EMPLOYMENT TRIBUNALS

Claimant: Mr J Ink

Respondent: Endeavour Recruitment Services Limited

FINAL HEARING

Heard at: Midlands (East) (via CVP) **On:** 7 October 2020

Before: Employment Judge Camp

Appearances
For the claimant: in person
For the respondent: Mr P Judge, Director

REASONS

1. Further to the written Judgment signed on 7 October 2020, this is the written version of the reasons that were given orally on the day for the decision to dismiss the claim, the claimant having asked for written reasons at the end of the hearing.

2. This is a claim for unauthorised deductions from wages; in fact, for non-payment of wages.

3. The claimant was engaged by the respondent, an employment agency of some kind, to work in July and August 2018 for a third party to this claim called Beechwood Joinery, a company which I now understand to be defunct, as a labourer on a building site where a (possibly the) main contractor, and Beechwood Joinery's employer, was another company called Paragon, which is now in liquidation.

4. The dispute between the parties which leads to the claim concerns what date the claimant worked up to and the amount due for whatever work was done. It is common ground, or not reasonably in dispute, that the claimant worked on Thursday and Friday, 26 and 27 July 2018. He worked 15 hours that week – the week ending Sunday, 29 July 2018, which we are calling "week 1". The following week – week 2 – he worked a total of 60 hours. It is agreed that his basic rate of pay was £9.50 per hour. He has been paid for 75 hours work at £9.50 per hour.

5. The claimant's main claim is for payment for work he alleges he did on the site from Saturday 11 to Tuesday 14 August 2018 (weeks 3 and 4). He is also claiming that

whenever he worked at weekends and/or for the hours he did in excess of 40 in a given week he was entitled to time-and-a-half: £14.25 per hour instead of £9.50 per hour. His basic claim (ignoring any claim for compensation which he might be entitled to under section 24(2) of the Employment Rights Act 1996 had I decided the case in his favour) is for the £4.75 difference between his basic hourly rate and time-and-a-half for 20 hours of week 2 – £95 – and for time-and-a-half for the 20 hours he says he worked on 11 and 12 August 2018 – £285.00 – plus 16 hours at the basic rate of £9.50 per hour for week 4 (13 & 14 August 2018) – £152.00 – making the total claimed £532.00.

6. There is also a claim for additional compensation under section 24(2), but we agreed at the start of the hearing that I would deal with that only if and when I decided the case in principle in favour of the claimant.

7. This hearing, although it concerns the equivalent of a County Court small claim, has taken all day, which is a disproportionately large amount of time. We started – or attempted to start (there have been a fair few technical glitches along the way) – at 10 o'clock this morning. We took less than 20 minutes for lunch. And I started giving judgment, only shortly after closing submissions, at 4. I heard evidence on oath from both the claimant and from Mr Judge, who is a director of the respondent company. Neither he nor the claimant had produced a conventional witness statement. There was a document headed "*Statement of the claimant*", with numbered paragraphs, each making a particular point. It has been helpful, and we have gone through it, but it isn't close to being a conventional, narrative witness statement.

8. Both the claimant and Mr Judge gave their evidence-in-chief largely by me asking them questions, and both were cross-examined.

9. So far as concerns Mr Judge's evidence, the respondent's case is based more on the documents than on anything he has direct knowledge of. He was not on site. He does not know whether the claimant worked on the days in question. He relies on what has been provided to him by his client, Beechwood Joinery. What has been provided to him suggests that the claimant was paid everything to which he was entitled. All Mr Judge can really tell me is his interpretation of the documentary evidence and his explanation of the way in which the part of the construction business in which his company operates works.

10. The respondent provides labour to building sites. The claimant was one such labourer, engaged through the Construction Industry Scheme. We have been quite loose about terminology in terms of 'employees' and 'workers' and 'contractors' as we have not had to worry about it, because the respondent accepts the claimant was its worker under the Employment Rights Act 1996 and workers can make claims for wages. I am not sure whether the claimant was an employee (although I would make an educated guess that he wasn't) and one reason I am not sure about this is that no relevant written contract between the claimant and respondent has been put before me.

11. In fact, I am missing quite a lot of documents which I really ought to have and which ought to have been, but have not been, provided by the respondent. Some of them may by mistake been sent to the Employment Appeal Tribunal (where the claimant's case

was for a time), and some of them may have got lost in the ether because of 'lockdown', although as this claim started life in 2018, that ought not to have been a big problem. Whatever the reason, I can only deal with the case on the basis of the evidence put before me.

12. This case is all about the facts and not the law. No one disputes that if the claimant was underpaid for work that he did for the respondent, the respondent made unauthorised deductions from his wages, nor that the burden of proof is on the claimant.

13. There are three issues I have to deal with at this stage of the hearing:

    13.1 how many hours of work, if any, did the claimant do on 11, 12, 13 and 14 August 2018?

    13.2 if he did work on those dates, was he doing it for the respondent or for someone else?

    13.3 is the claimant entitled to be paid time-and-a-half for 20 hours of the 60 he worked in [what we are calling] week 2 and (if he did work on those dates for the respondent) for the hours he worked on 11 and 12 August 2018?

14. The first question is: did the claimant work on 11 to 14 August 2018? There is no exactly contemporaneous documentary evidence from either party showing whether or not he did. I should have the respondent's time sheets. At an earlier hearing, Employment Judge V Butler appears to have taken great pains to get on top of the case. One of the things she did was not to direct the respondent to provide the time sheets for those two weeks as such, but to say that the respondent was going to provide them. By the end of today – I think it was after 3 o'clock by the time it arrived – the respondent sent through a document that purports to be the relevant time sheet for the week beginning Monday, 13 August 2018. The electronic file containing the other time sheet, covering 11 and 12 August 2018, is apparently corrupted.

