EMPLOYMENT TRIBUNALS

Claimant **Respondent**

Mr M Ng'Ang'a **V** **Fusion People Limited**

Heard at: London Central **On**: 27 November 2019

Before: Employment Judge Joffe (sitting alone)

Representation

For the Claimant: In person

For the Respondent: Mrs N Willis, director

RESERVED JUDGMENT

1. The respondent unlawfully deducted sums from the claimant's wages for 'umbrella margin' and 'employers NI and apprenticeship levy' during the period from 3 September 2018 to 28 November 2018 in the sum of £614.78 and must pay that sum to the claimant.

2. The respondent failed to pay the claimant for accrued but untaken annual leave under regulation 14 of the Working Time Regulations 1998 in the sum of £650.23 and must pay that sum to the claimant.

3. The claimant's remaining claims for unlawful deductions from wages are not upheld and are dismissed.

REASONS

Claims and issues

1. The claimant brings claims for unlawful deductions from wages and unpaid holiday pay. The issues were agreed at a case management hearing before EJ Sharma on 7 June 2019. These claims had been consolidated with another claim the claimant brings against this respondent but at a preliminary hearing on 19 September 2019, EJ Quill concluded, with the agreement of the parties, that the facts issues in Case Number 2200399/19 do not overlap with the facts and claims in this case. EJ Quill directed that a further case which the claimant brings against Arriva Rail Limited and one other respondent (Case Number 3200485/2019) will be heard with Case Number 2200399/19.

2. The issues I have to decide therefore are as follows:

Status

(1) Is the claimant a worker or an employee?

Unlawful deductions from wages

(2) Did the respondent make unauthorised deductions from the claimant's wages contrary to section 13 of the Employment Rights Act 1996 in the following respects:

   a. Not paying the alleged agreed hourly rate of £13.27;

   b. The claimant alleges that three methods of payment were suggested by the respondent. The claimant chose the PAYE option but the respondent had already directed payments to be made through a limited company to pay his first week's wages, The claimant alleges that a payment through the umbrella company would result in the claimant paying fees and deductions which would not be payable under the PAYE method. The claimant alleges that when he raised this, the respondent explained that the first week's wages would be paid through the umbrella company but thereafter he would be paid by the PAYE method. The claimant therefore thought that from the second week's pay period, payments would be made via PAYE. The claimant alleges that he discovered that all payments made from 28 August 2018 to 21 December 2018 had been made through the umbrella company (and thus subject to fees and deduction) which would not have been the case had he been paid via the PAYE method. This resulted in an unlawful deduction, the claimant alleges;

   c. Not paying holiday pay;

d. Not paying sums the claimant would have earned on 25 and 26 December 2018;

e. Loss of earnings between 26 January 2019 and 30 June 2019, the period after the claimant ceased to work at Arriva Rail London Limited premises but retained a bearer's pass.

Findings of fact

3. I heard evidence from the claimant on his own behalf and from Mr Ben Isaacs, senior consultant, for the respondent. I was provided with an agreed bundle of 268 pages. Because the claims raised some difficult issues about status and contractual terms and because evidence and submissions took until after 3 pm on the day of the hearing, I reserved my decision.

4. The respondent describes itself as an employment business. It finds workers for both temporary and permanent placements. Mr Isaacs and a colleague, Neil Duggan, manage a range of clients in the rail sector. They have approximately 220 temporary workers on placements with clients at any one time.

5. On 25 August 2018, the claimant saw a job advert on the Indeed website for a train cleaner position offered by the respondent.

6. The advert itself was not produced but the respondent provided me with a document which showed me what information had been sent to an organisation called Broadbean which the respondent uses to post its advertisements to various websites aimed at job seekers. This showed that the information provided for the advertisement the claimant responded to was that the salary would be '11 GBP per hour'. In the section entitled 'Description' it said further 'Pay: £11 per hour (umbrella or ltd) paid weekly.'

7. The claimant said that the job he saw on the Indeed website was advertised at an hourly rate of £13.27. The document I have described included a posting history, which was consistent with it being the advert the claimant saw, and a job reference. The same job reference was contained on the 'Broadbean response notification' which notified the respondent that the claimant had sent in his CV in response to the advert. I was satisfied that the document I saw and its posting history confirmed that the job which the claimant applied for was advertised at a rate of £11 per hour.

8. The job was a train cleaning role for Arriva Rail London Limited ('Arriva') at Clapham Junction. The claimant responded to the advert by submitting his CV on 25 August 2018. Mr Isaacs invited the claimant to an interview by way of an email dated 28 August 2018 at the respondent's office and the claimant attended an interview at 10 am on 29 August 2018. The claimant said that the interview lasted about 5 minutes. Mr Isaacs said that it would have been more

like 30 minutes. I took the view that it was likely to have been closer to the latter than the former since part of the interview involved ascertaining whether the claimant was suitable for the role. Mr Isaacs told the claimant about the respondent and had to obtain information from him such as his National Insurance number and input that information into the respondent's systems.

