EMPLOYMENT TRIBUNALS

Claimant: **Mr A Haile**

Respondent: **UK Solutions Ltd**

Heard at: **East London Hearing Centre** **On:** **25 June 2020**

Before: **Employment Judge Allen QC (sitting alone)**

Appearances
For the claimant: in person
For the respondent: Mr D Spencer, UK Solutions Limited

This has been a remote telephone hearing which was agreed to by the parties. The form of remote hearing was A: audio - fully (all remote). A face to face hearing was not held because it was not practicable and no-one requested the same and all issues could be determined in a remote hearing. The documents that I was referred to are in the tribunal file, which I had before me.

JUDGMENT

1. **The Tribunal lacks jurisdiction to hear the Claimant's claim of unfair dismissal – because he lacks the relevant 2 year qualifying period. The unfair dismissal claim will therefore not proceed.**

2. **The Claimant's claim for £455.51 unpaid wages succeeds.**

REASONS

1. By ET1 Claim Form presented on 11 February 2020, the Claimant, a driver, brought claims for unlawful deduction from wages from his final pay for the period up to 29 January 2020 when his relationship with the Respondent ended. The Claimant did also tick the box for unfair dismissal but he does not have unfair dismissal rights, given that his current period of employment with the Respondent started on 12 December 2019 and therefore he lacked the 2

years of necessary continuous qualifying service. The Claimant had been informed of this jurisdictional issue by means of a Notice from the Tribunal dated 21 February 2020. He had been invited to give reasons why his claim should be permitted to proceed by 28 February 2020 but no such reasons were provided by that date. The Claimant had also been informed by letter from the Tribunal dated 6 May 2020 that the claim for unfair dismissal would be struck out and no further representations from the Claimant on this point were received by the Tribunal subsequently or today.

2. Therefore the only remaining claim for determination today was that for unlawful deduction from wages of £455.51.

3. This afternoon's hearing had been listed initially for an in person final hearing by Notice dated 21 February 2020. By letter from the Tribunal dated 6 May 2020, the parties were informed that that hearing would take place by telephone because of the Covid–19 pandemic. The parties both agreed today that the hearing could continue by telephone. I checked that the hearing had been placed on Courtserve and that contact details had been given in case any member of the public had wished to listen in on the hearing. No such request had been made to listen in to the hearing.

4. The Notice of Claim, dated 21 February 2020, informed the Respondent that any response must be received by 20 March 2020. The Respondent did not complete an ET3 Response form by that date. However an email was sent on 26 February 2020 asking whether the response form should be sent after clarification of the position as to the scope of the Claimant's claim and stating that the Claimant was a self employed contractor. There is no record on the tribunal file of any response to that query. By letter dated 6 May 2020, the Tribunal recorded that the Respondent had failed to present a response to the claim and that therefore under Rule 21 of the Employment Tribunal Rules, a judgment may be issued at the hearing and that the Respondent would only be permitted to participate in any hearing to the extent permitted by the Employment Judge who hears the case. By email dated 12 May 2020, the Respondent pointed out that there had been no response to its previous email; repeated that the Claimant was a self employed contractor; and asked for an opportunity to provide the tribunal with the necessary documentation. By Notice dated 4 June, the Respondent was informed that because it had not entered a a response to the claim, under Rule 21 of the Employment Tribunal Rules, a judgment may be now be issued and that the Respondent would only be permitted to participate in any hearing to the extent permitted by the Employment Judge who hears the case. The Respondent then emailed the Tribunal again on 4 June 2020 requesting the opportunity to respond. The tribunal responded on 11 June 2020 telling the Respondent to complete and submit the ET3 form and provide an explanation for the previous failure to do so and that the matter would be dealt with today. It was also explained that the 'strike out' of the Claimant's claim was only relevant to the unfair dismissal and not the other part of his claim. Both parties were invited to send any relevant documents and witness statements.

5. The Respondent then on 11 June 2020 submitted an ET3 response attaching a number of relevant documents. No documents were received from the Claimant.

6. On the basis that the Respondent was not represented and that emailed queries to the Employment Tribunal were not responded to until 11 June 2020 and that the background facts were relatively straightforward, I accepted the ET3 response form out of time and permitted the Respondent to take part in the hearing.

7. After a discussion at the outset of the hearing, the parties agreed that the two issues for determination were:

   (i) Whether the Claimant was a 'worker', therefore giving the tribunal jurisdiction to hear his unlawful deduction from wages claim;

   (ii) If so, whether the Respondent had the right to deduct or set off sums against the amounts due to the Claimant – specifically whether an amount of £1,000 could be set off against an amount of £455.51, which it was agreed would otherwise have been owed to the Claimant.

