EMPLOYMENT TRIBUNALS

Claimant: **Mr Brian Bradford**

Respondent: **Harris Pye Fabrication Limited**

Heard at: **Cardiff** **On: 10th May 2018**

Before: **Employment Judge Howden-Evans (sitting alone)**

Representation:

Claimant: **In person, supported by Mrs June Bradford**

Respondent: **Mr George Pollitt (counsel)**

RESERVED JUDGMENT

The employment judge's decision is the claimant has not suffered an unauthorised deduction from his wages. His claim presented under s23(1)a Employment Rights Act 1996 is dismissed.

REASONS

The Parties

1. Mr Brian Bradford ("the claimant") is a Senior Paint Inspector and has experience of working in the shipping and oil industry. He has worked in this

field for 22 years, has a Level 3 qualification and is registered with the British Institute of Corrosion.

2. Harris Pye Fabrication Limited ("the respondent") is part of the Harris Pye group of companies that has Harris Pye Engineering Group Limited as its parent company. The Harris Pye group of companies has 30 years experience of providing repairs to the marine industry. Over 1,700 people work for the Harris Pye group around the world. 31 people work for the respondent, which has hangars in Llandow in South Wales. Harris Pye Dubai Multi-Commodity Centre ("DMCC") is another company within the same group of companies.

3. In early 2017, the respondent engaged the claimant to undertake inspection work upon various vessels. The nature and terms of this agreement are disputed. In Spring and early Summer 2017 the claimant worked on a number of ships for the respondent. On 4th July 2017, the claimant terminated his agreement with the respondent.

The Issues

4. The claimant notified ACAS through its early conciliation procedures and complied with the requirements of s18A Employment Tribunals Act 1996. By an ET1 claim form presented on 16th August 2017, the claimant presented a claim to recover unauthorised deductions from wages (under s23(1)a Employment Rights Act 1996) and for damages for breach of contract in respect of the unpaid mileage expenses.

5. In his Order following the Preliminary Hearing on 3rd May 2018, Regional Employment Judge B J Clarke helpfully set out the issues: the claimant asserts the respondent engaged him, as either an employee or a worker, for a six month trial period in the first half of 2017. He asserts he was to be paid a daily rate of £300 for a guaranteed number of days working on ships or at the respondent's premises in Llandow. He asserts that in breach of the agreement, the respondent only used him on a "zero hours" basis. The claimant says if the original agreement had been honoured he would have worked 140 days during the six month period, yielding a gross income of £42,000. He worked and was paid for:

    a. 21 days on "Independence of the Seas";
    b. 7-10 days on "Enchantment of the Seas";
    c. 10 days on "Liberty of the Seas"; and
    d. 3 days in Llandow.

    The claimant asserts the amount owed to him is £19,000 and £300 for unpaid mileage expenses. At the start of the Final Hearing,

parties were able to agree the mileage expenses claim and the claimant was given a cheque to settle this debt.

6. Helpfully, at the Preliminary Hearing, it was agreed that:

    a. Harris Pye Fabrication Limited is the correct respondent;
    b. The claimant was a worker for the purpose of a complaint of unauthorised deductions from wages (s 13(1) Employment Rights Act 1996);
    c. The tribunal has jurisdiction to consider this claim, notwithstanding the extra-territorial aspects of the claimant's working arrangements; and
    d. The claim was presented in time.

7. The respondent does not accept the claimant was an employee and asserts it has paid the claimant all the wages that were due to him under the terms of their agreement.

8. Regional Employment Judge B J Clarke explained the tribunal would need to determine,

    "what is the amount that was "properly payable" by the respondent to the claimant under the terms of the agreement between them (whether written or oral) by which he would be engaged as a worker?; was it an amount that can be calculated by reference to the guaranteed days the claimant expected?; or was it only for the days he actually worked, in accordance with what typically happens in a zero hours arrangement?"

9. At the start of the hearing, both parties agreed, since the preliminary hearing, a further issue had arisen in relation to the amount of wages properly payable. The claimant was asserting he was entitled to be paid for a further 2 days work, following an alleged additional agreement with Mr Stewart. The respondent's position on this was if the claimant could produce timesheets or explain the work he had undertaken and the time it took, the respondent would pay these additional wages; the claimant had not provided additional timesheets and could not explain what work had been undertaken.

Background

10. The matter came before me, (an employment judge sitting alone) for a one-day hearing. The claimant represented himself and was supported by Mrs Bradford. Mr Pollitt, counsel, represented the respondent.