9. The claimant was provided with the respondent's 'Registration Agreement' ('the registration agreement') by email on 29 August 2019 and signed and returned it by email the same day. It appeared from the history of the document which I saw that the claimant had the document emailed to him at 10:02, viewed it at 10:39 and electronically signed and returned it at 12:21. It therefore appears that the document was emailed to the claimant during the course of his interview.

10. I interpose that at 11:46 that day, Mr Isaacs emailed the claimant with details of where to report and to whom that evening at 22:30 and the claimant confirmed that he would attend.

11. The registration agreement included standard terms and conditions of which relevant provisions included:

    Clause 2.1: 'You authorise Us to provide work-finding services to You and to introduce You to Clients for potentially suitable vacancies, the details of which shall be discussed and agreed from time to time, whether verbally or in writing.'

    Clause 7.2: 'If You agree to carry out a temporary Vacancy for a Client, You agree to be engaged:

    (i) by Us as a PAYE worker under terms substantially similar to [PAYE terms];

    (ii) through a limited company of which You are a director under terms substantially similar to [Ltd Terms]; or

    (iii) by a third party umbrella company provided that such umbrella company has been approved by Us… Please be aware that, by choosing this route to payment, You will incur weekly processing charges and other costs from the umbrella company. **If you would prefer not to incur these charges and costs, You should choose an alternative form of contracting with us.'** [Emphasis added]

12. Each of these options in the electronic document linked to a further document as reflected by the words in square brackets. The link from the PAYE option was to a document entitled 'Contract for services – Agency workers' ('the PAYE terms').

13. Amongst numerous other provisions, the PAYE terms included:

    'Clause 3 No employment relationship

3.1 This contract shall not create an employment relationship between Fusion and the Agency Worker… The Agency Worker shall be a worker rather than an employee of Fusion.'

'Clause 7 Remuneration

7.1 Fusion shall pay the Initial Pay Rate to the Agency Worker until the Agency Worker completes the Qualifying Period. The Initial Pay Rate will be agreed separately for each Assignment and set out in the Assignment Schedule.

7.2 Upon the Agency Worker completing the Qualifying Period, Fusion shall pay to the Agency worker:

7.2.1 the Qualifying Pay Rate; and

7.2.2 any Additional Payment

Which will be confirmed in an Amended Assignment Schedule, if applicable.' There is no provision for any deductions.

'Clause 8 Annual Leave

8.1 the Agency Worker is entitled to be paid annual leave in accordance with the statutory minimum under the WTR from time to time

…

8.3 On completion of the Qualifying Period the Agency Worker may be entitled to additional annual leave in addition to the Agency Worker's entitlement under the WTR. If this is the case, any such entitlement, the date from which such entitlement will commence and how payment for such entitlement will be made shall be confirmed in an amended Assignment Schedule

8.4 If clause 5.3 applies Fusion shall make payments on a rolled-up basis in respect of any annual leave which exceeds the maximum under the WTR

8.5 All paid annual leave must be taken during the Leave Year in which it accrues and the Agency Worker is responsible for ensuring that all paid annual leave is requested and taken within the Leave Year.'

14. Clause 5.3 relates inter alia to equal treatment of agency workers in comparison with the client's permanent employees. Clause 5.2 inter alia requires the worker to work in accordance with a client's reasonable instructions and under the client's supervision and control.

15. I was not shown any document explicitly called an 'assignment schedule' but Mr Isaacs said that he provided the claimant at interview with a hard copy of a document which was in the bundle dated 29 August 2018. He said that he would input information in the document and then a member of administrative staff in the office would print this document and some time sheets, which

would be handed to the worker. This document was addressed to the claimant and said it confirmed the details of his contract assignment as a night cleaner at Clapham Junction. Under 'Pay rates and expenses'; the 'rate type' column says: 'Standard Hourly Rate, the column headed '£ Pay' says '11.00' and there is no entry in the column headed 'Comments'. In a box entitled 'Pay type' 'LTD' is filled in.

16. The claimant said that he was not handed a copy of this document during the interview and did not see it until it was provided by the respondent in the course of these proceedings.