8. The parties made oral submissions as to these two issues. During submissions it became apparent that there was an additional document, a vehicle rental / hire agreement, not before the tribunal, that may be relevant. The Respondent agreed to send this document to the tribunal – and a direction was given for the Claimant to comment in writing (if desired) on that document prior to the tribunal making its decision. The Respondent sent the document as requested and the Claimant commented as requested.

9. The basic background facts are not in dispute and are as follows:

   (i) The Claimant was a delivery driver, delivering parcels for Amazon and other companies. He worked under an 'Agreement for Services for Self Employed Sub-Contractor' ['the Agreement'] dated 29 November 2019 to which the parties were the Respondent and the Claimant.

   (ii) He was provided by the Respondent with a vehicle (via the Rental / Hire Agreement referred to below). However, according to Mr Spencer, this was not an integral or necessary part of the relationship between the parties, as drivers like the Claimant could supply their own vehicle. The Claimant was provided with any necessary equipment (such as the Amazon scanner used when parcels were delivered).

   (iii) On a day to day basis, the Claimant received instruction from one of the Respondent's managers.

   (iv) The Agreement states:

   "**2. The Assignment**

2.1 The subcontractor shall carry out the Assignment with effect from the Commencement Date until properly completed using reasonable care and skill and in accordance with services specification as detailed in the letter of agreement.

2.2 The subcontractor shall ensure that all the facts upon which the company makes its decision to offer the subcontractor any services shall be materially correct. Without prejudice to the foregoing, the subcontractor shall ensure that it, and any substitute it utilises, shall have the necessary skills, qualifications and experience required to provide the services. The subcontractor shall, if required by the company provide satisfactory proof[1] its, and any substitute's, skills, qualifications and experience. In the event that the subcontractor does not provide any such proof, the Company shall be entitled (but not obliged) to terminate this agreement immediately by notice.

2.3 The subcontractor agrees to undertake the services to the standard of a reasonably comparable independent person providing the same services.

3. **Subcontractor's obligations**

The subcontractor agrees on its part that it shall:

3.1 not engage in any conduct detrimental to the interests of the company;

3.2 execute the Assignment at such times and/or complete the execution of the Assignment within such period as may be so required by the Company;

3.3 take such steps as may reasonably be practicable to safeguard the health and safety of itself and health and safety of any other person who may be affected by the execution of the Assignment;

3.4 comply with any health and safety and security rules in force at the premises where the Assignment is being executed, only to the extent that they are reasonably applicable to independent subcontractors or customers;

3.5 furnish the Company with any progress reports as to transport and delivery times of the Assignment as may be reasonably requested or as detailed in the Letter of agreement;

3.6 where work permits are required, ensure it and any substitutes have the appropriate and valid work permits required for them to work at the location, or locations, agreed with the company;

[1] [the word 'of' appears to be missing at this point]

3.7 where any part of the Assignment requires the driving of a motor vehicle on the public highway or the premises of the Company, ensure that any substitute carrying out such driving on behalf of the subcontractor shall have full and valid driving licences;

3.8 be responsible for insuring the vehicle meets all legal standards.

3.9 The subcontractor will ensure that all the relevant provisions of the Roads Transport (Working Time) Regulations 2005 and Drivers Hours are adhered to and warranties that it monitors to ensure compliance.

3.10 The subcontractor will meet any contract specific requirements that apply to any assignment as set in the Letter of agreement.

3.11 If you have agreed to provide the services but you are unable to provide that service due to illness or injury you shall notify UK solutions limited on site representative as soon as reasonably practicable.

3.12 The subcontractor will use all reasonable endeavours to achieve the set performance indicators and will accept a deduction from its fee for any penalty in relation to non completion of any assignment with regards to these specifications or where we have to send additional resources to recover any undelivered parcels. Any loss or damage to devices used on behalf of the customer will be recharged to the subcontractor at the purchase price.

3.13 If the subcontractor is found to be in breach of any obligation this will entitle the Company to terminate the agreement with immediate effect and by signing this agreement the subcontractor agrees to forego his right to Notice.

(v) The Agreement goes on to set out the fee payment mechanism by the Respondent to the Claimant following periodic submission of an invoice by the Claimant.

(vi) Clause 4.6 states:

"4.6 The Company shall be entitled to deduct from any amounts due to the subcontractor any amount it is required by law to deduct and shall amount[2] for such amounts to the appropriate authorities."

(vii) Clause 5 places responsibility for tax and national insurance with the subcontractor.

(viii) Clause 10 states:

[2] [presumably intended to be 'account']

"10. Relationship between the parties

10.1 the parties agree and acknowledge that nothing in this Agreement shall constitute the relationship of Master and servant or employee or any partnership between the Company and the subcontractor

10.2 Neither the Company, nor the sub contractor is obliged to provide future work following completion of any Assignments and if any such offer is made, the subcontractor is not obliged to accept it."

