



EMPLOYMENT TRIBUNALS

Claimant: Mr P Carrington

Respondent: A Catlow Civil Engineering Limited

HELD AT: Sheffield

ON: 24 May 2019

BEFORE: Employment Judge Little

REPRESENTATION:

Claimant: Mr A Johnson of Counsel (instructed by OH Parsons LLP)

Respondent: Mr G Woodcock, HR consultant (EL Direct)

JUDGMENT

My Judgment is that:-

1. At all material times the claimant was a worker for the respondent within the meaning of the Working Time Regulations 1998, Regulation 2 and the Employment Rights Act 1996 section 230(3).
2. Accordingly he was entitled paid annual leave under the 1998 Regulations and on termination of the relationship was entitled to a payment in lieu of accrued but untaken holidays and payment for any holidays taken that were unpaid.
3. The award in respect of holiday pay is £1635.46 and the respondent is to pay that sum to the claimant forthwith.
4. As a worker the claimant was also entitled to have his wages protected from unauthorised deductions but nevertheless suffered unauthorised deductions contrary to the Employment Rights Act 1996, section 13.
5. The amount so deducted was £616 and the respondent is to pay that further sum to the claimant forthwith.
6. Accordingly the total award is £2251.46.
7. The claimant's application for costs is refused.

REASONS

1. These reasons are given at the request of the respondent's representative made at the conclusion of the hearing.
2. In a claim form presented on 9 January 2019 Mr Carrington brought complaints in respect of unpaid holiday pay and what he contended was an unauthorised deduction from wages. The claim was based on a contention that in law he had been a worker for the respondent. The respondent defended the claim. They contended that the claimant was neither an employee, nor a worker, but was instead a self-employed sole trader.

3. The relevant issues

The essential issue therefore was whether the claimant was a worker as defined by the Employment Rights Act 1996, section 230(3) (as regards the unauthorised deduction complaint) or under the Working Time Regulations 1998, Regulation 2 (as regards the holiday pay complaint).

It was common ground that the claimant had not been paid for any holidays taken and had received no payment in lieu at the termination of the relationship. However as far as the deduction from wages complaint was concerned, the respondent's secondary argument was that the deduction which had been made was authorised because of a document titled "Indemnity Form" which the claimant had signed immediately prior to the relationship beginning.

4. The evidence

The claimant gave evidence but called no other witnesses. The respondent's evidence was given by Mr A Catlow managing director of the respondent company.

5. Documents

The parties had agreed a bundle which ran to 69 pages.

6. Findings of fact

- 6.1. The claimant describes himself as a civil engineer although the respondent refers to him as a civil operative.
- 6.2. In April 2018 the claimant and a Mr Day approached the respondent seeking work. The respondent carries out utility and civil engineering work usually as a subcontractor to larger utilities contractors.
- 6.3. The claimant and Mr Day worked as a team. They had just spent some six months working for a company called HV Civils.
- 6.4. The claimant attended at the respondent's office on 24 April 2018 and the initial contact was with a Mr Lowman the respondent's agent. Subsequently, but possibly not until the following day, there was a meeting with Mr Catlow.
- 6.5. Contrary to the respondent's contention within these proceedings I find that the claimant did not negotiate the terms on which he would carry out work for the respondent. He was simply told what the daily rate would be. If the work was to excavate and install electricity supply link boxes

there was a fixed rate for each type of box completed. If the work was other than link boxes there was a daily rate. The daily rate was £130 gross. Depending on the type of box the other work was either £300 or £240 per box. The box prices were to be divided between the claimant and Mr Day. Mr Catlow's evidence was that if the claimant had had his own van and equipment he would have been paid at a higher rate. However I do not find that to involve negotiation. What happened as far as the claimant was concerned was an offer which he had the choice of either accepting or refusing. That is not negotiation.