17. Mr Isaacs' evidence in his witness statement was that he would explain to candidates at interview the different pay models – PAYE, through a limited company, through an umbrella company. Although he said in his witness statement that he explained that the £11 quoted was the umbrella company rate which would include the employer's NI, apprenticeship levy, employer's pension contributions and holiday pay and that what was left after those were deducted would be the gross rate before employee's NI and tax, I was not persuaded that he had in fact had that discussion with the claimant. When questioned he was not confident about what had actually been said by him in the meeting and was not able to give clear evidence to me about how the different models worked. What he perceived to be the significant difference between the different models was that an umbrella company would pay the holiday pay 'up front' (i.e. rolled-up holiday pay) so the worker would receive a larger sum initially.

18. Mr Isaacs was confident that he would have discussed the rate of pay and ultimately said that what he would have told the claimant is that the weekly payment through an umbrella company would be higher because the holiday pay would be paid 'up front'. He did not explain to the claimant that the umbrella company charged a fee and agreed that he would not have been able to give net figures (ie pre-tax and NI but net of the other payments Mr Isaacs referred to in his witness statement) on the spot for the different payment models and had not done so.

19. Mr Isaacs said that the claimant chose the umbrella model at the interview. The claimant denied that he did so and said that he had had bad experiences with umbrella companies in the past.

20. On 3 September 2018, the claimant received an email from an umbrella company called Paystream thanking him for expressing an interest in 'our award winning umbrella service My Max' and inviting him to complete an online application. The respondent has an agreement with Paystream which was in the bundle. Neither party took me to any provisions of this agreement. The subject line of the email to the claimant was 'My Max initial illustration and online access' and there appears to have been an attachment 'Personal illustration pdf'

21. On 5 September 2018, the claimant emailed Mr Isaacs asking for his advice. He pointed out that the registration agreement seems to allow a choice of modes of payment and asked what the criteria were to be paid as a PAYE worker. He had been contacted by Paystream and asked 'am I to understand that I have no option but to sign on with Paystream?'

22. Mr Isaacs wrote back on 5 September 2018 at 13:39: 'If you go back to the advert it confirms the rate of £13.27 being either umbrella or Ltd. I am happy to pay you PAYE plus your holiday pay on top of that if you wish?'

23. The claimant replied the same day by email: 'Yes, please proceed with PAYE.'

24. Mr Isaacs replied, 'OK mate it will be from next week only as we have already processed this week is that ok?'

25. The claimant responded, 'That's fine, thank you.'

26. On 10 September 2018, the claimant had a telephone call from Farihah Awan from Paystream saying she had been asked by Mr Isaacs to contact the claimant to sign up with Paystream. The claimant said that he would need to seek clarification from Mr Isaacs.

27. The claimant emailed Mr Isaacs the same day asking whether the respondent was still happy to pay the claimant PAYE plus holiday pay. He was concerned that he had not been paid yet for work done.

28. Mr Isaacs wrote back that day, 'As I said in the email the first timesheet would be paid through Paystream as the paperwork was already done and from there we would change it to PAYE plus holiday pay. Have you fully signed up with them?'

29. Again that day, the claimant wrote back to say 'No I hadn't signed up with them. I guess I will have to sign up just for this one week's payment..'

30. Mr Isaacs accepted in evidence that he understood that the claimant had chosen the PAYE arrangement. He said the failure to move him over to those payment terms was an error.

31. The claimant by this time had received a number of emails inviting him to register with Paystream and he did so on or about 10 September 2018 but sent an email to Ms Awan in which he said:

    'Just to be clear, I have NOT expressed interest in your services

    The only reason I am signing up is on advice that I HAVE TO, in order to receive my wages for hours worked from Wednesday 29th August to Friday 31st August 2018, which have already been processed by yourselves. To be perfectly clear, this agreement is for this period ONLY.

Beginning 3rd of September 2018, my wages will be processed by Fusion People under the PAYE terms.'

32. There were in the bundle two documents relevant to the relationship between the claimant and Paystream:

- A document entitled 'Personal Illustration – Michael Ng'ang'a' dated 3 September 2018.

  This set out that the claimant's income would be based on 35 hours at £11 per hour. It then set out an array of deductions which would be made from that sum, which include a figure of £18 for 'Umbrella margin' and another figure for employers' NI and apprenticeship levy. It broke down the resultant sum into three figures called 'basic pay', 'holiday pay' and 'commission'.

  The claimant accepted he had had this document on a number of occasions but said he took it to be an 'illustration' not a breakdown of what his actual pay would be.

- The other document was entitled 'employment contract'. This document says it was electronically signed by the claimant on 10 September 2018. The claimant said he did not see this document until it was disclosed by the respondent as part of these proceedings. Mrs Willis said that was not the case and that the claimant had disclosed it. I invited the parties to try and locate their lists of documents in order to resolve the issue but ultimately these were not provided to me.