11. At the start of the hearing, I explained the times we were likely to be taking breaks and emphasised that we could take a break at any point, should anyone need a short rest. I read out the relevant sections of Regional

Employment Judge B J Clarke's order to help refresh our memories of the issue I had to decide. I explained I had read all the witness statements in full.

12. We heard evidence from the claimant first. This was given on oath. The claimant confirmed he did not need to make any amendments to his witness statement and did not need to add to his evidence (having read the respondent's statements). The claimant answered questions from Mr Pollitt before answering my questions. In answering questions, the claimant was able to expand fully on his answers, to give all the evidence he felt was relevant to that question. During the claimant's evidence we took a 15-minute refreshment break. At the end of his evidence, the claimant was given a further opportunity to clarify and expand on any answer he had given.

13. After lunch we heard evidence on oath from Mr Wayne Davies, Group HR Manager, who had arranged for the claimant to be paid and had entered into correspondence with the claimant. Mr Davies did not make any amendments to his witness statement. Mr Pollitt did not need to ask any supplemental questions. The claimant was able to ask extensive questions of Mr Davies. I did not have any questions, nor did Mr Pollitt need to ask any final questions of Mr Davies.

14. We also had a signed witness statement and signed supplemental witness statement for Mr Billy Stewart, the respondent's Senior Project Manager, who could not attend the hearing as he was offshore, working on a ship. At the Preliminary Hearing, the respondent had applied for permission for Mr Stewart to give evidence from the ship via video link. At that hearing, it was explained it would not be possible to arrange this without vacating the 10th May 2018 final hearing. Both parties were eager to avoid any adjournment, so the respondent agreed to rely on written statements for this witness. In considering Mr Stewart's statements, I am mindful that this evidence has not been given on oath and has not been tested by cross-examination. As such it carries little evidential weight.

15. I also had the benefit of an agreed bundle containing approximately 423 pages.

16. Mr Pollitt had prepared written closing submissions, which he gave to the claimant prior to lunch. At 4pm when we had finished hearing evidence, the claimant was able to respond to Mr Pollitt's written submission and explain any further points he wanted me to consider. The claimant was able to make extensive oral closing submissions. Unfortunately, there was insufficient time left for me to consider my decision properly, so I reserved judgment.

Findings of fact

17. The claimant, is a senior paint inspector, with extensive experience of working in the shipping industry. In evidence he explained that whilst he lived in Gateshead, he had reached a high position in this field and was used to travelling all over the world with his work, working for various companies on various projects. He had not worked for the respondent before February 2017.

18. On 21st February 2017, Mr Bernie Lively, who works in the respondent's Project Technical Resource team, sent the claimant an email explaining he had received the claimant's cv and was *"looking for someone to start work on our RCCL project in the US this weekend. Can you let me know your rates and availability and we can take it from there."*

19. It is likely that Mr Lively had received the claimant's CV from a recruitment company, as the claimant was registered with a specialist recruitment agency.

20. The claimant replied by email that morning, explaining *"the rate is commensurate within the industry. Between 35-55 per hour…or a flat day rate with negotiable hours which is not normally a problem, most generally a day rate is anticipated for all away days"….*

21. In response, Mr Lively stated *"I have just spoken to the project manager and he is offering a £300 day rate? he will explain what's required on the job if you are interested and can travel on an ESTA for this one and go on as a passenger. Let me know."*

22. The claimant responded by email *"yes all sounds good…is it for 30 days or more…"* to which Mr Lively replied *"Billy in copy can advise you further".* Mr Lively had copied Mr Billy Stewart, the project manager, into this email.

23. Later that same day, Ms Debbie Williams, Senior HR Advisor, sent an email to the claimant attaching an offer letter for the position of Paint / Coatings Inspector. This letter states: *"you will be employed on a Zero Hour contract, paid weekly. Salary of £300 per day. Start date of you contract will be confirmed once an acceptance to this offer has been received. I look forward to your formal acceptance of this offer and your contract will be issued on the first day of employment."*

24. On 22nd February 2017, the claimant responded by email, *"yes that is fine for this project".*

25. On 23rd February 2017, Mr Lively wrote to the claimant by email, *"Can you confirm you can fly to the US on Monday 27th to attend the RCCL project, the project manager Billy would like to meet with you on Sunday to brief you up*

on the job and discuss any other matters here in our Llandow site. If you are available, we can make all your travel and accommodation arrangements today".

26. The claimant replied *"travel on Monday is no problem. I have no concerns. If you feel a meeting in Llandow is a requirement than I shall attend but normally I would simply get a remit via email of your requirements and any concern you may have in the first instance…."*

27. On Saturday 25th February 2017, the claimant travelled to South Wales, from his home in Gateshead. On Sunday 26th February 2017, he met Mr Stewart, project manager, at the respondent's site in Llandow.

