



EMPLOYMENT TRIBUNALS

Claimant: Farzan Haji Khani

Respondents: (1) APG Recruitment Ltd
(2) Credipay Ltd

Heard at: East London Hearing Centre

On: 28 August 2020

Before: Employment Judge Housego

Representation

Claimant: In person

Respondents: Neither Respondent attended, was represented, or send representations.

JUDGMENT

1. The Respondents are jointly and severally ordered to pay to the Claimant holiday pay outstanding at the end of his employment, of £1,330.
2. The Respondents made unlawful deductions from the wages of the Claimant of £696 in respect of sick pay for 2 weeks in July 2019 and throughout his employment of £17.65 a week (a total of £706), stated to be for a management fee and apprenticeship levy.
3. The Respondents are jointly and severally ordered to pay the Claimant £1,402 in respect of those deductions.
4. In total the Respondents are jointly and severally ordered to pay to the Claimant £2,732.

REASONS

Proceeding in the absence of the Respondents

1. The hearing was a CVP hearing notified to the parties in advance. Only

the Claimant attended the hearing. I noted that the Second Respondent ("CrediPay") was added to the claim at a Case Management Hearing on 28 May 2020. That Order was sent to the parties on 01 June 2020.

2. That Order and the claim form was sent to CrediPay on 01 June 2020 with a letter stating that their response had to be received by 29 June 2020. It also stated that the necessary form was enclosed. On 16 June 2020 CrediPay, Second Respondent emailed the Tribunal to say that the ET3 form was not enclosed. The Tribunal did not reply, and CrediPay has not contacted the Tribunal since. The notice of this hearing was sent to the Claimant by email and to both Respondents by post. I checked at Companies House that the address of the CrediPay was correct, and it was.

3. The last contact from the First Respondent ("APG") was from its managing director (Graham Bletchley) who wrote to say that they had sent documents to the Tribunal in February. This is a reference to the Order made at the hearing on 28 May 2020, and sent to the parties on 01 June 2020, in which APG was ordered to send to Mr Haji Khani a copy of the contract said to exist between him and CrediPay, to arrive no later than 11 June 2020, because he did not have one. The only document received by the Tribunal from APG is the ET3. This stated that a copy of the "contract for services" between CrediPay and Mr Haji Khani was attached, but it was not.

4. I decided that I should conduct the hearing in the absence of both Respondents. APG gave no reason for not attending. There is no reason to think that they do not know of the hearing. They had not attended the Case Management Hearing. I find that they had decided not to attend. CrediPay appear to have considered that they had asked for a response form and having done so had no need to do anything else. There is no reason to think that they did not receive notice of the hearing. They were told the date by which a response had to be filed. While it is unfortunate that the Tribunal did not enclose the form a simple internet search "*response to Employment Tribunal claim*" brings up the government website page where the form is there to be downloaded. This is a commercial organisation. They did not ask for a form again as the deadline approached, nor ask for more time, nor (it would appear) take the very simple step of looking for the form, and nor did they respond when they received the notice of this hearing. Again, I decided to proceed in their absence.

Background and claims made

5. The Claimant is from Iran and in March 2019 came to the UK to be with his British citizen spouse. His command of the English language was then limited (and at the hearing he needed a Farsi interpreter). He contracted with the First Respondent ("APG") to work for them as an agency worker. They placed him and he started work on 03 May 2019. While he was at work the Second Respondent ("CrediPay") rang him. They said payment was arranged through them and he needed to sign a document. He said that he would like to speak to them in a break, but they told him that unless he dealt with this in the next five minutes he would not be paid. He downloaded to his phone the document they sent him, and signed it electronically. He did not have time to read it, and could not have done as his English was not then at a level which would allow him to do so. He was never sent a copy of the document, which after signing was not on his phone.

6. Mr Haji Khani was paid hourly and on a shift pattern but was effectively full time. In his claim form he put that he was paid £348 weekly gross and £294 net. In their ET3 APG agreed that this was correct.

7. Mr Haji Khani makes 3 claims: for sick pay for 2 weeks in July 2019, for holiday pay, as he never received any, and for the £17.65 deducted each week as a "management fee and apprentice levy".

8. The Order of 28 May 2020 ordered the Claimant to provide documentation, which he appeared not to have done, but in the (intentional) absence of the Respondents, or any denial by either of them of any of the claims of the Claimant, I decided to rely upon his oral evidence.

9. I heard evidence from Mr Haji Khani who spoke with the assistance of a Farsi interpreter. I accepted his evidence as truthful.

With whom is there a contract?

