EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: S/4102939/2017

Held in Glasgow on 26 October 2017

Employment Judge: W A Meiklejohn

Mr Ferenc Scherer	**First Claimant** **Represented by** **Ms N Kovacs – Representative**
Mr David Marton	**Second Claimant** **Represented by** **Ms N Kovacs – Representative**
Renderworks Limited	**Respondent** **No appearance and No representation**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that –

(1) the First Claimant suffered unlawful deduction of wages by the Respondent and the Respondent is ordered to pay to the First Claimant the sum of ONE THOUSAND AND THIRTY ONE POUNDS (£1,031.00);

(2) the Respondent unlawfully discriminated against the First Claimant because of his race and the Respondent is ordered to pay to the First Claimant the sum of ONE THOUSAND SIX HUNDRED AND SEVENTY POUNDS (£1,670.00) together with interest of TWENTY THREE POUNDS AND FORTY EIGHT PENCE (£23.48);

(3) the Second Claimant suffered unlawful deduction of wages by the Respondent and the Respondent is ordered to pay to the Second Claimant the sum of ONE THOUSAND AND THIRTY ONE POUNDS (£1,031.00); and

(4) the Respondent unlawfully discriminated against the Second Claimant because of his race and the Respondent is ordered to pay to the Second Claimant the sum of ONE THOUSAND SIX HUNDRED AND SEVENTY POUNDS (£1,670.00) together with interest of TWENTY THREE POUNDS AND FORTY EIGHT PENCE (£23.48).

REASONS

1. The First Claimant and the Second Claimant alleged that the Respondent had failed to pay monies due to them and that this constituted unlawful deduction of wages. The First Claimant and the Second Claimant also alleged that they had been subjected to unlawful discrimination because of their race. The Respondent had not submitted a response to these claims and accordingly did not participate in the proceedings.

2. The Claimants have very limited knowledge of English. Both were represented by Ms Kovacs who is the First Respondent's fiancée. Ms Kovacs had been closely involved in the sequence of events which led to the present claims and I agreed that she should give evidence on the Claimants' behalf. She lodged a bundle of productions to which I will refer by page number.

Evidence and Findings in Fact

3. The First Claimant and the Second Claimant are Hungarian. They work as roughcast installers. The First Claimant came to the UK in November 2012 and the Second Claimant came to the UK in May 2013. They worked together as a roughcasting team from January 2017. There was a third member of their team, Mr Tamas Zana, who had decided not to participate in these proceedings.

4. The Claimants commenced work with the Respondent on 26 April 2017. Prior to that they worked for a company called Mastercasters who were asked by the Respondent if they could engage the Claimants and Mr Zana. The Claimants were asked by the Respondent for their passports, driving licences

and CS cards. They agreed with the Respondent that they would be paid at the rate of £8.80 per square metre net of the income tax the Respondent was required to deduct under the relevant HMRC scheme for the construction industry. This arrangement was not committed to in writing but it was clear that the Respondent and the Claimants entered into a verbal contract in these terms.

5. The Claimants undertook roughcasting work for the Respondent at a number of locations. They were paid fortnightly in arrears by bank transfer. The Respondent had two other roughcasting squads the members of which were Scottish. These included members of the families of the directors of the Respondent, Mr Liam Baillie and Mr Peter Lafferty. One of these was Mr Lafferty's son. The Claimants understood that the members of the other squads were paid in the same way as they were.

6. The Respondent provided the Claimants with a van so that they could travel to and from the locations where the Respondent provided them with work. The Claimants were required to meet the cost of fuel themselves. The Respondent also provided a generator. The Respondent advised the Claimants where they were required to work and provided the materials. The Respondent dictated when the Claimants were to work and supervised their work. The Claimants understood that they were expected to carry out the work themselves.

7. The details of the work undertaken by the Claimants were entered on a weekly timesheet which was signed off by the Respondent's supervisor (Keir – the Claimants did not know his surname). Page 17 was a copy of the Claimants' timesheet for the week ending 30 June 2017.

