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EMPLOYMENT TRIBUNALS



Claimant
Respondent

Mr A Ozoemena

AND

LJB & Management and
Recruitment Services Ltd
t/a LJB & Company

HELD AT: London Central **ON:** 24 July 2019

BEFORE: Employment Judge Hildebrand (Sitting Alone)

Representation:

For Claimant: In person
For Respondent: Miss N Webber, of Counsel

JUDGMENT

1. The name of the Respondent is amended to LJB Management and Recruitment Service Limited trading as LJB & Company.
2. The Claimant's claims of race discrimination, whistleblowing and for unpaid annual leave are dismissed having been withdrawn at a preliminary hearing on 12 April 2019.
3. The Claimant's application to amend his claim to add a claim of unpaid holiday pay is refused.
4. The Claimant's remaining claim of unlawful deduction of wages fails and it is dismissed.

REASONS

The Issues

1. The issues to be determined on this hearing were set out in the order of the Tribunal dated 12 April 2019. This recorded that the Claimant, who has represented himself throughout, did not make claims of race discrimination, whistleblowing or for unpaid annual leave. The order sets out in a schedule the issues to be determined, namely:
2. whether the Claimant was an employee or worker of the Respondent at the material time for the purposes of s.230 of the Employment Rights Act 1996
3. if so whether the Respondent unlawfully deducted the sum set out in the Claimant's schedule of loss from the Claimant's wages

Procedural History

4. I deal first with the position of the Second Respondent. The Claimant is an intelligent and resourceful individual who has represented himself throughout these proceedings. At the outset of the hearing I referred to the overriding objective and my desire to ensure the parties were on an equal footing. In this case the Claimant produced a claim form in relation to his engagement as an agency worker. He claimed against the employment agency, LJB & Company Recruitment, correctly LJB Management and Recruitment Service Limited, ("LJB") the trading name of the Respondent. He also named "Navigate Contracting/Glenlee Limited", ("Navigate") as Second Respondent. This is the name of the payroll company which was responsible for paying the Claimant during part of the period of his engagement with OD Interiors Limited ("OD").
5. The Claimant was paid through Claymore Contracting Services Limited ("Claymore"), from his start on 5 January 2018 to 5 July 2018. He was paid through Navigate from 11 July 2018 to 7 January 2019. From 7 January 2019 he has been paid through his own limited company Ozpire Ltd and there is no claim after that company was appointed. Notwithstanding the fact that the Claimant named Navigate on the claim form there was no ACAS certificate number supplied for that Respondent. The form was referred to a judge who directed the rejection of the claim against Navigate.

6. The claim was presented on 26 November 2018 and referred to a judge who on 18 December 2018 directed rejection against the Second Respondent. Notice of rejection was given on 5 February 2019. The Claimant wrote on 13 February by email to say that he had brought proceedings by the claim against all three companies namely, LJB, Claymore and Navigate and produced certificates for Claymore and Navigate. The response to the rejection was not referred to a judge. When the response to the claim was referred the judge directed that the preliminary hearing for case management should remain as listed.

7. In his agenda for the case management hearing the Claimant wrote, in response to the question whether anyone should be joined: Yes, as with initial application Navigate/Glenlee and Claymore, contracts, purchase orders, ACAS included as proof. The Claimant provided a substantial bundle of documents at that time which was placed on the Tribunal correspondence pin.

8. At the preliminary hearing the Claimant indicated that he did not pursue the application to join the payroll companies. He said there had been a change in the law whereby the agency became his employer and the recruiter was responsible for payment of National Insurance irrespective of the umbrella company. In the light of what took place at the preliminary hearing it would therefore be inappropriate to reopen the issue of the rejection of the claim against Navigate and the absence of any claim against Claymore.

9. Regarding holiday pay, at the preliminary hearing the Claimant indicated that there was no race discrimination, holiday pay or whistleblowing claim. The schedule of loss now produced indicates a claim of £5,552 in respect of deduction of Employers National Insurance, £5,440 in respect of holiday pay, £427.73 in respect of pension and £1,700 "administration and representation". This last sum must be considered as a claim for costs.