10. The first issue is who is the correct respondent. APG limited their ET3 to an assertion that:

"The relationship in place means Mr Khani was engaged on a contract for services with CrediPay (a third-party payroll company). Mr Khani was engaged on a contract for services but is employed for tax purposes only. Therefore there is not a requirement for holiday pay/sickness on the contract they are engaged on. The contract states the following:

"2.5 on each assignment where the agency legislation (Chapter 7, part 2 of the Income Tax (Earnings and Pensions) Act 2003 (IT PA) as amended and Social Security (Categorisation of Earners) (Contribution) (Amendment) Regulations 2014) applies the freelance subcontractor will remain working in a self-employed capacity although his tax status will be that of "employed" in accordance with the agency legislation. This will have no effect on his employment status from an employment law perspective or otherwise, which will remain that of a self-employed freelance subcontractor."

Further to this APG is a recruitment agency which helps people like Mr Khani to find work and does not employ them directly. I hope this helps to clarify the way in which we work with Mr Khani".

11. Plainly Mr Haji Khani was a worker (and Credipay's website describes the people they pay as such), and so the statement about holiday pay is incorrect, as workers, whether self-employed or not, are entitled to holiday pay.

12. The clause (and I assume, without finding as a fact, that this is an accurate account of the document, of which there is no evidence) attempts to state that for employment purposes Mr Khani was a self-employed contractor. In truth, Mr Khani was an employee of the agency paid through the mechanism of a third party. He was paid on a PAYE basis. He was employed full time at the places he worked at. He was told what to do and when to do it. Once he accepted a placement he was a member of the workforce at the place he worked. He was in no sense self-employed. It was not a technicality that he was paid on the PAYE basis. He was an employee.

13. APG gave no evidence that might lead to a conclusion that Mr Haji Khani was not their employee. Agencies effecting the mechanics of payment through another company is a commonplace, and does not mean that the person paid is not the

employee of the agency.

14. CrediPay's website states that "*We provide many agencies with pay solutions to keep them compliant and their workers happy.*" They also offer solutions to skilled professionals who wish to be self-employed. Mr Haji Khani's work was as a litter picker and warehouse operative. These are valuable things to do, but he would not fall within that description.

15. CrediPay has not filed an ET3 and so the case so far as they are concerned is an "*appearance not entered*" case. They paid Mr Haji Khani on a PAYE basis, so the starting point is that he is their employee. There is no evidence before me to come to any other conclusion.

16. Mr Haji Khani was an agency worker working for APG. I conclude (and find) that both APG and CrediPay employed Mr Haji Khani. As neither has provided any document or other evidence about their relationship, I find that they both employed him, and are jointly and severally liable.

Sick pay claim

17. The sick pay claim is out of time. However I accept Mr Haji Khani's evidence that he had no idea that he might claim for sick pay until about December 2019, plainly less than 3 months before the claim was lodged (06 February 2020), when a colleague told him. As he spoke little English at the time, and had been in the UK only a few months. I find that the requirements of S23(4) of the Employment Rights Act 1996 are met: that it was not reasonably practicable for Mr Haji Khani to present the claim in time, and that he did so within a further period which I find to be reasonable.

18. I accept Mr Haji Khani's evidence that he was absent as he stated. He claimed £680. The figure should be twice £348, which is £696, and I order the larger sum to be paid.

Holiday pay

19. I accept Mr Haji Khani's evidence that he was not paid for any time when he was away from work. Accordingly whether he took holiday or not is immaterial. He worked for 8 months. The annual entitlement is 5.6 weeks. Eight months is 2/3rds of a year, which is about 3.75 weeks' pay. At £348 a week that is £1305. Mr Haji Khani's evidence was that he had calculated it with exact dates on the government website and had arrived at £1,330. I accept Mr Haji Khani's evidence as truthful, and the website is inevitably going to be more accurate. I order the Respondents to pay the Claimant the sum of £1,330 for holiday pay.

Other deductions

20. There is no evidence provided to me that Mr Haji Khani signed anything to permit deductions. If he did sign something he would not have understood what it was he was signing. I accept Mr Haji Khani's evidence that the deductions were a total of £17.65 weekly and came to £706 altogether. The arithmetic is not entirely clear, as 8 months is about 35 weeks, and that would be about £620, but the rest of Mr Haji Khani's evidence has been arithmetically accurate and in a CVP hearing it is not possible to examine all the payslips. I accept his evidence that this is not an estimate. I order the Respondents to pay the Claimant this sum.

21. Even had Mr Haji Khani signed to agree to deductions, the apprenticeship levy is on employers, not employees, and should not (if that is what it was for) have been deducted even if Mr Haji Khani had signed to agree to deductions.

Totals

22. The deductions from wages are £696 sick pay and £706 is £1402. Adding £1,330 holiday pay brings the total to £2732, and the Respondents are jointly and severally ordered to pay this sum to the Claimant.

23. "Joint and severally" means that the Claimant can pursue either or both APG and Credipay for the whole amount, but cannot get more than £2,372 in total from them.

**Employment Judge Housego
Date 11 September 2020**