33. The employment contract purports to create an employment relationship between the claimant and Paystream and at clause 2.1 'The Employee accepts that the Employee has no contractual relationship with any Customer or Client' . Clause 9 deals with annual leave and says that 'holiday pay may be accrued or advanced on request; the default position is that the employee receives rolled-up holiday pay.12.07% of each payment is in respect of annual leave entitlement and the employee is not entitled to any additional payment when actually taking annual leave.'

34. Mr Isaacs accepted that there was an error made by the respondent and the claimant was never moved on to PAYE terms. He continued to be paid by Paystream and Paystream sent him payslips showing the payments made. These payslips broke down the sums into basic pay, holiday pay and commission and showed the deductions for 'margin' and 'employers NI and levy' In the bundle I was provided with payslips from Paystream for dates covering week ending 31 August 2018 to week ending 14 December 2018.

35. The claimant accepted that Paystream had been sending him payslips but told the Tribunal that he did not see the payslips at the time because, after signing up with Paystream for what he thought would be a single week, he

had directed communications from Paystream to be sent to his spam folder. He said that he did this immediately after the first payment on 12 September 2018. He said that he did not check his bank balance to see who was paying him; he just looked to see that payments were being made.

36. The payslips which were in the bundle from Paystream spanned the period from the week ending 31 August to 2018 to the week ending 14 December 2018. The payslips which included the £13.27 hourly rate were those for the weeks ending 26 October 2018, 23 November 2018, 30 November 2018, 7 December 2018 and 14 December 2018. The rest refer to the £11 hourly rate.

Christmas shifts

37. Mr Isaacs was contacted by the client, Arriva, in early October 2018 to say what additional Christmas shifts they anticipated having over 24, 25 and 26 December 2018.

38. On 8 October 2018, Mr Isaacs sent an email to the cleaners currently engaged on Arriva work at various sites to say that there was some Christmas security work paying £30 per hour available . 'We are putting it out to our regular workers so would need confirmation ASAP if you are free for the following'. There are then set out a variety of available shifts at various locations.

39. The claimant emailed Mr Isaacs on 9 October 2018 saying that he would like to be put forward for shifts at Crystal Palace on 24, 25 and 26 December 2018. Mr Isaacs replied on 9 October 2018: 'I have Crystal Palace 10:00 – 22:00 on the 25th and 26th if you want to do that. You will need you own transport to get there.'

40. Again on 9 October 2018, the claimant emailed Mr Isaacs: 'That will be perfectly OK. You can confirm those two days for me, I will have my own transportation.'

41. There was no further correspondence or discussion between the claimant and Mr Isaacs about this issue. Mr Isaacs said in evidence that the number of shifts Arriva had available reduced as it got closer to Christmas and priority was given to Arriva employees and workers already working at the particular sites where the work was available. The claimant had asked for shifts at Crystal Palace but he was not working at Crystal Palace.

42. It was suggested to the claimant in cross examination that he would have expected emails effectively firming up and confirming the arrangement if it was a concluded agreement. The claimant accepted that he usually received emails confirming that he would be required to attend a site but also said that he only received them when he asked for them.

Move to Dalston Junction

43. At the end of October 2018, Mr Isaacs was informed by Arriva that it no longer required the respondent to provide cleaners at Clapham Junction. However a new role was becoming available at Dalston Junction and these roles were offered to those workers who were currently working at Clapham Junction in an email dated 30 October 2018 from Mr Isaacs to the claimant and others. The claimant asked for clarification of the role in an email of the same date and Mr Isaacs responded that 'Rate is £13.27, 35 hours a week and is at Dalston Kingsland Station'. The claimant confirmed he was available for that role in an email also dated 30 October 2018.

44. On 6 November 2018, the claimant wrote to Mr Isaacs: 'Not to be too pushy, but please could you let me know if my position for the above role is confirmed…' Mr Isaacs wrote back the same day to say 'You're definitely in for Dalston Junction unless they ask me for someone at Clapham. Dalston will start next Tuesday and it's days.' The claimant commenced working at Dalston Junction on 13 November 2018 on day shifts.

45. On or around 14 November 2018, the claimant spoke to a colleague about the pros and cons of the various pay models offered and said that he was impressed by the advantages of being paid through a limited company set up by himself. He checked his payslips at this point and says that he realised at this point that he was still being paid by Paystream and not by the respondent. He emailed Paystream the same day, copying in Mr Isaacs, to terminate their services and say that he had registered a limited company through which he would be paid. Mr Isaacs wrote to the claimant that day asking for details of the claimant's limited company.

46. On 18 November 2018, the claimant emailed Mr Isaacs to say that he had not registered a limited company but had registered for self-assessment as a self-employed contractor. He said he was waiting for a Unique Tax Payer Reference Number which he would forward to Mr Isaacs when it was available. He sent the number through on 19 November 2018. Mr Isaacs wrote back the same day to say 'We only pay UTR if you are a standalone self-employed worker which you are not. The methods we can use are PAYE, Umbrella or Ltd.' Again on 19 November 2018, the claimant wrote to Mr Isaacs to ask if he could be paid via PAYE.

