EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4105211/2017

Held in Glasgow on 8 May 2017

Employment Judge: Michelle Sutherland (sitting alone)

John Wright	**Claimant** **Represented by:-** **In Person**
Tradestart Recruitment Limited	**Respondent** **Represented by:-** **Jamie Brice** **Director**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Tribunal is that:-

The employer of the Claimant in respect of the alleged unlawful deductions from wages was Cinch Contracting Services Limited and not the Respondent.

The Claimant's application to substitute Cinch Contracting Services Limited (Registered Office address of Unit 2, Shepcote Office Village, Shepcote Land, Sheffield S9 1TG) as a Respondent is granted (and their application to merely add Cinch as a Respondent is refused).

It is ordered that the claim be listed for a one day continued final hearing to determine all outstanding issues including whether claim for unlawful deduction of wages was presented within the relevant time limit and to determine the hours worked by the

Claimant under his contact with Cinch in the period between 15 May and 25 May inclusive.

REASONS

Introduction

1. The Claimant claims the following deduction from wages from his employment with the Respondent–

Date of work	Hours of Work	Rate of Pay	Due Date	Total Sum
15 May 2017	13	£22	26 May 2017	£286
16 May 2017	13	£22		£286
17 May 2017	13	£22		£286
18 May 2017	13	£22		£286
19 May 2017	13	£24.50		£318.50
20 May 2017	13	£24.50	2 June 2017	£318.50
22 May 2017	13	£22		£286
23 May 2017	13	£22		£286
24 May 2017	13	£22		£286
25 May 2017	8	£22		£286
Sub-total				£2815
Less payments of £250 and £200 made on 9 and 16 June 2017				£450
Total				£2365

2. A Final Hearing was listed for 8 May 2018 and the issue of employment status was to be considered at that Hearing.

3. During the course of that hearing the Claimant made an application to add, failing which to substitute, Cinch Contracting Services Limited, as a Respondent.

4. The Claimant appeared in person. The Respondent was represented by Jamie Bruce, Director of the Respondent.

5. A joint set of productions was prepared on the day of the Hearing with the assistance of the Tribunal.

6. The Claimant gave evidence on his own behalf. Jamie Brice, Director gave evidence on behalf of the Respondent.

7. Both parties made very brief closing submissions.

Findings of Fact

8. Based on the evidence led and the information provided, the Tribunal was able to find the following facts admitted or proved:-

9. The Respondent is a recruitment agency engaged in the supply of labour to clients. The Respondent had a contract with Roltech Engineering Limited to supply pipefitting labour to them at the biomass power plant at Levenseat (the 'Roltech contract'). That labour was then subcontracted to M&W construction who were the ultimate users in the supply chain.

10. The Claimant was identified by the Respondent as one of a number of pipefitters deemed suitably qualified and experienced to undertake pipefitting labour in fulfilment of the Roltech contract. The Respondent advised the Claimant (and the other pipefitters so identified) that he would be engaged to undertake pipefitting labour at Levenseat through an intermediary - either a limited company owned by the Claimant or a third-party umbrella company which employed the Claimant. The Respondent would then contract with that intermediary regarding the supply of the pipefitting labour in return for an assignment fee.

11. The Claimant elected to supply his labour through a third-party umbrella company. (The other pipefitters so identified elected to supply their labour through limited companies owned by them.) The Claimant was directed to

contact either Red Recruitment or the Cinch Group to affect that arrangement.

12. On 12 May 2017 the Respondent emailed the Claimant under the heading "job confirmation" advising a start date of 12 May 2017, work with Roltech at the M & W Levenseat site, the site contact details, the usual site hours of Monday to Thursday 6pm – 6 am and Friday to Sunday 4pm – 4am, and a rate of pay of £22 an hour Monday to Thursday and £24.50 an hour Friday to Sunday, and sought confirmation of his attendance.