10. Since the Claimant clearly indicated that he was and was not pursuing a claim for holiday pay and was recorded as I cannot consider such a claim at this hearing. The Respondent has not had an opportunity to prepare for such a claim and this is the final hearing of the case. The Claimant's justification for pursuing a claim is that he gave the indication in error and he did not pursue and that he had set out the relevant sums in the schedule of loss produced at that time. I did not find that to be clear on the papers which I understand were supplied to the preliminary hearing. I have however dealt with the holiday pay claim in so far as is possible and the reasons in the event that I am incorrect in that conclusion.

The Evidence

11. I heard evidence from the Claimant and from Ms M Lynch, Payroll Manager for the Respondent, I was also provided with an extensive bundle of documents divided into two sections being the Respondent's and Claimant's documentation. It was very unsatisfactory to produce a bundle of this type at hearing and it has not assisted with judicial process to have the documents presented in this unsatisfactory manner. I do not know where the fault lies for this so I made no specific criticism on the parties today.

The Findings of Fact

12. The Claimant, who is an experienced employee in the construction industry had obtained a post as banksman/first aider through LJB to work for OD in January 2018. The work involved the refurbishment of a Marks and Spencer store. The Claimant, who was over qualified for the role, rapidly progressed and in July 2018 became a foreman at the site. In the period January to July 2018 the Claimant was paid through Claymore. The rate paid to the Claimant was £13 per hour and LJB charged a premium on this figure to OD. The payroll company used, Claymore, is not an associate of LJB. Ms Lynch gave evidence that there are between six and ten payroll companies operating for the Respondent's agency staff from time to time. Claymore deducted from the Claimant's payment Employer's National Insurance contributions. The Claimant objected because he had a CIS certificate and a

Unique Tax Payer Record (UTR). He said he should not have used a payroll company. Ms Lynch's evidence was that as an employment agency in the construction industry LJB is not allowed to employ agency workers individually and has to use a company, whether a payroll company such as Claymore or a company provided by the individual, I accept what Ms Lynch says although no statutory basis for this has been advanced. She says that it could be a company owned by the individual or a payroll provider as was the case here.

13. The evidence supplied no insight into how the payroll company was selected. I find that it was unconnected with LJB and LJB has not benefited from any deductions imposed on the Claimant. As a banksman first aider and later as foreman I found the Claimant worked as a self employed person, to use his own words. He chose his hours and decided on his holidays. He used his own equipment and OD also supplied some equipment. LJB had no control over what he did or when he did it. When the Claimant was appointed foreman, his pay increased to £17 per hour. He asked for another payroll company to be appointed and Navigate, of whom he had previous experience, were appointed. They operated a similar system of deductions. Pension contributions, from which the Claimant did not opt out, were deducted as well as employer's National Insurance and an element in respect of training levy.
14. The Claimant accordingly claimed against the Respondent in respect of Employer's National Insurance contribution for the period January to June 2018 and for employer's National Insurance contributions, apprenticeship levy and employee pension contributions in the period July to December 2018. The Respondent was paid £19.50 for the Claimant's services as foreman and thus making a profit of £2.50 per hour.
15. Looking at some of the documents and the provisions there set out, in the initial letter to the Claimant dated 5 January 2018 LJB recorded that the Claimant would provide his services through Claymore. There is an illegible document supplied by the Claimant dated it appears January 2018 from

which a reference to the Scottish Courts and Employment Tribunals can be deciphered. It appears this agreement is a contract of employment between a Claimant and Claymore.

16. In a letter dated 11 July 2018 Aaron Broaders of LJB confirmed to Mr Gavin Wales of OD that the charge out rate in respect of the Claimant was £19.50 “inclusive of employer’s National Insurance contribution and holiday pay. Trade discount or industry levies cannot be deducted by the client.” The Claimant confirmed that he understood “the client” to mean OD. He did not accept that this provision made clear that OD was not responsible for employer’s National Insurance contribution. This letter is found in the Claimant’s documents and he indicated that he was aware of the terms of it. At about the time it was produced, LJB provided a letter dated 2 July 2018 to the Claimant headed “Contract for Services”. It specified that he had chosen to supply his services through Navigate, an umbrella company. Terms and conditions of employment considered below were produced between the Claimant and Navigate although it is not clear if he signed them.
17. Navigate wrote to the Claimant on 18 July 2018 to explain the pension scheme which was provided by Nest. The Claimant was notified of his right to opt out. The Claimant did not. The Claimant states the pension deductions made have not been paid to Nest. It is difficult to see how that is an issue to be determined between the Respondent and the Claimant. It would involve determining whether Navigate paid the relevant deductions to the scheme. As mentioned above a document between the Claimant and Navigate headed Main Particulars of Terms and Conditions of Employment is found in the bundle. There is dispute when the Claimant received them but on balance I consider it more likely than not that these were sent to the Claimant by LJB on 2 July 2018. These are provided by Navigate and it was recorded that the Claimant had agreed to receive rolled up holiday pay in addition to his salary at the rate of 12.07%. This was to be identified on his payslip.
18. In the terms agreed by the Claimant at the time his own company Ozpire took over the payroll function, it agreed by clause 5.1.13 to indemnify LJB

