EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: S/4120796/2018

Held in Glasgow on 12 December 2018

Employment Judge: Mr G Woolfson (sitting alone)

Mr K Graham	**Claimant** **In person**
James Davies	**Respondent** **In person**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The claim for payment of wages is successful, and the respondent is Ordered to pay to the claimant the sum of **£502 (FIVE HUNDRED AND TWO POUNDS**).

REASONS

Introduction

1. The claimant brought a claim for non-payment of wages. He was unrepresented, as was the respondent.

2. It was confirmed at the start of the hearing that the respondent is Mr James Davies personally, and not James Davies Ltd which was the name of the respondent set out in the tribunal application.

3. Each party gave evidence on his own behalf, and neither party called any witnesses. Both parties produced documents which were referred to in the course of the hearing.

The issues to be determined

4. The issue is whether the claimant is due to be paid wages for the period 11 to 14 September 2018. He is claiming £502.

5. In order to determine this, it is necessary to determine whether the claimant was employed by the respondent on those dates and, if he was, whether the respondent was entitled to make a deduction from wages.

Findings in fact

6. The Tribunal makes the following relevant findings in fact.

7. The respondent is a subcontractor. He delivers concrete for large concrete companies. He supplies the transport in order to deliver the concrete, and takes the concrete from the customer's plant to the customer's sites. He generally only deals with one customer at a time.

8. Towards the end of August 2018, the claimant decided to look for another job. One of the employees of the respondent, Mr Byers, spoke with the claimant's wife. He informed the claimant's wife that the respondent was looking for drivers.

9. On Friday 31 August 2018, the claimant sent an email to the respondent asking that he be considered for the position of HGV driver. Shortly after sending this email, the claimant received a telephone call from the respondent. The respondent provided the claimant with a brief description of the job and suggested that he contact Mr Byers for additional information. They agreed to meet the following week.

10. The claimant saw information regarding the job on a government website. The claimant noted that the job was being advertised as paying £10 per hour, and £13 per hour for overtime. This was also confirmed to the claimant by Mr Byers.

11. On Monday 3 September 2018, the claimant and the respondent agreed to meet at 6:30pm that evening at Bankside Industrial Estate. When they met, the respondent showed the claimant the vehicle (a cement mixer) and explained how it operated. The respondent asked the claimant if he was interested in the job. The claimant confirmed that he was, and the respondent confirmed that the claimant could have the job. No specific start date was offered. They discussed that the claimant would have to give notice to his employer, and the respondent said the claimant should let the respondent know when he would be able to start.

12. The respondent also confirmed to the claimant that payment would be £10 per hour for the hours of 7:00am to 3:00pm, to include payment for lunch, and that overtime would also be paid.

13. The following morning, on 4 September 2018, the claimant handed in his notice to his employer. He did so on the basis that he had secured a job with the respondent. That evening, he informed the respondent by text message that he had put in his notice. The claimant informed the respondent in the same message that he needed to work until the following Monday (10 September 2018), and that he was available to start after that. The respondent replied by text message with the following:

> *"OK thanks, Send me your sizes for ppe, t-shirt, sweat shirt, fleece, overalls or trousers, jacket."*

14. The claimant replied and confirmed his sizes.

15. On Saturday 8 September 2018, the claimant sent a text message to the respondent asking for the date on which the respondent wanted the claimant to start. The respondent then called the claimant to confirm that he could

start on Tuesday 11 September 2018, and that for the first two days he would be working with Mr Byers and the following two days with the respondent himself. They also discussed meeting on Monday 10 September 2018 in order for the claimant to collect his PPE (personal protective equipment).

16. On 10 September 2018 the claimant sent a text message to the respondent confirming that he would be able to collect his PPE at around five o'clock that evening. The respondent replied to confirm that was fine. The claimant met with the respondent that evening, and the respondent provided the claimant with overalls, other clothing and PPE.

17. On the morning of Tuesday 11 September 2018, the claimant met with Mr Byers at one of the respondent's sites. Mr Byers put in the tachograph and carried out the relevant checks on the vehicle before purchasing diesel. The claimant drove the vehicle. They were informed by one of the other employees in the office which deliveries they were to make that day. Mr Byers was helping the claimant to learn how to drive the vehicle.

18. Mr Byers informed the claimant that there was a timesheet which the claimant was to complete. He showed the claimant the timesheet which was in the vehicle. The claimant completed this timesheet at the end of each day.

19. In the course of the day (11 September 2018), the claimant met with the respondent at one of the depots. The respondent provided the claimant with forms which the claimant was asked to complete, in relation to tax and insurance. The respondent also asked the claimant to provide bank details in order for payment to be made the following week. Later that evening, the claimant sent his bank details to the respondent by text message.

20. On Wednesday 12 September 2018, the claimant spent a second day in the vehicle making deliveries with Mr Byers. In the course of that day, the claimant realised that he had misplaced the insurance form provided to him by the respondent. He explained this to the respondent who confirmed that another copy would be provided.