8. Between 20 and 30 June 2017 the Claimants undertook work for the Respondent at various addresses in Ward Avenue and Hillock Avenue, Redding, Falkirk as detailed in Ms Kovacs' letter written to the Respondent on their behalf dated 18 July 2017 (pages 14-15). This work was also detailed

in the timesheet referred to in the preceding paragraph. The amount due by the Respondent to each of the Claimants for this work was £631.

9. Between 3 and 7 July 2017 the Claimants undertook work for the Respondent at various addresses in Ward Avenue, Salmon Inn Road and Hillock Avenue, Redding, Falkirk as detailed in Ms Kovacs' said letter. The amount due by the Respondent to each of the Claimants for this work was £400.

10. The Claimants expected to be paid by the Respondent for the work they had undertaken between 20 and 30 June 2017 by bank transfer on Friday 7 July 2017. When the Claimants became aware that there had been no payment into their bank accounts on 7 July 2017 they telephoned the Respondent and, as best they could with their limited English, left a message asking where their money was. Ms Kovacs also telephoned the Respondent but obtained no reply.

11. The Claimants received a text message from their supervisor Keir around 5pm on Friday 7 July 2017 saying that there was a problem with the Respondent's bank. Ms Kovacs then sent a text message to Mr Baillie seeking an explanation. Mr Baillie initially said that he was not aware of any problem and indicated he would call Mr Lafferty.

12. On Saturday 8 July 2017 Mr Baillie told Ms Kovacs by text message that he was on his way to meet Mr Lafferty at the bank. Not having heard further Ms Kovacs sent a text message to Mr Baillie on Sunday 9 July 2017 stating that the Claimants would not be going to work on Monday 10 July 2017 as they could not afford to put fuel in the van. The Claimants understood that none of the Scottish roughcasters engaged by the Respondent was placed in a similar position, ie they received payment of the monies owed to them.

13. On Monday 10 July 2017 Ms Kovacs sent another text message to Mr Baillie asking when the Claimants' wages would be paid. Mr Baillie replied "Definitely today". On Tuesday 11 July 2017 Ms Kovacs sent a further text message to Mr Baillie asking when the Claimants would be paid. Mr Baillie

replied that Mr Lafferty had told him the Claimants had been paid on Monday 11 July 2017. When Ms Kovacs responded advising that the Claimants had not been paid, Mr Baillie asked how much was due to them and Ms Kovacs replied stating that it was £631 each.

14. In the course of a further exchange of text messages with Ms Kovacs, Mr Baillie said that she should speak to Mr Lafferty "because the guys have over-claimed again". Ms Kovacs replied referring to the timesheet signed by Keir by way of confirmation that the Claimants had not over-claimed. Page 19-21 contained a transcript of the text messages between Ms Kovacs and Mr Baillie.

15. Ms Kovacs also exchanged text messages with Mr Lafferty. On Tuesday 12 July 2017 Mr Lafferty sent a text message to Ms Kovacs stating "I will pay when the van and the generator is returned". After Ms Kovacs had sent a number of further text messages to Mr Lafferty on Tuesday 12 and Wednesday 13 July 2017, Mr Lafferty telephoned her. According to Ms Kovacs, Mr Lafferty was rude to her and yelled at her to leave him alone and she ended the call.

16. Ms Kovacs then sent a number of further text messages to Mr Lafferty and received a reply stating "Return the van and everything inside. Guys will be paid. The guys are not employees so everything you have referred to is nonsense." The Claimants returned the Respondent's van to an address in Shotts on 13 July 2017. Ms Kovacs sent further text messages to Mr Lafferty on Wednesday 13, Thursday 14, Friday 15 and Saturday 16 July 2017 seeking payment for the Claimants but received no response. Pages 22-23 contained a transcript of the text messages between Ms Kovacs and Mr Lafferty.

17. Ms Kovacs wrote to the Respondent on behalf of the Claimants (and Mr Zana) on 11 July 2017 (page 12) seeking payment of the £631 each. Her letter also referred to a separate sum of £300 each allegedly owed to the Claimants but

Ms Kovacs advised me in the course of her evidence that recovery of this was not being pursued. The Respondent did not respond to this letter.

