EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**Respondent**
Mr C Lowery	TLC Building Contractors Limited

JUDGMENT OF THE EMPLOYMENT TRIBUNAL ON A PRELIMINARY HEARING

HELD AT Manchester on 5 March 2018

EMPLOYMENT JUDGE Warren

Representation
Claimant: Mr M Lowery, (claimant's father)
Respondent: Mr B Hendley, consultant

JUDGMENT

1. **There was an unlawful deduction of wages. The claim succeeds.**

2. **The respondent is ordered to pay the claimant compensation in the sum of one thousand three hundred and seventy seven pounds and forty five pence.**

REASONS

1.Background and Issues

1.1 By an ET1 presented to the Tribunal on 27 August 2017, the claimant

alleged that the respondent had made unlawful deductions from his wages. The respondent denied paying less than the minimum wage, and underpaying over time, and asserted that the claimant as an apprentice and had been paid accordingly.

1.2 The issues were identified as:-

1.2.1 Was the claimant an apprentice working under an approved English apprenticeship scheme within the terms of the Apprenticeships, Skills Children & Learning Act 2009 ("ASCLA")?

1.2.2 If not, was the claimant employed by the respondent under a contract of service?

1.2.3 What was the correct hourly rate of pay for the claimant (bearing in mind the National Minimum Wage applicable to an apprentice and or employee aged 21)?

1.2.4 What was the correct overtime rate?

1.2.5 Was there an unlawful deduction from wages?

2.The Evidence

The tribunal heard evidence from the claimant in person, and from Mr Rawlinson, director of the respondent business. Both gave evidence frankly and honestly. There was an agreed bundle of 82 pages. Page references herein relate to that pagination.

3.The Facts

3.1 In January 2017 the claimant was interviewed by Mr Rawlinson for an approved English apprentice vacancy which had been advertised in November 2016.

3.2 Mr Rawlinson had received advice from the local apprentice officer that whilst it was too late then to get anyone enrolled into college, it would be the next year before the proper apprentice scheme could start. However he could employ some one immediately, they would be employed 'as would anyone else' and then in March/ April 2017 place at college could be obtained. If the apprentice was aged between 16 and 18, they could undertake a 2 week trial. The scheme was for 2 years and the respondent would receive £6000 towards costs.

3.3 The respondent's subsequent advertisement indicated that the successful applicant would be enrolled on a two year apprenticeship scheme through the Construction Industry Training Board (C.I.T.B.) on day release, whilst getting valuable experience at site level.

3.4 On 20 January 2017 the claimant received an email from Mr Rawlinson informing him that his application for the apprentice joiner position had been successful. (page 37). The terms relevant to this case were set out as follows:-

3.4.1 A two year apprenticeship through the C.I.T.B. on day release.

3.4.2 An hourly pay rate of £5.00 until the end of the first year at College with a rise thereafter.

3.4.3 Overtime payable at the hourly rate plus time and a half.
3.4.4 A standard work week of 40 hours.
3.4.5 This was for a trial period of 3 months, and then to be reviewed.

3.5 The claimant responded on the same day confirming acceptance.
The parties agreed a start date of 30 January 2017 and the claimant duly commenced work.

3.6 During his working period the claimant was paid the agreed contractual rate of £5.00 an hour. Authorised over time (one weekend) was paid at 1.5 times the hourly rate, and working more than a 40 hour week was paid at the standard rate. The claimant did not query these rates of pay and on oath confirmed that his pay was as he expected.

3.7 No further action was taken with regard to the apprenticeship – no frame work agreed, and no approval scheme prepared. The claimant was not enrolled in college.

3.8 In April 2017 the respondent became concerned at elements of the claimant's conduct at work, and on 15 May 2017 he was dismissed or gross misconduct.

3.9 Before dismissal the claimant worked for 540 hours. He had 68 hours paid holiday. 14 hours of overtime were pre-authorised. He worked beyond 40 hours a week by 8 hours in total over the period of employment.

3.10 Pre-authorised over time was paid to him at 1.5 times an hour's pay. Other overtime was paid at basic rate. Mr Rawlinson conceded in evidence that the claimant should have been paid pre-authorised overtime at the rate of time plus 1.5, as that is what his emailed statement of terms and conditions stated.

3.11 Mr Rawlinson confirmed in evidence that the apprenticeship was for 2 years starting in September 2017, but also confirmed that he was committed to the

apprenticeship from the first day. His intention was to get through the trial period and then contact the college.

3.12 The claimant admitted in evidence that he did not raise the issue of the apprenticeship at all, nor any grievance about his pay or rate of pay until after his dismissal.

4 The Law

4.1 The law is governed by ASCLA 2009.

The relevant law in this case is:-

4.1.1 Section A1 (2) (a) An approved English apprenticeship is an arrangement which takes place under an approved English apprenticeship agreement and satisfies any conditions specified in regulations made by the Secretary of State.

4.1.2 Section A1 (3) An approved English apprenticeship agreement is an agreement which –
(a) provides for a person (“the apprentice”) to work for another person for reward in a sector and
(b) provides for the apprentice to receive training in order to assist the apprentice to achieve the appropriate apprenticeship standard in the work done under the agreement and
(c) satisfies any other conditions specified in regulations made by the Secretary of State

4.2 Under transitional provisions applicable at the time, the apprenticeship framework was to be withdrawn as each sector produced an approved apprenticeship standard and assessment plan duly approved by the IfA.