- 6.6. Whilst some administrative documentation may have been completed that I have not seen, the only document which was created at the beginning of the relationship is something called an Indemnity Form, which is at page 27 in the bundle. In the narrative of that form reference is made to there being increased charges that the respondent found were being passed on to it such as vehicle damage, plant loss or cable strikes. The implication is that those matters were being incurred by "operatives" and so the form goes on to indicate that "a decision has been made to pass on the charge to the operative responsible". The form required a signature from the claimant to confirm that he had understood that. In his witness statement the claimant says that he would not have signed such a document or at least could not remember signing such a document. Today he was shown the original bearing what appeared to be his signature and he confirmed that it was his signature.
- 6.7. The claimant and Mr Day began undertaking work for the respondent on 25 April 2018 and that continued until 27 September 2018. I find that during that period the claimant did not work for anybody else. Indeed he was working long hours for the respondent during the week and was also working some weekends.
- 6.8. I find that the claimant was required to work set hours. Each working day he would report to the respondent's yard/office at 6.30am. His usual working hours were 7am to 5pm. Whilst the respondent suggests that the claimant was able to manage his own time, that is not consistent with the evidence I have heard. The claimant had no other work to do for anybody else. The claimant was not challenged about the evidence he gave of contacting Mr Catlow if during the course of a working day there were no more boxes to install. In those circumstances the claimant would either be instructed to go home or would be asked to undertake other work such as helping other teams or backfilling excavations.
- 6.9. Whilst the claimant was skilled and experienced in the work which he did, he would be given, on a daily basis, a work pack provided to him by the respondent which contained plans and instructions for the particular work to be undertaken. Primarily that would be in relation to installation of link boxes.
- 6.10. The claimant would submit on a weekly basis a handwritten note of the work which he and Mr Day had undertaken. An example in one form is at page 39. This appears to be something of a 'back of an envelope' document although the respondent seeks to describe this as an invoice. The claimant also used a proforma that it seems had been produced by another firm, O'Connor's. That was a link box check sheet and an

example is at page 28. Handwritten on that, I believe by the claimant, is a reference to it being a time sheet.

- 6.11. In order to undertake the work the claimant was provided with a van and other equipment, tools and materials by the respondent.
- 6.12. Throughout the relevant period the claimant provided work personally. He did not consider that he would be able to provide a substitute. The respondent at least accepts that it would not have been practical for the claimant to provide a substitute because of the induction and health and safety matters that such a substitute would have to satisfy and undergo.
- 6.13. The claimant received payment from the respondent on a fortnightly basis via a bank transfer. The claimant was registered as a subcontractor under the Construction Industry Scheme (CIS) and accordingly the only deductions from the gross payment was a 20% CIS deduction. The entry details given in the claimant's bank statements for receipt from the respondent is given as "A Catlow Civil Eng 2 weeks wages".
- 6.14. From the information which the claimant had provided the respondent would prepare documents which Mr Catlow describes as statement of earnings. An example is at page 51 in the bundle.
- 6.15. On 11 September 2018 Mr Catlow wrote to the claimant (pages 30 to 31). The letter referred to the loss by theft of a stihl saw which had been used by the claimant and to damage which the claimant had allegedly caused to some apparatus of Northern Powergrid. The letter went on to notify the claimant that deductions would be made from what the letter describes as "your wage".
- 6.16. As noted above, the last day of work was 27 September 2018. The claimant decided that he no longer wished to work for the respondent because it had started making instalment deductions from his wages.
- 6.17. Having consulted his union, the claimant sent an email to the respondent on 17 October 2018 (page 33) objecting to what he described as unlawful deductions. No reference was made to holiday pay.
- 6.18. Mr Catlow replied on 18 October 2018 (page 34) and commenced that email with the observation "I have little time for unions". The email went on to say that the respondent considered that the claimant had been negligent in relation to both the loss of the saw and the damage to cabling.

7. The relevant law

In the Working Time Regulations 1998 the definition of worker includes:

"An individual who has entered into ... a contract of employment; or 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 professional business undertaking carried on by the individual."

The combined effect of Regulations 13 and 13A is that a worker is entitled to 5.6 weeks paid annual leave per annum.

The Employment Rights Act 1996 contains provisions which protect wages. Section 13 provides as follows:

“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.”

For the purposes of these provisions, the definition of a worker is contained in section 230(3) and is identical to that set out above in relation to the Working Time Regulations.