against any claim by HMRC in the event of failure to pay National Insurance among other things due to be paid by Ozpire. This accords with the indication that when Ozpire took over the arrangement it would have paid Employer's National Insurance which I understood the Claimant to give in the course of his testimony. The Respondent is correct in its assertion that there is no contractual documentation showing any relationship between the Claimant and the Respondent.

The Submissions

19. Turning to the submissions of the parties I do not propose to set out at length the oral submissions provided by the parties. The Respondent also supplied a skeleton argument, salient points of which are that there was no mutual obligation in this case and no control by LJB of the Claimant. The Respondent did not set the pay rates. The Claimant chose the payroll company and the Claimant was paid on invoice which varied from time to time. He answered directly to OD in respect of his day to day activities and any problems which might have arisen from the work which he was undertaking. Accordingly, s.13(3) of the Employment Rights Act 1996 is not applicable as no relevant deduction was made by the Respondent and the Claimant does not fall within the category of protected individuals.

The Law

20. In terms of a concise summary of the law in addition to the provisions referred to by the Respondent I also refer to the provisions of s.230 of the Employment Rights Act. In order to fall within that definition, the Claimant would need to be a worker or an employee. The Claimant has also referred to chapter 10 of the Income Tax (Earnings and Pensions) Act 2003 as amended in 2017 although this appears to refer directly to employment where a public authority is the ultimate end user.

21. In the course of my own consideration I identified in s.54 of the same act the steps to be undertaken in identifying a deemed employment payment by an intermediary which included at step 6 of deduction of any Employer's National Insurance contributions paid by the intermediary in respect of the worker. The Respondent also provided a copy of the Court of Appeal authority of Bunce v Postworth Ltd trading as Skyblue 2005 EW CA Civ 490

where it was held that the individual had no prospect of establishing a contract of service with the agency during periods of time when he was working on an assignment with the end user to which he had been introduced by the agency. I have also considered the leading authority *Pimlico Plumbers*, in particular the Court of Appeal decision in that case where in the context of a finding that the Claimant there was a worker it is clear that the services were supplied to the Respondent company in contrast to the situation here where the services were supplied to the end user and not to the agency introducing the Claimant with whom there was no contractual relationship.

Conclusion

22. Turning then to my conclusion I found on the basis of the statutory and common law test that there is no basis for saying that the Claimant was an employee of the Respondent. He was not under the Respondent's control, he was not integrated into the Respondent's organisation, he did not work as part of the Respondent's team, he had complete freedom as to when he worked and he informed the end user OD in respect of the hours he wished to work and the time he wished to take off for holiday. Accordingly, I do not find that the Claimant was an employee of the Respondent.
23. By contrast the documentation appears strongly to suggest that he was an employee of successively Claymore, Navigate and Ozpire Ltd. It follows that the Claimant does not have the standing to present a claim under s.13(3) in respect of an unlawful deduction of wages against this Respondent.
24. Accordingly, I find no contractual relationship between the Claimant and the Respondent. The deductions about which he complains were made by the payroll companies with whom he was contractually engaged as employee and accordingly no relief is available regarding his pension claim against LJB where the company Navigate making the deductions was unconnected with LJB.

25. I also find that in the event a holiday pay claim was pursued against LJB on the basis of the material I have seen the Claimant would not have been able to pursue that case for the reasons outlined above.

Employment Judge Hildebrand

Dated:31 July 2019

Judgment and Reasons sent to the parties on:

02/08/2019

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For the Tribunal Office