4.3 Apprenticeships (Form of Apprenticeship Agreement) Regulations 2012:-
The form of the apprenticeship agreement requires that a written statement of particulars of employment are given to an employee for the purposes of section1 of the 1996 Employment Rights Act which also must include a statement of the skill, trade or occupation for which the apprentice is being trained under the apprenticeship framework.

4.4 Section.13 Employment Rights Act 1996
13 (1) An employer shall not make a deduction from wages of a worker employed by him unless –

(a) the deduction is required or authorized to be made by virtue of a statutory provision or a relevant provision of the workers contract or
(b) the worker has previously signified in writing his agreement or consent to the making of the deduction

Representations of the claimant

Mr Lowery senior asserted that based on the answers given by Mr. Rawlinson in cross examination, the claimant had been taken on as an apprentice, but with no commitment for the first 3 months, and so Mr Lowery junior, should have been paid the National Minimum Wage, fully accepting that once the apprenticeship had started, there would be a reduction in wages. There was however no evidence of contact with the apprenticeship scheme, once the claimant had been employed, and so the apprenticeship had not started.

Representations of the respondent

Apprenticeships are governed by ASCLA and the 2012 Regulations. The claimant had been given the required statement of terms and conditions, which included the matters required under the Apprenticeships (Form of Apprenticeship Agreement) 2012 Regulations. He was therefore an apprentice within the terms of ASCLA and as such entitled to be paid the minimum wage then applicable to an apprentice. In fact the respondent had paid him more than that.

Conclusions

The claimant, on agreement with both parties, was subject to a 3 month probationary period. There is no provision for such a period in an approved English apprenticeship. The only 'apprenticeship' which can be so called, is one within the terms of ASCLA.
The advice received by Mr Rawlinson confirmed that should he choose to employ the claimant before college registration commenced, the claimant was to be employed 'as any other employee', that is, until the apprenticeship started.
The start was envisaged by Mr Rawlinson to be on conclusion of a satisfactory 3 month probationary period. On his own evidence he actually expected the apprenticeship to start around the beginning of September 2017.
The tribunal accepts that Mr Rawlinson was committed to the apprenticeship from the first day, but finds that as a fact, the apprenticeship agreement had not been completed by the point when the claimant as dismissed, and, it's execution remained conditional upon the completion of a satisfactory 3 month probationary period.

The claimant was, therefore, during his employment with the respondent, engaged in a contract of service as an employee. He was not an apprentice. As such he was entitled to be paid at the hourly rate applicable to a 21 year old employee under the National Minimum Wage provisions.

Mr Rawlinson accepted that the overtime rate to which the claimant was entitled

for pre authorized overtime, was the hourly rate plus time and a half as specified in the terms and conditions. The claimant was thus entitled to receive 2.5 x normal hourly rate of pay for any pre authorised overtime.

On those weeks when the claimant worked over his contracted 40 hours, he was entitled to be paid at the normal hourly rate.

REMEDY

The respondent had undertaken the calculations in advance of remedy being considered, and after some explanation and discussion, the claimant agreed the calculations.

The claimant had worked 540 hours and earned 68 hours paid annual leave. He had worked 14 hours of pre-authorised overtime and 8 hours of none pre authorized overtime.

Up to the 31 March 2017, the National Minimum Wage applicable to the claimant was £6.95 per hour.

From 1 April 2017 the National Minimum Wage applicable to the claimant was £7.05 per hour.

Had he been found to be an approved English apprentice the claimant would have been entitled to £3.40 an hour, but he was actually paid £5.00 an hour.

The total due to the claimant (including the increased rate of the National Minimum Wage, and the increase in the payment for pre – authorised overtime amounted to £4562.45. He had been paid £3185.00.

The balance due to the claimant as thus £1377.45 in compensation.

The claimant should note that the order is made gross of tax and national insurance, and any other statutory deductions, for which the claimant remains personally liable.

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Employment Judge Warren

Signed on 5 March 2018

Judgment sent to Parties on

9 March 2018

NOTICE

THE EMPLOYMENT TRIBUNALS (INTEREST) ORDER 1990

Tribunal case number(s): 2404180/2017

Name of case(s): Mr C Lowery v TLC Building Contractors Ltd

The Employment Tribunals (Interest) Order 1990 provides that sums of money payable as a result of a judgment of an Employment Tribunal (excluding sums representing costs or expenses), shall carry interest where the full amount is not paid within 14 days after the day that the document containing the tribunal's written judgment is recorded as having been sent to parties. That day is known as "*the relevant decision day*". The date from which interest starts to accrue is called "*the calculation day*" and is the day immediately following the relevant decision day.

The rate of interest payable is that specified in section 17 of the Judgments Act 1838 on the relevant decision day. This is known as "the stipulated rate of interest" and the rate applicable in your case is set out below.

The following information in respect of this case is provided by the Secretary of the Tribunals in accordance with the requirements of Article 12 of the Order:-

"the relevant decision day" is: 9 March 2018

"the calculation day" is: **10 March 2018**

"the stipulated rate of interest" is: 8%

MR I STOCKTON
For the Employment Tribunal Office