28. The claimant's evidence is that this meeting lasted a few hours, during which time he was shown around the site. At its highest, his evidence was that Mr Stewart had not discussed any contract details other than to guarantee the daily rate agreed. He accepted Mr Stewart would not have authority to agree the terms of his contract; he expected there would be someone in management that would be able to agree terms. In evidence, the claimant explained Mr Stewart mentioned most of the British personnel were working on zero hour contracts and in cross-examination the claimant admitted that Mr Stuart had made comments like "one fish (or one ship) at a time is good fishing". This was a reference to one project or vessel at a time providing a good income, albeit they were both working on zero hour contracts.

29. In cross-examination, the claimant explained he was expecting to work onboard a vessel for a week or so and then in Llandow for a few days writing up the report and reporting back to the directors. He accepted he was not expecting to be paid for every working day in a 6 months period; rather there were a number of vessels and it was likely to take years to get the paint inspected across them all. Each vessel was going to require a few days or weeks working onboard before a few days working in Llandow.

30. On Monday 27th February, the claimant joined the ship, The Independence of the Seas, in the Bahamas, and started work on the project. He was advised by the personnel on that vessel that he needed to complete time sheets to be paid, and that these would need to be signed by Mr Stewart.

31. On 5th March 2017, whilst still on board the ship, the claimant emailed Ms Williams, *"I'm now on board the Independence of the Seas and I understand Scott Grant on board is doing time sheets etc. I normally use an umbrella type company with CIS and LTD for my affairs….ie revenue expenses mileage etc…is this possible with you."* Ms Williams' reply the next day was *"Unfortunately not. You were offered the position on a Harris Pye Zero Hour Contract. Which means HP will pay you"*.

32. The claimant continued to chase payment, as he had not yet received any pay. By email of 9th March 2017, Ms Williams asked Mr Lively to explain *"the circumstances surrounding [the claimant]."* On 10th March 2017, Bernie Lively explained, *"[The claimant] was brought in to work on the RCCL project for Billy, he came to Llandow on a Sunday to meet with him prior to flying to the US on the Monday. After discussions with Chris David I intend using him in the UK on completion of his RCCL commitments."*

33. On 14th March, Mr Wayne Davies, Group Human Resources Manager, emailed the claimant and others *"We have time sheets for week endings: 26.02.2017: 2 days; 05.03.2017: 7 days therefore 9 days x GBP 300 per day = GBP 2,700. We will process these payment as a 1 off payment today. Brian will then receive monthly payments following the last working Sunday of the month."*

34. On 16th March, Ms Magdalena Sanecka, one of the respondent's HR officers, sent the claimant a "*Zero Hours Casual Worker Contract".* This explained *"this contract governs your engagement from time to time by Harris Pye as a casual worker….in particular it does not create any obligation on the company to provide work to you and by entering into this contract you confirm your understanding that the company makes no promise or guarantee of a minimum level of work to you and you will be on a flexible "as required" basis. It is the intention of both you and the company that there be no mutuality of obligation between the parties at any time when you are not performing an assignment…..You will only be paid for the hours that you work. The company's current rate of pay for your role is £300 per day".* The contract did not have any clause providing the claimant with a right to claim a cancellation fee.

35. In evidence, the claimant explained he had always accepted he was working on a zero hours contract, his objection to the Zero Hours Casual Worker Contract was to the words "casual worker".

36. On 17th March the claimant returned home and on Monday 20th March he met Mr Stewart again. At the claimant's second meeting with Mr Stewart, Mr Stewart referred to a 6 month trial period. In cross-examination, candidly, the claimant admitted Mr Stewart had explained the respondent was introducing a trial 6 month period of quality control procedures that would require an inspector, but did not mention offering the claimant a 6 month contract or 6 months of work. He also agreed with Mr Stewart's statement that Mr Stewart had not guaranteed him ongoing work, or 12 weeks work; the claimant explained it was specifically agreed that he would not be working away from home for longer than 12 weeks at a time.

37. When asked to explain his understanding of what had been agreed with Mr Stewart, the claimant explained he understood there were a number of

vessels in the project and he would be undertaking a number of days work on board each vessel and then would spend a day or two writing up his report and reporting to the directors. He agreed Mr Stewart had never guaranteed there would be work in Wales for him between ships and had never guaranteed which ships or how many ships he would be working on. The respondent's hangars are in Llandow, South Wales; the claimant lives in Gateshead, so he would only be working in Wales for a day or two after inspecting each ship.