8. My conclusions

8.1. Was the claimant a worker as defined by the relevant legislation?

8.1.1. Was there a contract?

There was no written contract but it is sufficient if there was an oral contract. Clearly in this case there was an agreement between the parties. The claimant was to undertake work and he was to be paid at various rates for that work. I find therefore that there was an oral contract.

8.1.2. Did that contract require the claimant to undertake work personally?

Mr Catlow’s evidence was that the claimant came with a good recommendation from O’Connor’s. Moreover in paragraph 6 of Mr Catlow’s witness statement he describes the claimant as an experienced civil operative with experience and qualifications to work on the UK electricity distribution network. I find that the claimant was therefore taken on because of his particular skills and experience. In terms of substitution, I find that that was not merely impractical. Instead it was not contemplated at all by the parties. Accordingly the intention always was that the claimant would undertake the work personally.

8.1.3. Was the claimant carrying on a business undertaking of which the respondent was a client?

In my judgment clearly he was not. As I have found, there was no negotiation prior to commencement of the relationship as would have been the case if both parties were commercial organisations. The fact that the claimant has freely referred to himself during cross-examination as being self-employed is not determinative.

I also take into account the following matters:-

- The claimant did not provide his own vehicle, equipment, tools or materials – instead these were provided by the respondent.
- The claimant worked exclusively for the respondent during the material period.
- The claimant did not submit anything to the respondent that could sensibly be described as an invoice.

- Although the concept of control is less important than it would be in an employment situation, there was in this case obviously a significant amount of control exercised.
- The claimant had no public liability insurance.

In these circumstances I conclude that the respondent was not in business on his own account. It would not be unusual for two individuals in the same “trade” to work together as a team but that is insufficient to elevate the arrangement to that of a business or undertaking.

Although not determinative in itself, it is interesting to note that in two pieces of correspondence the respondent itself refers to payments to the claimant as being ‘wages’.

8.2. Was the deduction from wages authorised?

In other words did the Indemnity Form which the claimant signed immediately prior to the work beginning constitute authority as a provision of the worker’s contract or was it the claimant signifying in writing his agreement to the making of the deduction? The operative part of the form refers to charges being passed on to the operative responsible. It does not say how they will be passed on. Specifically it does not explain that a deduction would be made at source from monies otherwise due to the operative. Having regard to the purpose of the legislation – the protection of wages - careful consideration has to be given to a document with purports to authorise a deduction. In my judgment the indemnity form is manifestly insufficient. It follows that the deduction was unauthorised.

8.3. Quantum

Having delivered my Judgment on liability I asked Mr Woodcock whether he wished to address me on the amount now being claimed in the schedule of loss from the both heads. He said that he did not. The claimant had prepared a schedule of loss dated 11 February 2019 which indicated a calculation for holiday pay and also for the deduction. However I was informed by Mr Johnson at the beginning of the hearing that there was now a slightly reduced figure for the deductions. It was £616 rather than the figure of £640.68 shown on the schedule.

8.4. The claimant’s costs application

Mr Johnston put before me a copy of his instructing solicitor’s letter to the respondent’s representative dated 20 May 2019, which was in the nature of a costs warning. The letter stated that the solicitors did not consider the respondent had a defence to the unlawful deductions complaint. The letter went on to state that unless the respondent agreed to pay the claimant as per his schedule of loss, the claimant would make an application for legal costs which were stated to be £8,460 plus VAT.

Mr Johnston acknowledged that that figure seemed to be high and he had no breakdown of it. In those circumstances he invited me to make a decision in respect of costs in principle with quantification at a later date. He said that it was appropriate to make a costs order because the defence had no reasonable prospects and the proceedings had been

conducted unreasonably by the respondent continuing in the face of the costs warning.

Mr Woodcock resisted the application. He pointed out that the costs warning letter said nothing about the worker issue.

I have refused the costs application. Although of course the respondent has lost on the worker point, I did not think that that could properly be categorised as a defence which had no reasonable prospect of success. Nor did I consider that proceeding in the face of the costs warning (written only a matter of days before the hearing) could be categorised as unreasonable conduct of the proceedings. Again that was because the claimant's solicitors were not contending within that letter that the respondent had no reasonable prospects on the worker point.

Employment Judge Little
Date 31st May 2019

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