18. Ms Kovacs wrote to the Respondent on behalf of the Claimants on 18 July 2017 (pages 14-15) seeking payment of the sum of £631 each for the work carried out by the Claimants between 20 and 30 June 2017 and the sum of £400 each for the work carried out by the Claimants between 3 and 7 July 2017. Her letter indicated that the Claimants regarded themselves as having been dismissed. Although not stated in the letter, the reason for this was that without the use of the Respondent's van, the Claimants were unable to undertake work for the Respondent so that, by demanding the return of the van as a precondition of payment, the Respondent was effectively terminating the Claimants' engagement. Again the Respondent did not respond to Ms Kovacs' letter and the sums claimed were not paid to the Claimants.

19. Ms Kovacs referred in her letter of 18 July 2017 to the Claimants having suffered "extreme financial detriment and stress". She said in evidence that the financial difficulty caused to the Claimants by the Respondent's failure to pay the monies due to them had placed a considerable strain on their relationships with their respective partners to the point of almost causing those relationships to break down.

20. The Claimants had secured regular employment as from 7 August 2017 earning at the same level as when they worked for the Respondent which was an average of £330 each per week. In the period between 7 July 2017 when they last worked for the Respondent and 7 August 2017 the Claimants had undertaken casual work and had earned £650 each. They had not claimed benefits.

Submission

21. Ms Kovacs submitted that each of the Claimants was entitled to recover the sum of £1,031 from the Respondent as an unlawful deduction of wages.

22. She also submitted that there had been unlawful discrimination. The protected characteristic was race, by reference to the Claimants' nationality. They had been treated less favourably than the Respondent's Scottish employees who had not suffered unlawful deduction of wages.

23. Ms Kovacs submitted that there had also been unlawful discrimination in the form of victimisation. The Claimants' request for payment of the monies due to them had been met by a demand from the Respondent that they should return the van and generator as a precondition of payment. That amounted to a detriment as it rendered them unable to continue to work for the Respondent.

Applicable law

24. Section 13(1) of the Employment Rights Act 1996 ("ERA") provides –

"An employer shall not make a deduction from wages of a worker employed by him unless –

(a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or

(b) the worker has previously signified in writing his agreement or consent to the making of the deduction. "

Section 230(3) ERA provides –

"In this Act "worker" (except in the phrases "shop worker" and "betting worker") means an individual who has entered into or works under (or, where the employment has ceased, worked under) –

(a) a contract of employment, or

(b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual".

Section 4 of the Equality Act 2010 ("EqA") identifies the "protected characteristics". These include race. Section 9(1) EqA provides that race includes colour, nationality and ethnic or national origins.

Section 13(1) EqA provides –

"A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others."

Section 27 EqA provides –

"(1) A person (A) victimises another person (B) if A subjects B to a detriment because –

(a) B does a protected act, or
(b) A believes that B has done, or may do, a protected act.

(2) Each of the following is a protected act –

(a) bringing proceedings under this Act;

(b) giving evidence or information in connection with proceedings under this Act;

(c) doing any other thing for the purposes of or in connection with this Act;

(d) making an allegation (whether or not express) that A or another person has contravened this Act…"

Section 136 EqA provides –

"(1) This section applies to any proceedings relating to a contravention of this Act.

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred."

Discussion and Disposal

25. I found Ms Kovacs to be a credible witness. Her evidence was given in a measured way with no element of exaggeration. She had personal knowledge of the events she described and was clear in her recollection of events.

26. I accepted Ms Kovacs' evidence as to the failure by the Respondent to pay the sum of £1,031 due to each of the Claimants. The nature of the work undertaken by the Claimants for the Respondent was set out in detail in Ms Kovacs' letter of 18 July 2017 (pages 14-15). In respect of the work undertaken between 20 and 30 June 2017 this was supported by the relevant timesheet signed by the supervisor (page 17).

27. I was satisfied that the Claimants were workers for the purposes of the ERA. They entered into an oral contract with the Respondent to undertake roughcasting work personally. They were not engaged in their own profession or business undertaking. The arrangements described at paragraph 6 above were closer to the status of employment than self-employment.