47. The claimant noticed that he had not been paid his wages on 23 November 2018 and emailed Mr Isaacs to enquire. Mr Isaacs replied, 'Your rate should be £13.27 umbrella or Ltd. I have already told you we don't accept UTR'.

48. The claimant, again on 23 November 2018, queried why he was being restricted to two payment options, when he had been told that Mr Isaacs was happy for him to be paid PAYE. Mr Isaacs told the claimant he would be

happy to discuss the matter with him the following Tuesday when he was back in the office.

49. The claimant emailed asking for an update on Wednesday 28 November 2018. There was then a series of emails that day in the course of which Mr Isaacs asked the claimant if he was using a limited company for his pay. Mr Isaacs wrote on that day to say the claimant's hourly rate had gone up to £13.27 and the claimant responded ''It has always been 13.27!' The claimant reminded Mr Isaacs that he wanted to be paid through the PAYE model. Mr Isaacs eventually told the claimant in an email at 16:44 on 28 November:

    'OK, you know the PAYE is a different rate? £10.20 but you get your holiday pay on top of that too.'

50. The claimant replied the same day: 'I give up! Just pay me through Paystream.'

51. On 29 November 2018, there was an error in one of the claimant's payments. He said that this caused him to look back through his payslips, at which stage he realised that he had been receiving pay at an hourly rate of £11 and not £13.27 for much of the previous period.

52. On 19 December 2018, the claimant emailed Mr Isaacs. In the course of a long email, he said that there had been unlawful deductions from his wages. He said that he had gone through his payslips after the recent error in his payments and had realised he had not been paid £13.27 per hour throughout. He complained about the sums deducted by Paystream and the failure to pay holiday pay on top of the hourly rate. He said: 'The advertised rate created the impression that it was the take home pay, less statutory deductions. Nowhere was it stated that other charges will be incurred at the time of signing the contract with Fusion People.' He sent with the emails a table calculating the sums he was owed.

53. Also on 19 December 2018, Neil Duggan, another senior consultant for the respondent, informed the claimant by email that the existing Arriva role was finishing on 29 December 2018 and asked the claimant if he would like to be found another contract role and whether he had a preference for days, nights or both. On 20 December 2018, the claimant replied that he would like to be found another role with a preference for nights.

54. On 20 December 2018, Mr Isaacs wrote to the claimant to say that the agreement initially provided for £11 per hour, which had recently been raised to £13.27 per hour. He added '…this is the last I will say on this matter on email.'

55. On 24 December 2018, the claimant emailed Mr Isaacs to say that he had registered a limited company from 21 December 2018 and to ask for further payments to be made through the limited company. He notified Paystream the same day that he was terminating its services. There was some delay in

payments being made to the limited company for reasons which are not material to the claims I am considering.

56. On 15 January 2019, the claimant emailed Mr Isaacs and Mr Duggan to say that he was terminating his contract with the respondent with immediate effect.

57. It appears that the claimant worked for another week on Arriva work under a direct arrangement with an Arriva manager, but using one of the respondent's timesheets and the respondent arranged payment to the claimant for that period, despite the claimant having terminated his contract with the respondent.

58. The claimant did not take any annual leave during the period he worked for the respondent on Arriva work.

59. At some point shortly before he ceased to work at Arriva sites, Arriva issued the claimant with a bearer's pass valid until 30 June 2019 which allowed him to travel without cost on Arriva-related business. Mr Isaacs' evidence was that the validity period of bearer's passes bore no relation to the length of an engagement.

Law

Employment or worker status

60. Section 230 ERA 1996 provides that:

'(1) In this Act "employee" means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.

(2) In this Act "contract of employment" means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing.

(3) In this Act "worker" (except in the phrases, "shop worker") means an individual who has entered into or works under (or, where the employment has ceased, worked 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

whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual;

and any reference to a worker's contract shall be construed accordingly'

61. In order to qualify as a 'worker' an individual has to show:

- that there is an express or implied contract with the 'employer'
- that the individual undertook to do or perform work or services personally
- that the work or services were not performed on the basis that the recipient of the work or services was a customer or client of his or her business or profession.

Unlawful deductions from wages

62. Section 13 of the ERA 1996 provides that an employer shall not make unauthorised deductions from a worker's wages, except in prescribed circumstances. Wages are defined in section 27 as 'any sums payable to a worker in connection with his employment', including 'any fee, bonus, commission, holiday pay or other emolument referable to [the worker's] employment, whether payable under his contract or otherwise' with a number of specific exclusions.