13. The Claimant started to undertake the pipefitting labour in fulfilment of the Roltech contract on 12 May 2017.

14. On 17 May 2017 the Claimant entered into a contact of employment with the Cinch Contracting Services Limited ('Cinch') to supply his labour through them. Under clause 3.1 of the contract, his employment began on the date of his first assignment, namely 12 May 2017. He would be providing his pipefitting services to the Respondent as their client under a temporary assignment. Under Clause 2.5, the Claimant remained employed by Cinch during any period when he was not on an assignment. Under Clause 3.4, the Claimant was obliged to work when required by the Company. Under Clause 4.1, the Claimant was guaranteed a minimum of 336 hours of work within a 12-month period and at a minimum rate of the national minimum wage. Under clause 4.5, an enhanced rate may be agreed. An enhanced rate was agreed in respect of this assignment namely £22 an hour Monday to Thursday, and £24.50 an hour Friday to Sunday an hour, less Cinch's flat fee of £17 a week and their employer's NI contribution. The Claimant was to be paid on a Friday one week in arrears. Under Clause 9, Cinch were entitled to terminate on 1 weeks' notice, or without notice in the event of serious misconduct or negligence.

15. On both 12 and 13 May 2017 the Claimant worked 13 hours at the Levenseat under the temporary assignment. The Respondent then advised Cinch of the hours worked by the Claimant under the assignment and the Respondent paid Cinch the fee for the assignment. On or about 19 May 2017 the Claimant received payment from Cinch in sum of £593.09 together with a payslip from them in respect of those hours of work. The gross pay was calculated having regard to the agreed enhanced rate of £24.50 an hour less Cinch's flat fee of £17 a week and their employer's NI contribution.

16. On 9 and 16 June 2017 the Claimant received payments from Cinch of £250 and £200 respectively in part payment of the arrears of wages. The cost of these payments was met by the Respondent.

17. The Claimant continued to be employed by Cinch until at least August 2017.

Observations of the Evidence

18. There were areas of factual dispute between the parties.

19. The Claimant believed that he was employed by the Respondent because he had responded to their advert, they had communicated with him about the hours of work and rate of pay, he had more contact with them than with Cinch during the brief period of the assignment, and the Respondent had explained and apologized for the delay in paying wages. The Claimant believed Cinch were merely payroll providers rather than his employer. On 17 May 20 17 the Claimant contacted Cinch Group and completed their registration form. The Claimant provided the Cinch Group with significant details including contact details, next of kin, qualifications and experience. On 17 May 2017 Cinch expressly advised the Claimant by email that he was employed by them and that he would be providing his services to the Respondent under a temporary assignment and that an enhanced rate had been agreed. The Claimant paid little attention to that email. On 17 May 2017 Cinch provided the Claimant with a copy of his contract of employment with them. The Claimant received but did not read the contract. During the Hearing, and in the face of the evidence, the Claimant ultimately admitted that he entered into a contract with Cinch.

20. The precise termination date of the contract of employment with Cinch is unknown. The Claimant received his P45 from Cinch in August 2017. That P45 asserted a leaving date of 14 May 2017 which is prior to the date when the Claimant entered into the contract with Cinch. It is understood that this leaving date was asserted because the Respondent had not provided Cinch with either timesheets or the assignment fee in respect of any work performed by the Claimant after 13 May 2017. The Respondent advised that they are awaiting timesheets and their fee from Roltec. However the Claimant did not receive notice of termination of his employment with Cinch prior to August 2017 and the contract with Cinch subsisted until at least August 2017. Accordingly the termination date arose after the relevant due dates for payment of wages on 26 May and 2 June 2017.

Discussion and decision

21. Section 13 of the Employment Rights Act 1996 ('ERA 1996') provides that an employer shall not make a deduction from wages of a worker employed by him unless the deduction is required or authorised by statute, or a provision in the workers contract, or the worker's prior written consent. A worker means an individual who has entered into or works under a contract of employment, or any other contract whereby the individual undertakes to perform personally any work for another party who is not a client or customer of any profession or business undertaking carried on by the individual (s230 ERA).