28. I noted from the appendix to the Claimants' bundle of productions that Ms Kovacs had checked the First Claimant's employment status with the Respondent using the HMRC online tool and the result had indicated that he

was an employee. I also noted what Mr Lafferty had said in his text message to Ms Kovacs on 13 July 2017 (see paragraph 16 above) about the Claimants not being employees. I did not believe it was the intention of the parties to enter into an employer/employee relationship. The Respondent's engagement of the Claimants was in my view covered by the definition of "worker" in section 230(3) ERA.

29. It followed that by failing to pay the sums of £1,031 owed to each of the Claimants the Respondent had made unlawful deductions from wages contrary to section 13 ERA. The Claimants were entitled to receive these sums and I decided that the Respondent should be ordered to pay them.

30. I then considered whether the Respondent had discriminated against the Claimants. Ms Kovacs' argument was that the Claimants had been treated less favourably because they were Hungarian. The Respondent had withheld payment of monies earned by the Claimants. They had not withheld payment of monies earned by their other roughcasting squad members who were Scottish. These included Mr Lafferty's son who for this purpose was the Claimants' comparator.

31. I was satisfied that these were facts from which I could decide, in the absence of any other explanation, that the Respondent had contravened section 13(1) EqA by treating the Claimants less favourably than their comparator. The Respondent had not entered a response to the Claimants' claims and so there was no other explanation before me of the Respondent's treatment of the Claimants. In these circumstances section 136 EqA required me to find that the contravention of section 13(1) had occurred. According the Claimants' claims under section 13 EqA were well founded.

32. Had the Respondent not failed to pay the Claimants the sums to which they were entitled, the Claimants would have continued to undertake work for them. They would have used the Respondent's van to travel to work on and after 10 July 2017 if they had been able to pay for fuel. The Respondent's discriminatory action in failing to pay the Claimants and then requiring them to return the van caused the Claimants to suffer loss of earnings for which they were entitled to be compensated.

33. The Claimants' average weekly earnings while working for the Respondent were £330 each. They did not secure equivalent work until 7 August 2017. They therefore each lost four weeks of earnings which amounted to £1,320 each. However they undertook casual work within this period, earning £650 each, and so their net loss was £670 each.

34. The Claimants also suffered injury to feelings. They were placed in a position of financial difficulty which caused a strain on their relationships with their respective partners. They were entitled to compensation for this.

35. In assessing what compensation to award I took account of the decision in **Vento v Chief Constable of West Yorkshire Police 2003 IRLR 102** and the subsequent cases where the bands of compensation for injury to feelings have been considered. The present case commenced before the recent Presidential Guidance was issued and so I did not take that Guidance into account.

36. While I accepted that the Claimants had been caused some distress by their treatment at the hands of the Respondent, this had been relatively short lived as they had secured comparable employment within one month. However, it counted against the Respondent that the discriminatory conduct had been decided upon by their directors, ie at the most senior level within their organisation. They had also chosen to ignore the letters which Ms Kovacs sent them on the Claimants' behalf.

37. It seemed to me that this should be regarded as a one off incident of the type which fell within the lower Vento band, and within that band it was at the lower end in terms of seriousness and impact on those affected. I decided that the appropriate award for injury to feelings was £1,000 for each Claimant. Taking matters in the round I believed this was an adequate figure without any uplift under reference to the case of **Simmons v Castle [2012] EWCA Civ 1288**.

38. The award for injury to feelings attracted interest at 8% from the date of the discriminatory act which I calculated to be £23.48 for each Claimant. According the total award for unlawful race discrimination was £1,670 for each Claimant together with the said interest.

39. I did not consider that the Claimants had suffered victimisation under section 27 EqA. The allegation made by the Claimants which led to the detriment of being required to return the van and generator and having their engagement terminated was that the Respondent had failed to pay monies owed to them. That was not, at the time when payment was first requested, a protected act within the meaning of section 27. There was no reference at that point to the Respondent having treated the Claimants differently from their Scottish workers and accordingly no allegation of a contravention of the EqA as required by section 27.

Employment Judge: Mr WA Meiklejohn
Date of Judgment: 01 November 2017
Entered in register: 07 November 2017
and copied to parties