63. On a complaint of unauthorised deductions from wages, a tribunal must decide, on the ordinary principles of common law and contract, the total amount of wages that was properly payable to the worker on the relevant occasion: Greg May (Carpet Fitters and Contractors) Ltd v Dring [1990] ICR 188, EAT.

64. A contract may be varied by agreement, which may be implied by the conduct of the parties. Where there is no express agreement, the fundamental question is whether an employee's conduct in continuing to work is only referable to his having accepted new terms imposed by the employer: Solectron Scotland Ltd v Roper and ors [2004] IRLR 4, EAT. If employees continue to work following a contractual pay cut, an inference that they have accepted the variation will not arise if the employees' conduct in continuing to work is reasonably capable of a different explanation: Abrahall and ors v Nottingham City Council and anor [2018] ICR 1425, CA.

65. Where there is ambiguity in a contract, a court or tribunal must consider the language used and ascertain what a reasonable person, who has the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract, would have understood the parties to have meant: Rainy Sky SA v Kookmin Bank [2011] UKSC 50, [2011] 1 W.L.R. 2900.

66. The task of a court or tribunal is to decide the objective meaning of the language in which the parties have chosen to record their agreement. If there are two possible constructions, the court or tribunal is entitled to prefer the construction which is consistent with business common sense: Lukoil Asia Pacific Pte Ltd v Ocean Tankers (Pte) Ltd (The "Ocean Neptune") [2018] EWHC 163 (Comm).

67. The court or tribunal must place itself in the same 'factual matrix' the parties were in when concluding the contract: Reardon Smith Line Ltd v Yngvar Hansen-Tangen [1976] 1 W.L.R. 989.

68. Where there is ambiguity, a contract is also construed more strongly against the party who has made the contract: Borradaile v Hunter (1843) 5 M. & G. 639.

Holiday pay

69. Under regulation 13 of the WTR 1998, a worker is entitled to four weeks' annual leave in any leave year and under regulation 13A, a worker is entitled to a further 1.6 weeks' of annual leave.

70. Under regulation 14, where a worker's employment is terminated during the course of his leave year and 'the proportion of leave taken by the worker is less than the proportion of the leave year which has expired, his employer shall make him a payment in lieu…' calculated in accordance with the formula set out in regulation 14(3).

71. By regulation 16, a worker is entitled to be paid for any period of annual leave he or she is entitled to at the rate of a week's pay in respect of each week's leave.

72. There is no provision in the WTR for employers to pay 'rolled-up' holiday pay, i.e. to pay an additional sum paid as part of the worker's weekly wage which is referable to holiday pay for the weeks when the worker is actually on leave.

73. Rolled-up holiday pay arrangements may be lawful in circumstances where they are made transparently and comprehensibly: Robinson-Steele v RD Retail Services Ltd and two other cases [2006] ICR 932, ECJ, Lyddon v Englefield Brickwork Ltd [2008] IRLR 198, EAT.

Submissions

74. The claimant and Mrs Willis made oral submissions. I have carefully taken into account all of the parties' submissions but refer to them below only insofar as is necessary to explain my conclusions.

Conclusions

Issue 1 Employment / worker status

75. I accepted the claimant's account that he had not opted for the umbrella company payment model at the interview. His email of 5 September 2018 seeking advice as to which model to choose was consistent with his not having elected a method of payment at the interview. Mr Isaacs' email in response does not suggest that he understood the claimant to have already elected the umbrella company model, which one might have expected if that had been his impression. The document which Mr Isaacs produced and says he handed to the claimant on the day itself says 'LTD' in the box referring to pay type but no one suggested that the claimant had chosen this pay model at the time.

76. By his further email of 5 September 2018, the claimant elected the PAYE model and his subsequent emails confirmed that he was consenting to payment via Paystream for a single week only.

77. I therefore concluded that the claimant had accepted the PAYE terms. That contract explicitly states that the claimant is a worker for the respondent. Although the label is not binding on a tribunal, it seemed to me to fairly reflect the situation. The claimant undertook by way of an express contract to perform services personally for the respondent's client, Arriva. There was no suggestion that those services were provided by the claimant to the respondent or Arriva as part of a business or profession carried on by the claimant and that would be a wholly unreal description of the relationship between the parties. Mrs Willis accepted during the course of the hearing that the claimant was a worker.

78. It is not necessary for me to go further and consider whether the claimant was an 'employee' of the respondent since it is sufficient for the purposes of the claims which he brings that he was a worker.