22. The Claimant sought to rely upon the EAT authority of *Blakely v On-site Recruitment Solutions Ltd & Heritage Solutions Limited UKEAT/0134/17*. In that case Mr Blakely applied to On-Site in response to an advertisement for work as a pipefitter. On-site had intended for him to supply his labour to them through Heritage as a third-party umbrella company. However Mr Blakely was not advised of that intention and was only advised to contact Heritage for payroll services. Mr Blakely did not receive and therefore did not accept an offer of employment by Heritage. The EAT held that there was a contract between Mr Blakely and On-Site but that the nature of that contract fell to be determined by an employment tribunal and was remitted accordingly.

23. In the instant case, whilst the Claimant applied to the Respondent in response to an advertisement for work as a pipefitter, the Respondent advised the Claimant that he required to supply his labour through Cinch and the Claimant accepted an offer of employment with Cinch. The relevant facts in EAT authority of Blakely are therefore materially different to the relevant facts in this claim.

24. The employment contract with Cinch is consistent with the relationship between the parties. There was no divergence between the contract and the reality on the ground. It is therefore not necessary to find a contractual relationship between the Claimant and the Respondent.

25. The Claimant made an application to amend during the Final Hearing to add, failing which to substitute, Cinch as a Respondent. According to the EAT in Selkent Bus Co Ltd v Moore [1996] IRLR 661 the Tribunal should take into account all the circumstances and should balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it. The following were indicated to be relevant considerations: the nature of the amendment; the applicability of time limits; the timing and manner of the application.

26. Allowing the amendment does not put Cinch to any additional hardship or disadvantage than if the claim had been raised against them in the first instance. The Respondent has been in ongoing discussions with Cinch regarding the dispute since the issue first arose in May 2017 and are fully aware of the details of the claim. Refusing the amendment would prevent the Claimant being able to proceed with his claim for unauthorised deduction from wages. It appears that the issue is not whether the Claimant worked the hours claimed but that Respondent is unable or unwilling to confirm those hours because of their dispute with Roltec. That is a matter that for Cinch, the Respondent, and Roltech to resolve between themselves and does not affect the Claimant's entitlement to be paid by his employer for the hours he has

worked. His claim therefore appears to have reasonable prospects of success. Although there are considerations of time bar (see below), they are not sufficiently clear cut to render the claim having little or no reasonable prospects of success.

27. The provision of labour through employment with an umbrella company is complex. The Claimant does not have the benefit of legal representation. Given the nature of the communications with the Respondent, it was not unreasonable for the Claimant have formed the erroneous belief that he was employed by the Respondent and that Cinch were merely payroll providers. The Response form lodged on 2 February 2018 advised that the Claimant was employed by Cinch but this was not accompanied by an application either to add or to substitute them as a Respondent. Following initial consideration the Claimant was directed that the issue of employment status would be considered at the final hearing. In the circumstances there was not an unreasonable delay in making the application to amend.

28. Taking into account all the circumstances and balancing the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it, the application to substitute Cinch as Respondent is granted. This decision has been reached in the absence of Cinch and Cinch may apply for reconsideration of this decision under Rule 71.

29. A complaint for unlawful deduction from wages must be made within 3 months beginning with the due date for payment (Section 23 ERA 1996). If the due date for the final payment of 2 June was the last in a series of deductions then the claim ought to have been lodged by 1 September 2017 subject to any extension of time. The EC Notification was received on 7 July 2017 (Day A) and the EC Certificate was issued on 7 August (Day B). Since that time limit would expire in the period beginning with Day A and ending 1 month after Day B, the time limit is extended to 7 September 2017 (Section 207B(4) ERA 1996). The Claim was lodged on 15 October 2017. However Cinch made a partial payment in respect of the arrears of wages on 16 June 2017. If that

date is the last in a series of deductions then the time limit is 16 October 2017 (15 September plus the period of early conciliation of 31 days) (Section 207B(3) ERA 1996). The Claimant had no prior notice of the issue of time bar which was first raised with him during the final hearing. Accordingly the issue of whether the claim was lodged out with the applicable time limits, whether it was not reasonably practicable for the claimant to lodge the claim within that time limit, and if so whether it was presented within such further period as is reasonable falls to be considered at the continued Final Hearing.

30.

Employment Judge: M Sutherland
Date of Judgment: 16 May 2018
Entered in Register: 07 June 2018
and Copied to Parties