(ix) Clauses 11.4 and 11.5 state:

11.4 The subcontractor shall be entitled to utilise a substitute in the performance of the services (send someone in its place) providing the Company is reasonably satisfied such substitute possesses the appropriate skills, qualifications and abilities to perform the services. Where a substitute is utilised by the subcontractor the company shall have no legal or financial relationship with any substitute. The subcontractor will be responsible for all payments made to a substitute, and for ensuring any substitute agrees to provide its services in line with this contract for services. The subcontractor will be responsible for all acts and omissions of its substitutes.

11.5 As a self-employed individual in business on its own account the subcontractors negative performance shall be its own. Neither the company or any of its clients or customers will, or shall retain any rights to, supervise, direct control the manner in which the subcontractor provides its services.

(x) A 'Letter of Subcontractors Agreement' also dated 29 November 2019 set out the commencement date, the route rate and makes reference to a bonus payable if key performance indicators are met amongst other matters.

(xi) The 'Rental / Hire Agreement' is signed by both parties. It refers to an insurance excess of £1,000 and under the heading 'Insurance Declaration it states:

"I the undersigned agree to pay the insurance excess cost of [as above] in the event of any damage or theft claim on this vehicle or any third-party claim made against our insurance policy."

(xii) In a section entitled 'Liability Statement' there is a reference to fixed penalty notices such as the congestion charge, excess parking charges and penalty charges under the road traffic legislation and it goes on to state:

"I also acknowledge that this liability shall extend to any period by which the original period of hiring may be extended. I hereby agreed to hire the above vehicle on the terms and conditions set out herein and the appendix A1 supplied, and confirm that if payment is required with regards to any charges as above my signature below shall constitute authority to debit from any monies owed (on termination of this hire) the total amount due plus any administration charges, hire extensions or additional charges incurred from this rental."

(xiii) At some point during his engagement with the Respondent, the Claimant had been involved in a collision with another vehicle. It was not yet clear where responsibility lay. The matter was in the hands of the respective insurers and not yet resolved. As a result, the Respondent claimed the right to impose a £1,000 charge on the Claimant against payment of the fees due to him. The situation which would follow the future resolution of the matter was unclear. The Respondent suggested that some or all of the £1,000 might be returned to the Claimant in due course – and / or that even if one or other set of insurers accepted liability, there may be an excess payable – which the Respondent believed it could withhold from the Claimant. The Claimant stated that he had not had any clear communication about this from the Respondent or its insurers. The Claimant denied that the Respondent had the right to withhold £1,000 from the amount due to him.

(xiv) Both parties agreed that a document before me entitled 'Departure Agreement' reflected the correct figures. The Claimant was entitled to £17.74 for 'week 03'; and £87.77 for 'week 04' and the return of a deposit of £350 (which related to £50 per week withheld from the Claimant's wages for the 7 week period of his engagement by the Respondent). This came to a total of £455.51. The Respondent claimed to be entitled to set off £1,000 as referred to above – and therefore the Claimant had been paid nothing and the Respondent believes that in fact the Claimant owes £544.49 to the Respondent.

Applicable legal principles

Worker status

10. Section 203 Employment Rights Act States:

"**230 Employees, workers etc**

(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" and "betting 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.

(4) In this Act "employer", in relation to an employee or a worker, means the person by whom the employee or worker is (or, where the employment has ceased, was) employed.

(5) In this Act "employment"—

(a) in relation to an employee, means (except for the purposes of section 171) employment under a contract of employment, and

(b) in relation to a worker, means employment under his contract; and "employed" shall be construed accordingly.

. . ."

11. The elements required to satisfy the statutory definition of a worker under section 230(3)(b) of ERA 1996 are therefore:

(i) There must be a contract between the worker and the putative employer;

(ii) The contract must require personal service;

(iii) The other party to the contract is not the customer or client of any business undertaking or profession carried on by the individual.

12. Part II of the Employment Rights Act 1996 which deals with claims for unlawful deduction from wages, refers to 'workers' rather than the narrower category of 'employees'. Section 13 states:

"13 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.

(2) In this section "relevant provision", in relation to a worker's contract, means a provision of the contract comprised—

(a) in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or

(b) in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.

(3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion.

(4) Subsection (3) does not apply in so far as the deficiency is attributable to an error of any description on the part of the employer affecting the computation by him of the gross amount of the wages properly payable by him to the worker on that occasion.

(5) For the purposes of this section a relevant provision of a worker's contract having effect by virtue of a variation of the contract does not operate to authorise the making of a deduction on account of any conduct of the worker, or any other event occurring, before the variation took effect.