38. On 20th March, the claimant left an unsigned copy of the Zero Hours Casual Worker Contract in the office and asked them to look into it as he said *"it was unworkable as he was employed on a day rate."*

39. By email dated 21st March 2017, the claimant advised Mr Davies he would prefer to be paid via Dubai. Later that day, Mr Davies replied *"Please see enclosed a DMCC Zero Hours letter of offer. If you are happy with the base terms set out, please print sign scan and return this letter. If you do not have the facilities to enable this, please respond by return mail."* DMCC is the respondent's Dubai company.

40. Mr Davies's email attached a single-page document *"Zero Hours Casual Worker Contract with Harris Pie DMCC".* This provided, *"….I am pleased to confirm the following offer ….Offer details: rate of pay £300 per day for all hours worked including holiday pay, whilst working at a Harris Pye office / station or when project based…Harris Pye will not be deducting PAYE / tax or national insurance / social security at source therefore you will have the option to be paid into the bank account and country of your choice whilst the onus for any and all relevant tax and national insurance…are to be managed by you…your start date is confirmed as 25th February 2017".*

41. Later that same day, the claimant replied by email to Mr Davies's email (enclosing the single-page document), *"Hello Wayne, thank you all agreed. Regards Brian"*.

42. The same day, Mr Davies sent the claimant the detailed "*Zero Hours Casual Worker Contract",* which had exactly the same terms stated above in paragraph 34, albeit this contract was now with Harris Pye DMCC (the Dubai company).

43. The claimant replied by email, *"Hello Wayne, all in order thank you. You may want to change the work title to "Senior Coating Inspector". More for image for Harris Pye clients than myself."* Mr Davies subsequently amended the claimant's title to Senior Coating Inspector.

44. In total, including travelling time (and the meetings in Llandow before and after joining the vessel), the claimant had spent 23 days working on the

Independence of the Seas vessel and was paid for this work. The last date he worked on the project on this vessel was 22nd March 2017 (when he was working in the office in LLandow).

45. On 26th March 2017 the claimant flew to Miami to join The Enchantment of the Seas. He worked onboard this vessel until returning to the UK on 4th April 2017. On 30th March 2017 he received an email from Mr Tom David, one of the respondent's group managers, instructing him to return to Newcastle (rather than Wales): *"Back to Newcastle, when we have something I will let you know, Thanks"*

46. The claimant felt aggrieved: he had expected to work on The Enchantment of the Seas for a longer period and had expected further work in Llandow upon leaving the vessel. While working on The Enchantment of the Seas, the claimant had been "caught in the crossfire" in a dispute between Mr Stewart and the Technical QC officer onboard the ship.

47. On 4th April 2017, the claimant returned to home in Gateshead. In evidence, in response to questions, the claimant confirmed that in the period between leaving The Enchantment of the Seas and joining The Liberty of the Seas (ie between 4th April and 11th June 2017), he did undertake 19 days work for a different client, inspecting galvanising, for which he was paid £350 per day.

48. On 23rd May 2017, Mr Matthew Bawden, Project Technical Resource officer with the respondent emailed the claimant enquiring whether he would be available to join an RCCL ship in Galveston on 4th June 2017. On 31st May, Mr Bawden confirms the job would be onboard The Liberty of the Seas from 11th until 18th June.

49. The claimant replies the same day, *"Sorry for delay had to confirm with clients in Netherlands…that looks like a trip no shorter than 9 - 10 days. Longer would be better….The day rate you have in mind:and what the day rate entails. Full work insurance medical etc. No problem regarding your manger putting down hours on time sheet for clients, but due to short trips I would prefer to be paid off invoice immediately on completion as an independent. This stops any conflict on board with times and availability and gains more respect with managers when they know your acting as an independent and not on an hourly rate…"*

50. The claimant did work on the Liberty of the Seas, albeit the dates changed to 11th to 19th June 2017: Mr Stewart was paid for this work. On 10th June 2017, the claimant had flown to Houston, Texas and met Mr Stewart. Whilst there was initially a dispute about whether the claimant should be paid for 10th June 2017, as there was no timesheet for this date, the claimant was subsequently paid for this day as well.

51. The claimant alleges he had an agreement with Mr Stewart that he would be paid for a further 2 days, working at home, finalising the report on the Liberty of the Seas. This allegation is contested by Mr Stewart. Whilst the claimant said he had sent emails chasing drawings he could not identify any other work he had completed, to justify payment for 2 days. He accepted the emails had taken such a very short amount of time he would have completed this work for no payment. The claimant was not able to identify which days he had worked. He had sought this payment as by this point his relationship with the respondent had deteriorated. The claimant has not supplied a time sheet for this work.