21. The claimant then spent the Thursday and Friday of that week, 13 and 14 September 2018, in the vehicle with the respondent. Like Mr Byers, the respondent was helping the claimant to learn how to drive the vehicle. The claimant was having some difficulty. He was concerned about the pressure involved in the job, and what he considered to be a lack of breaks. He formed the view that the job was not suitable for him.

22. On the evening of 14 September 2018, the claimant informed the respondent that he did not think he was suited to the job. The respondent informed the claimant that if the claimant was not going to attend work the following week then he should let the respondent know over the weekend. On Saturday 15 September 2018, the claimant sent a text message to the respondent. He stated that the job was not for him and thanked the respondent for the opportunity.

23. On Monday 17 September 2018, the claimant sent a photograph of his timesheet to the respondent by text message, confirming the hours he had worked the previous week, from 11 to 14 September 2018. The respondent replied with the following text message:

> *"The following costs will be deducted from the hours you worked, £150 per day for 4 days for driver trainer, £200 for ppe purchased by the company for your equipment. The company has suffered a financial loss because of your sudden departure from the company."*

24. The claimant replied to say that all PPE was in the truck and in the locker room, and that he had not taken any of it home with him.

25. On 19 September 2018, the claimant sent an email to the respondent. The claimant explained that he had been seeking advice from ACAS and that deductions could only be made if there has been a signed agreement, and that they had not signed any paperwork regarding this. He informed the respondent that he had been advised he should receive his full wages for the hours he had worked. The claimant received no reply to this email.

26. On 21 September 2018, he sent a further email to the respondent in similar terms requesting payment by 24 September 2018. The claimant received no reply.

27. On 7 October 2018, the claimant sent a further email to the respondent setting out the sums which the claimant said were owed. He stated that the total was £582. The following day, on 8 October 2018, the claimant sent a further email to the respondent, in almost the same terms as the email of 7 October 2018, except that the later email referred to revised hours and a total of £502. This was because the claimant had miscalculated the hours worked when he sent the earlier email.

28. The claimant's email of 8 October 2018 confirmed that his claim for £502 was based on the following:

> *"Tuesday the 11th September 7am till 6pm this is 8 hours at £10 per hour and 3 hours at £13 per hour.*
>
> *Wednesday the 12th September 7am till 6:30pm which is 8 hours at £10 per hour and 3 hours and 30 minutes at £13 per hour.*
>
> *Thursday the 13th September 7am till 7:15pm this is 8 hours at £10 per hour and 4 hours 15 minutes at £13 per hour.*
>
> *Friday the 14th September 7am till 6:15pm this is 8 hours at £10 per hour and 3 hours 15 minutes at £13 per hour.*
>
> *This in total comes to 32 hours at £10 per hour and 14 hours overtime at £13 per hour which is £502.00"*

29. The hours of work which the claimant referred to in this email reflected the hours which he had noted down on his timesheet.

30. The claimant received no reply to his emails of 7 or 8 October 2018.

Observations of the witnesses

31. I consider the evidence of the claimant to have been credible and reliable. Where there are differences in the evidence as between the claimant and the respondent, I generally prefer the evidence of the claimant. The respondent was less clear and seemed to have difficulty on occasion understanding what was being said by the claimant.

Relevant law

32. The applicable legislation is the Employment Rights Act 1996 (the "ERA").

33. In terms of section 13 of the ERA:

Right not to suffer unauthorised deductions.

(1) 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.

34. Section 230 of the ERA defines a "worker" as an individual who has entered into or works 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 (as long as the other party is not a client or customer of any profession or business carried on by the individual).

35. Under section 230 of the ERA, “employment” means, in relation to a worker, employment under the worker’s contract. “Employed” is to be construed accordingly.

Submissions

36. The following is a summary of what the parties said in their summing up after giving their evidence.

37. The claimant says that he had been offered a position with the respondent and that he carried out work for him in the course of the four days in question. He says that he did not agree to any non-payment, and he did not sign anything to this effect. He says he was informed of the hourly rates, and he expects to be paid for the four days which he worked. He says that the fact the job did not work out is just one of those things, but he did work a week and he was convinced that he would be paid for that week. He refers to the fact that the text message from the respondent on 17 September 2018 refers to costs being *“deducted from the hours you worked”*, which the claimant says shows the respondent admits that the claimant had worked for him. The claimant says he would not have left his previous job if he did not have a guarantee in relation to the job with the respondent.

38. The respondent says there was no offer of employment and that the claimant was not employed by him. He says that an offer was made for the claimant to start work on 17 September 2018, but that the claimant did not turn up. The respondent says that the claimant was not given a timesheet, and that he was not told until the following week about timesheets and other matters. The respondent denies that the claimant was asked to give bank details.

Discussion

39. Further to the statutory provisions set out above, it is firstly necessary to consider whether the claimant was a worker and employed by the respondent.