79. I considered whether there could have been a variation of the contract by conduct or acquiescence on the part of the claimant in receiving payments and payslips from Paystream which might have changed his status (and other terms of the contract relevant to the issues I consider below). I found that the claimant was not knowingly being paid by Paystream until he investigated the situation in November 2018. I accepted the claimant's evidence that he arranged for email from Paystream to be sent to his spam folder after what he considered the termination of his relationship with Paystream once his first week's payment had been made through Paystream. This was consistent with the claimant's professed dislike of umbrella companies and his desire not to be bothered with further communications from Paystream. Also by 5

September 2019, the claimant believed he had agreed to be paid directly by the respondent on the PAYE terms so would have perceived no disadvantage in not receiving Paystream emails.

80. In those circumstances, the claimant's actions in continuing to work for the respondent could not be construed as an unequivocal acceptance of a variation of the contract with the respondent to change the payment model to 'umbrella company', with whatever effect that might have had on the claimant's status.

Unlawful deductions from wages

81. It follows from my conclusions above that the claimant was employed on the PAYE terms from 5 September 2018 (for the pay period from 3 September 2018) until 28 November 2018 when he said to Mr Issacs 'Just pay me through Paystream'. This has implications for various of his heads of claim as I set out below.

Issue 2 (a): Was there an unlawful deduction from the claimant's wages in that he was not paid an hourly rate of £13.27?

82. I was persuaded that the job the claimant accepted was advertised at £11 per hour and that was the rate discussed at interview. The claimant accepted the role at that rate and started working on 29 August 2018 on that basis. It was not made clear at interview that there would be some lower rate if the claimant chose the PAYE model.

83. The question is what effect if any the further correspondence on 5 September 2018 had on the rate of pay.

84. In my view, although there was a concluded contract for the claimant to carry out work through the respondent at Arriva premises prior to 5 September 2018, there were aspects of the contract which had not been finalised at that point, in particular as to the payment model which would apply. The different payment models carried with them different standard terms and conditions and to some extent different pay implications. The claimant ultimately accepted the PAYE terms.

85. The question then is what effect on the pay rate, if any, Mr Isaacs' email of 5 September 2018 at 13:39 had. What was the claimant agreeing to when he then said 'please proceed with PAYE'?

86. It is difficult to know how to construe Mr Isaacs' email since it confirms that the rate of £13.27 is for 'umbrella or ltd'. It does not say what the PAYE rate is but that he is happy to pay holiday on top of that rate. The reference to £13.27 being confirmed in the advert is of course in error.

87. It seemed to me that it was relevant to look at the factual matrix ie the facts known or reasonably available to both parties. That includes the fact that the job was advertised at a rate of £11 per hour and that I concluded that one thing which Mr Isaacs would have conveyed at the interview was that a higher rate was paid for the umbrella model because holiday pay was paid 'up front' or rolled-up. There was also apparently at least one 'personal illustration' document sent to the claimant by this stage (email from Paystream of 3 September 2018 with attached personal illustration). This document 'illustrated' the £11 per hour figure being reduced by both the employers NI and apprenticeship levy and the 'umbrella margin', before being subject to tax and NI.

88. Given the fact that the advert made no reference to the £11 per hour rate being before deductions for the umbrella's company's fee and 'employer's NI and apprenticeship levy', it seems to me that the objective observer would have made the assumption the claimant made which was that the 'illustration' the claimant was subsequently sent by Paystream did not necessarily correspond with the actual figures on offer.

89. The claimant's account, which I accepted, was that he became aware that he was still being paid by Paystream on about 14 November 2018 when he decided to look at his payslips to see whether being paid through a limited company would be more favourable. By this stage, the claimant had started at Dalston where the pay rate was in any event £13.27. The payslip for the period ending 26 October 2018 refers to an hourly rate of £13.27.

90. I was not satisfied that the claimant was provided with the document which I have described at paragraph 15 above. The claimant's evidence was that he had not received it and Mr Isaacs did not have a clear recollection of providing it, just that he would have provided such a document at interviews of this sort.

91. Doing my best therefore with a confused factual matrix, it seems to me that an objective bystander with knowledge of the interview and the surrounding circumstances which I have set out, would have understood that the £13.27 must be the higher rate mentioned at interview for the umbrella company payment model (including the up front / rolled-up holiday pay) and would assume that the PAYE rate would be the rate which was in fact referred to in the advert and at interview, with holiday pay to be paid on top of that.

92. It follows that there was no unlawful deduction by the respondent in not paying the claimant at the rate of £13.27 per hour prior to the change in hourly rate when the claimant moved to Dalston Junction. My finding is that the

contract was for an £11 hourly rate plus holiday pay. This aspect of the claimant's claims is therefore not upheld.

Issue 2(b): Deductions made by Paystream

93. During the period from 3 September 2018 to 28 November 2018, I have found that the contract was for a gross hourly rate of £11 before tax and NI, on the respondent's PAYE contract terms. These of course did not include the deductions made by Paystream. I therefore find that the deductions in fact made by Paystream for 'margin' and 'employers NI and levy' were unauthorised. Since the contractual obligation to pay the claimant's wages was, on my findings, on the respondent, the respondent is also responsible for the deductions made by Paystream acting as its agent.

