal may award two or four week's pay to an employee whose employer has failed to comply with these provisions.

3.4 S.13 ERA provides for an employee's or worker's right not to suffer unauthorised deductions from wages save in certain circumstances such as where the deduction is required by law or the payee has previously signified consent in writing.

3.5 The Working Time Regulations 1998 (WTR) sets out an employee's and worker's right to paid holidays which accrue per month to a maximum of 28 days each year (Regs 13 & 13A WTR). Regs 13 - 16 WTR provide for the method of calculating accrued holiday pay including that which is to be paid on termination of employment or a worker's engagement.

3.6 S. 86 ERA gives an employee rights to certain statutory minima periods of notice of termination of employment dependent on length of employment, to a maximum notice period of 12 weeks. The stated incremental increases in notice and the overall notice periods can be varied by parties to an employment contract provided that the minima are honoured.

4 Application of the law to the facts by reference to the agreed issues at paragraph 1 above:

4.1 *During the period of time that the claimant worked driving the respondent's vehicles was his status that of employee, worker, or self-employed contractor?*

- 4.1.1 The claimant was an employee employed by the respondent as an HGV driver on implied contractual terms throughout the period from 18th April 2016 until his summary dismissal in breach of contract by the respondent on 23rd August 2016.
- 4.1.2 The implied terms of the contract were those set out by the respondent in his own document said to be a statement of employment particulars (not issued to the claimant but worked to by both parties) together with the expressed rules referred to above which were given to the claimant and were also worked to by both parties. The effect of the implied terms and express rules was to create a relationship of mutual obligation between the parties whereby they created mutual rights and responsibilities commensurate with an employment relationship. The respondent would provide work for the claimant to perform under his control and the claimant would perform it for the agreed regular payment, subjecting himself to the said control and to the exclusion of such other working arrangements that conflicted with this employment by the respondent.
- 4.1.3 It follows from all that was said and written by the respondent and accepted by the claimant that the claimant had no right to provide a substitute driver and that he was obliged to provide his personal service to the respondent as directed by him, directly or through his transport manager Mr Tack. The events of 23rd August 2016 when the claimant informed the respondent, directly and through Mr Tack, that he could not legally complete his shift corroborate this finding. It did not occur to the claimant that he could provide a substitute, even if he knew of one; it did not occur to the respondent (or presumably to Mr. Tack) that the claimant could be asked to or reminded that he could provide a substitute; the respondent immediately took it upon himself to arrange for another driver and so informed the claimant that he (or Mr Tack on his behalf) would send another driver to complete the shift and unload the wagon. As opposed to discussing substitution or allowing such an opportunity the respondent summarily dismissed the claimant for not working on in contravention of the restrictions imposed by WTR.
- 4.1.4 The claimant was an employee, but even if he was not then he was a “worker” and was not at any material time a self-employed contractor. The respondent through his transport manager Mr. Tack and the latter’s personal friend Ms Woznicka, created the semblance of a different

relationship whereby the claimant appeared to be in self employed business and the respondent appeared to be a customer. This was a labelling exercise with no legal effect; it was cosmetic and in no sense dictated or described the working relationship between the parties; it was a fiction intended for the respondent's benefit. The respondent hoped to minimise any tax/NI and employer disadvantages, and to maximise any tax advantages while to all intents and purposes controlling the claimant as one would an employee. The rules issued by the respondent to the claimant display a degree of micro-managing control that some would consider unusual even in most employment relationships. In any event, they are inimical to any independence of thought and action that a self-employed contractor would normally enjoy.

4.2 If the claimant was an employee at all material times did the respondent provide him with a written statement of employment particulars and, if so, when?

4.2.1 The respondent did not provide the claimant with a written statement of employment particulars as required by s.1 ERA.

4.2.2 The respondent had some such documents available to him for distribution and wanted to exercise the control consistent with such a relationship but without the obligations that went with it. The claimant did not ask for a copy. He knew that the respondent was conducting himself behind pretence that he, the claimant, was self-employed. The claimant could have, and perhaps ought sensibly to have, asked for a statement of terms in addition to the issued rules. He did not do so. I did not get the impression that the claimant was cowed by or in any sense nervous of the respondent but that he was well able to ask for such a statement had he thought it necessary or advisable, as it was. In all the circumstances, I consider that it would be appropriate to award the claimant two weeks' pay in respect of the respondent's default. The agreed figure for this award is £1,153.84.

4.3 If the claimant was an employee, or worker, did the respondent make unauthorised deductions from wages paid to him and if so how much was so deducted?

4.3.1 The respondent did not pay the claimant for all his work but made deductions in the sum of £1,073.30. This figure

was agreed between the parties in the light of my findings.

4.3.2 The respondent did not prove entitlement to make any deductions or that the claimant was indebted to him in any way. The claimant did not sign any authorisation for the respondent to make any deductions from his pay in any circumstances let alone in prior to the deductions being made.

4.4 If the claimant was an employee, or worker, did the respondent make unauthorised deductions from wages by not paying sums due to be paid to him and if so how much was so deducted?

4.4.1 The parties did not agree that the respondent would pay to the claimant any sums more than £2,500 in any circumstances. Specifically, there was no contractual term that the respondent would pay the claimant additional sums for “stop overs” or any night out allowances. Such payments were not discussed or agreed and did not fall due to the claimant.

4.4.2 The respondent failed to pay the claimant all his outstanding wages on termination of employment. He was due to be paid £1,274.09 which the respondent did not pay to him. That was an unauthorised deduction. This figure was agreed between the parties in the light of my findings.

4.5 If the claimant was an employee, or worker, did the respondent fail to pay to him accrued holiday pay on termination of employment or assignment and if so in what sum?

4.5.1 The claimant was entitled as an employee and as a worker to paid annual leave. The respondent failed to pay accrued holiday pay to the claimant on termination of his employment.

4.5.2 The parties have agreed that the sum due to the claimant if I was to find as above would be £936.66.

4.6 If the claimant was an employee did the respondent breach the claimant’s contract of employment by terminating it without notice or did he give the claimant no less than the minimum statutory notice provided by s86 Employment Rights Act 1996; alternatively, was no notice of termination due to the claimant because of his conduct?

4.6.1 The respondent dismissed the claimant summarily in circumstances not justified by the claimant's conduct. The claimant was dismissed because he would not work in breach of lawful restrictions on his working hours. He would not breach driver's hours by finishing his last shift.

4.6.2 At the time of his dismissal and in the absence of express agreement on notice provisions the statutory notice period applied. The claimant was entitled to one week's notice of termination having been employed for more than a month but less than a year. The figure for notice pay is £480.34 which figure was agreed between the parties in the light of my findings.

4.7 The claimant is entitled to recover fees paid by him to the tribunal; the respondent did not oppose the claimant's application. The claimant has already paid the issue fee of £160. He has not yet paid, but believes he is due to pay, the hearing fee of £230. In the circumstances, it was agreed by the parties that the respondent would pay the claimant the issue fee and would also pay him in respect of the hearing fee upon production of evidence that the claimant has paid it to the tribunal.

12 April 2017
Mr T. V. Ryan
Employment Judge
JUDGMENT SENT TO THE PARTIES ON

18 April 2017

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FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS
[TVR]