(6) For the purposes of this section an agreement or consent signified by a worker does not operate to authorise the making of a deduction on account of any conduct of the worker, or any other event occurring, before the agreement or consent was signified.

(7) This section does not affect any other statutory provision by virtue of which a sum payable to a worker by his employer but not constituting "wages" within the meaning of this Part is not to be subject to a deduction at the instance of the employer."

13. In relation to the question of whether the Claimant was a worker, I explained during the hearing and prior to hearing the parties' submissions that there had been a number of cases decided at appellate level, which provided me with some guidance. I applied the following principles:

(i) Those who fail to reach the high pass mark necessary to qualify as employees may still qualify as workers. Where there are some factors which point towards employment, it may be possible for an individual to qualify as a worker, even though they do not reach the higher pass mark to qualify as an employee.

(ii) The question of whether or not a contract provides for the performance of personal services is essentially a matter of construction. The tribunal is concerned with construing the contract, rather than with general policy considerations.

(iii) The fact that an individual chooses personally to supply the services is irrelevant; the issue is whether he or she is contractually obliged to do so.

(iv) A limited power to appoint substitutes is not inconsistent with an obligation of personal service. The right or obligation to appoint a substitute will not necessarily mean that there is no obligation on the part of the individual to perform services personally, unless that right to employ a substitute is unfettered.

(v) The degree to which the Claimant is integrated into the Respondent's business may be a relevant factor – but not a determining factor.

(vi) If the dominant feature of the contract is the obligation personally to perform work, that could indicate either employment or worker status. If, on the other hand, the dominant feature is a particular outcome or objective, and the obligation to provide personal service is incidental or secondary, that points away from employment or worker status.

(vii) Mutuality of obligation is a relevant factor – but not a determining factor.

(viii) The existence of a relationship of subordination is a relevant factor – but not a determining factor.

Permitted Deductions

14. The situations in which a deduction can be made from wages are tightly constrained by the relevant legislation.

15. The contractual provision must make it clear that the deduction may be made from the worker's wages. The employer must also be able to demonstrate that the event justifying the deduction has occurred.

16. A contractual provision which is a penalty clause will be unenforceable, and so any deductions that are purportedly made under such a clause will not be 'required or authorised by a contractual provision'.

17. The ‘worker’s contract’ authorising the deduction must be the contractual relationship between the parties for the supply of services. It would not suffice that a liability to the Respondent is contained in some other contract.

Conclusions

18. I have concluded that the Claimant was a worker – and therefore that the Tribunal has jurisdiction to determine his unlawful deduction from wages claim. There was a contract between the parties. It was described throughout as a Self Employed Subcontractor Agreement (it is also described in clause 11.4 as a ‘contract for services’) but I looked at the substance of the relationship between the Claimant and Respondent and the detail of the contract rather than its form. It was an Agreement drafted by the Respondent. There had been no negotiation of terms. The Claimant did not supply his own equipment (although I took into account that he could have supplied his own van). The right of substitution within the Agreement was a limited right constrained by a number of requirements and the dominant purpose of the Agreement was clearly that the Claimant would provide his services personally. The Respondent did not stand as a customer or client of the Claimant. The Claimant’s position was subordinate and dependent vis-à-vis the Respondent. On balance weighing the various factors and construing the contract in light of the evidence before me, I concluded that the Claimant was a worker.

19. I have concluded that the Respondent does not have the right, power or authority under the terms of the Agreement with the Claimant to deduct £1,000 from his pay. I have some concerns that this is a penalty in any event – but more fundamentally, it is not a deduction authorised by the Agreement. It is, if anything, an amount referred to in another Rental / Hire Agreement, which is, by the Respondent’s admission, not integral to the relationship between the Claimant as a driver and the Respondent. In addition, I was not satisfied by the Respondent that it had demonstrated to me that the event justifying the deduction has occurred. I did not have sight of any documentation relating to the accident, nor any means of concluding whether £1,000 was an appropriate figure to deduct.

20. I hasten to add that I do not make any finding as to whether in contract or tort, the Claimant is or is not liable for £1,000 or any other amount claimed by the Respondent. That would be a matter for the civil courts and not the employment tribunal. My finding is merely that this amount cannot be deducted from the Claimant’s pay.

21. I also note that I was unable in the documents before me to see any contractual authority for the withholding of the £50 per week. However that did not concern me today, as the Respondent was not seeking to withhold it beyond the date of termination of the Agreement and had included the cumulative total in the amount due to the Claimant.

22. Therefore the Respondent was not entitled to make a deduction from the wages of the Claimant and the Claimant is due £455.51 from the Respondent.

Employment Judge Allen QC
Date: 2 July 2020