94. This aspect of the claimant's claims is upheld.

Issue 2(c): Is the claimant entitled to holiday pay?

95. I have concluded that between 3 September 2018 and 28 November 2018, the claimant was employed on the PAYE terms under which the respondent was obliged to provide him with his statutory annual leave and pay and was not entitled to pay rolled-up holiday pay in respect of those obligations. The claimant did not take any annual leave over that period. It follows that when his employment / engagement with the respondent ended, the respondent was obliged to make a payment in respect of the claimant's accrued but untaken annual leave.

96. This aspect of the claimant's claims is upheld.

Issue 2(d): Is the claimant entitled to be paid for sums he would have earned on 25 and 26 December 2018?

97. Was there a concluded contract that the respondent would provide the claimant with Arriva work at Crystal Palace on 25 and 26 December? I concluded that there was not. The emails which passed between Mr Isaacs and the claimant finished by the claimant saying on 9 October 2018, 'You can confirm those two days for me'. There was never a further email of confirmation from Mr Isaacs and the claimant never chased the matter.

98. One analysis of the exchange is that Mr Isaacs' email of 9 October 2018 was an offer which the claimant accepted by his email of the same date.

99. That in my view does not reflect the commercial reality of the situation, however, which was that this was a tripartite arrangement also involving Arriva, who would ultimately have to confirm any arrangement. That this was the understanding of the parties as to how the contract worked is illustrated by the sequence of emails relating to the claimant's engagement at Dalston Junction. Even after the claimant 'confirmed' his availability for the role, he contacted Mr Isaacs on 6 November 2018 to ascertain whether his position had been confirmed by the client.

100. In the absence of a contractual obligation to engage the claimant for that work on those days, it is my conclusion that there were no sums payable to the claimant by the respondent for those days.

101. This aspect of the claimant's claims is not upheld.

Issue 2(e): Is the claimant entitled to loss of earnings between 26 January 2019 and 30 June 2019, the period after the claimant ceased to work at Arriva Rail London Limited premises but retained a bearer's pass?

102. I could see no basis for this claim. There was no contract between the claimant and the respondent that the claimant would be provided with Arriva work during this period and in any event the claimant had terminated his contract with the respondent on 15 January 2019. The provision of a bearer's pass by a third party, Arriva, had no effect on the contractual arrangement between the respondent and the claimant.

103. This aspect of the claimant's claims is not upheld.

Remedy

104. I was provided with the claimant's Schedule of Loss. In order to enable me to reach conclusions on remedy, if required, I invited submissions from the parties on the appropriate basis for calculation and the sums in the schedule.

105. On the holiday pay issue, Mrs Willis argued that the calculation should be done on a lower hourly rate since the £11 included rolled-up holiday pay and she proposed an alternative figure for the holiday pay figure in the claimant's calculations, of £640.23. This was based on a standard percentage which the respondent used for rolled-up holiday pay calculations.

Paystream deductions

106. The claimant's total figure for 'margin' and 'employers NI and Levy' deducted by Paystream was £780.41. This was for the period 28 August 2018 – 21 December 2018. I found that the claimant accepted the umbrella model on 28 November 2018. By reference to the payslips the total sum deducted by Paystream is £614.78 up to the week ending 30 November 2018 but discounting the first week. I have assumed for these purposes that the claimant's agreement to the umbrella company model would commence for the first full week following his acceptance of that pay model. I therefore find that the sum of £614.78 was an unlawful deduction.

Holiday pay

107. The claimant worked for three months on the PAYE terms. He was therefore entitled under reg 14 to be paid for one quarter of a leave year or for seven days pay. The claimant's basic rate of pay varied over the relevant period, as I have found, between £11 and £13.27 per hour.

108. Under regulation 16, a week's pay under the WTR is calculated in accordance with section 221 – 224 ERA. The calculation date is the first day of the period of leave in question. No alternative date is provided when the leave has not been taken but logically it would seem to make sense for that date to be the same as the termination date. Because the claimant had normal working hours of 35 per week, a normal week's pay for him at the end of the period for which the holiday pay is claimed would be 35 x £13.27 = £464.45.

109. A day's pay would therefore be £464.45 / 5 = £92.89. Seven days' pay is therefore £650.23 and that is the sum I find to be due to the claimant for accrued but untaken annual leave.

Employment Judge JOFFE

Date 12 Dec 2019

JUDGMENT SENT TO THE PARTIES ON
12/12/2019

FOR THE TRIBUNAL OFFICE