52. By email dated 4th July 2018, the claimant wrote to Ms Julie McCulloch, who had been endeavouring to resolve the claimant's outstanding pay, "*Hello, Julie I'm not interested in how you or others are working payment out…The hours on the time sheet do not always reflect the job in a number of ways. I would normally simply place an invoice for time away and additional works when required when I return. It is H/P which requires time sheets for whatever reason…at a guess for your clients, which is not my concern. As the company does not wish to honour these arrangements the matter is finished for me. I have no contract with H/P so the matter rests. I shall inform the product company I am not longer available for inspections….I understand the position was in acting as an independent level 3 inspector and as such require any copies of reports sent to the client on my behalf or any other should be made available to me. May I close by saying many thanks for the opportunity to have represented Harris Pye in a professional manner for Royal Caribbean Cruise-lines".*

The Law

53. Section 13 of the Employment Rights Act 1996 provides:

> **s13 Right not to suffer unauthorised deductions.**
>
> (1) An employer shall not make a deduction from wages of a worker employed by him…..
>
> (3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion… the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion.

54. As Regional Employment Judge Clarke identified, the crucial question from s13 ERA in this case is what were the "wages properly payable" under the claimant's contract with the respondent.

55. In Greg May (Carpet Fitters and Contractors) Ltd v Dring 1990 ICR 188, the Employment Appeal Tribunal explained the approach the tribunal should take in answering this question. Essentially I should decide, on the ordinary principles of common law and contract, the total amount of wages that was properly payable - to do this I consider all the relevant terms of the contract that was agreed between the claimant and respondent.

56. The individual terms of a contract need to be sufficiently clear and certain. The terms need to be objectively ascertainable. As Lord Justice Wall explained in Coors Brewers Ltd v Adcock and ors 2007 ICR 983, the claimant must demonstrate that he is owed a specific sum in wages.

Conclusions

57. I have set out the facts of this case in detail. From these facts, it is quite clear to me that at all times, the parties agreed the claimant would be paid on a zero hours contract, for work that he had actually undertaken. He has already been paid the full amount properly payable to him under the terms of their agreement.

58. The claimant has suggested the zero hours contract can't be a true contract as he was being paid a daily rate rather than by the hour. The parties appear to have interpreted this as on days he has worked for the respondent he was to be paid his daily fee, regardless of how many hours he had actually worked on that day.

59. The nature of the agreement between the respondent and the claimant was that the claimant was being offered specific work of days or weeks on each individual vessel, which might entail a day or two of work back on land, reporting findings back to the directors and inspecting procedures being used in Llandow.

60. I do not accept the claimant's assertion that he was guaranteed 6 months work and wages. None of the correspondence or documents support this assertion. The conversations with Mr Stewart may have identified there was likely to be further work available, but they went nowhere near to an agreement that the claimant would be guaranteed 6 months' wages. For a section s23(1)a Employment Rights Act 1996 claim, demonstrating a loss of potential future opportunity to earn wages is not enough.

61. The claimant clearly accepted the terms of the Zero Hours Casual Worker Contract when it was emailed to him by Mr Davies. This explicitly states he would only be paid for hours / days worked. The claimant would not have accepted this contract if he already had an agreement that he was guaranteed to be paid for 6 months' work. Further, the claimant would not have accepted work from other clients, if there was an agreement that he was guaranteed 6

months' work: he would have already been committed to working for the respondent in April /May 2017.

62. The claimant felt aggrieved that the work on the Enchantment of the Seas was less than he had anticipated. The contract did not include a right to a cancellation fee, nor was this right agreed verbally by the parties.

63. Turning to consider whether the claimant was owed 2 days' pay for work undertaken after the Liberty of the Seas, even at this stage, the claimant is not able to explain what work he actually undertook or when any work was actually completed. As the contract clearly specified he could only be paid for the days that he actually worked, the claimant has not been able to demonstrate that he is owed any specific amount of wages.

64. As noted above, the parties were able to resolve the mileage/expenses between them. I commend them for doing so; it has meant that I did not need to resolve the wider question of whether the claimant had the status of an employee. The claimant was anxious that I resolve this issue, but I have declined to do so. The parties have agreed that he had the status of a worker and there is no need for me to go beyond that agreed point.

_____
Employment Judge L Howden-Evans
Dated: 3rd June 2018

REASONS SENT TO THE PARTIES ON

……16 June 2018……...

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FOR THE SECRETARY OF
EMPLOYMENT TRIBUNALS