40. The respondent says that no offer of employment was made on the evening of 3 September 2018. During his cross-examination of the claimant, he referred to the fact that no start date had been offered. He suggested the claimant was saying that on 3 September 2018 he was given a job offer with a start date. However, that is not what the claimant was saying. It is correct that no start date was offered at that point, and the claimant agrees with that.

41. However, it is important to consider what else was discussed and the events which followed. During the evening of 3 September 2018, the respondent and the claimant discussed the fact that the claimant would need to hand in his notice to his previous employer. I accept the evidence of the claimant that he was told by the respondent that the job was his and that they agreed the claimant would let the respondent know when he would be able to start. In other words, the claimant was offered a job but with the start date to be confirmed. The next day the claimant confirmed that he had put in his notice and that he would be available to start after the following Monday, i.e. from Tuesday 11 September 2018. At this point, there was still no final agreement in terms of a start date. However, on Saturday 8 September 2018 the claimant asked the respondent in a text message when he wanted the claimant to start. I accept the claimant's evidence that this resulted in a phone call in which the respondent confirmed that the claimant could start on 11 September 2018 and that for the first two days he would be working with Mr Byers and the following two days with the respondent himself. This is the point at which a start date was offered.

42. The claimant and the respondent then met with each other in order for PPE and clothing to be provided, and the claimant started working for the respondent on 11 September 2018. As such, the claimant accepted the offer of a start date of 11 September 2018.

43. Therefore, on the evening of 3 September 2018 the respondent offered a job to the claimant, but with no confirmed start date. After the claimant confirmed when he could start, a start date of 11 September 2018 was offered during a phone call on 8 September 2018. The claimant then started working for the respondent on 11 September 2018.

44. There is no written contract in this case. The agreement was reached verbally. There was therefore an oral contract that the claimant would commence work for the respondent on 11 September 2018. I therefore conclude that the claimant was employed by the respondent as a worker for the purposes of section 13 and section 230 of the ERA.

45. The next issue is whether the respondent was entitled to make deductions from any wages due to be paid to the claimant, resulting in the claimant receiving no pay.

46. During his evidence the respondent said that between Saturday 8 September and Monday 10 September 2018, in the course of a phone call, the claimant offered to work but not be paid. However, the claimant was clear in his evidence that he would never have suggested that he leave his previous job and then work without being paid. He referred to having commitments, including a young family. He also pointed out that in the text message of 17 September 2018, which referred to deductions, the respondent made no mention of the claimant having agreed to work without being paid. The claimant questioned why the text message referred to deductions, if such an agreement had been reached. He said that if it was the case that he was working for no pay then there would have been no need for the respondent to refer to deductions, as there would be nothing to deduct from. The respondent was unable to provide an explanation for this, suggesting there was some significance in the fact that his text message was sent on 17 September 2018 rather than 15 September 2018. However, this did not provide an explanation. I agree with the analysis of the claimant and I accept his evidence. I do not believe the claimant offered to work for no pay or that there was any agreement to that effect.

47. The claimant had been informed of the hourly rates by both Mr Byers and the respondent, which were consistent with what the claimant had seen on the government website, i.e. £10 per hour from 7:00am to 3:00pm, to include payment during lunch, and thereafter an overtime rate of £13 per hour.

48. The respondent said in evidence that he had informed the claimant that the rate of pay was £9 per hour, and £11 per hour for overtime. However, there is no evidence that this was confirmed in writing. The respondent also suggested during cross-examination of the claimant that the claimant had become aware of the hourly rates from the government website and Mr Byers, and not the respondent himself. This tends to suggest the respondent acknowledges that the claimant was informed of higher hourly rates. In any event, I accept the evidence of the claimant that he was informed of the higher hourly rates, and that he was provided this information through the government website and from Mr Byers and the respondent. It is not clear if the respondent referred specifically to the overtime rate of £13 per hour, however I accept that the claimant was provided this information from Mr Byers and saw it on the government website.

49. During cross-examination by the claimant, the respondent confirmed that he could not deduct legally unless the claimant had signed a consent form. He said that he assumed the claimant had filled in a form to confirm that training costs could be deducted if the claimant left within three months. However, no such form was produced. Nothing was produced to suggest the claimant had agreed that in certain circumstances deductions could be made from wages to be paid to him. Therefore, the respondent was not entitled to make deductions, and by doing so he has breached section 13 of the ERA.

50. The hours which the claimant has said he worked, as set out in the timesheet, have not been challenged by the respondent. I accept the evidence of the claimant that the hours from the timesheet represent the hours he worked.

51. Therefore, the sum which is owed to the claimant is that which is set out in his email to the respondent of 8 October 2018, i.e. £502, and the respondent is Ordered to pay that sum to the claimant.

Employment Judge: G Woolfson
Date of Judgment: 21 December 2018
Entered in register: 24 December 2018
and copied to parties