15. Even if we had had both time sheets, however, and had them weeks or months ago, I am not sure it would have taken matters very much further one way or the other. This is because it is reasonably clear, from the other near-contemporaneous documentation, including, in particular, emails between the claimant and respondent, that the respondent's time sheets for those two weeks did not feature the claimant. The real question is: should they have done, i.e. should the person who filled them in, who was not the claimant and was apparently acting on information provided not directly by the claimant himself but by someone he worked with, have included the claimant on them?

16. In terms of potentially significant non-contemporaneous documentation, there is, from November 2019, an email that was sent by somebody called Joe Fletcher. He calls himself the Site Manager. It seems not to be substantially in dispute that whether he was, technically, the Site Manager or not, he was nominally in charge of the bit of the site on which the claimant was working. What his email of 13 November 2019 says (I note that that is over a year after the events with which this claim is concerned) is: "*Regards to the above mention employee Joss Ink through Endeavor Recruitment on a site for Paragon Interiors. He work on weeks beginning 23 July 2018 and 5 August 2018 with a*

total of 75 hours in total. This was signed off by the Paragon Site Manager. He was released from working on the contract due to him not fulfilling his full work hours and spending too long on dinner and tea breaks. In all he was overpaid for the amount of work he carried out."

17. That is the information provided to the respondent by its client. It is consistent with emails of August/September 2018, in which the respondent was saying to the claimant that it did not have time sheets for weeks 3 and 4 showing him working, that it needed him to get time sheets for those weeks before it would pay him, and that it would pay him as soon as it got them. The respondent's position has been the same since then. The claimant's position has consistently been that he is owed money.

18. In assessing this case, I also look at the surrounding circumstances and I ask myself: why would the respondent not pay if there was a time sheet? As has been pointed out by Mr Judge, it would be in the respondent's best interests to have billed its client for the claimant's services because it would get a percentage cut – indeed, that is how the respondent makes its money. What would be in it for the respondent capriciously not to bill for the claimant's services if it was satisfied that he had provided them?

19. Something else I have thought about is: why would Beechwood Joinery not submit a time sheet in respect of the claimant if he had done the work? There would be nothing in it for them. And a further relevant question – albeit one that provides only weak support for the respondent as one can only speculate so far – is: why would Mr Fletcher (who the claimant has not accused of having something against him personally) send that email if he did not believe that the contents of it were true? Why would he lie on the respondent's behalf? After all, he is the respondent's client, not the other way around.

20. I mentioned earlier that the claimant had consistently been alleging that he was owed money for work done in July / August 2018. However, he has not been consistent in terms of the details of his allegation. Returning to the written record of the preliminary hearing of 1 April 2020 before Employment Judge V Butler, in its relatively detailed Case Management Summary section, the Judge wrote this: "*He (that is the claimant) acknowledges in his ET1 that he was paid for 2 weeks' work, namely weeks commencing 23 July and 30 July 2018. However, the week in dispute is the week commencing 6 August 2018. Mr Ink maintains that he worked on site for Beechwood that week but the respondent failed to pay him.*"

21. I assume she wrote that because that was what the claimant told her his case was. It is not what his case is today.

22. Similarly slightly inconsistent with his case today is something stated in section 8.2 of his claim form: "*Was first paid on 3 August 2018. Joss* [the claimant] *was again paid on 10 August 2018 and should have been paid 17 August 2018.*"

23. I should mention that the respondent paid slightly less than a week in arrears, in that the claimant was paid on 3 August 2018 for the week ending Sunday, 29 July, and was paid on 10 August 2018 for the week ending Sunday, 5 August. Any payment that "*should have*" been made on 17 August 2018 would have covered only 2 out of the 4 days that

the claimant is claiming for today: Saturday, 11 and Sunday, 12 August 2018. It would not have covered 13 and 14 August 2018.

24. What is in the claim form, then, fits with what Judge V Butler wrote to the effect that the claimant was claiming only for what we are calling week 3: the week ending 12 August 2018.

25. Also stated in the claim form is that the claimant: "*received £60 direct from Beechwood Joinery covering 11 to 12 August 2018*".

26. As I have already explained, Beechwood Joinery was the respondent's client, and in turn provided services to the head contractor, Paragon. From the claimant's bank statement, it appears that £60 was paid into his account by Beechwood Joinery on 7 August 2018. That £60 is unlikely to be the £60 the claimant referred to in his claim form, because the latter £60 covered 11 and 12 August 2018.

27. The claimant today explained the £60 payment of 7 August 2018 by saying that it was a reward for working extra specially hard during the weekend of 4 and 5 August 2018, and that he believed he was entitled to overtime – time-and-a-half – for his work that weekend in addition to the £60. I am afraid that that is just not credible. Beechwood Joinery, as a business, would not pay the claimant extra money out of the goodness of its heart. For him to receive money directly from Beechwood Joinery for working on a site that he was being paid to work on by the respondent is odd. It is the kind of thing one would expect to be prohibited by the contracts between the respondent and Beechwood and between the respondent and the claimant. There has to have been in existence a separate deal between the claimant and Beechwood Joinery, on the side as it were, under which the claimant did something specifically for Beechwood Joinery in return for that £60. That is the only plausible explanation for it paying him this extra money.

28. The claimant was, then, paid an additional sum on 7 August 2018 by Beechwood Joinery for some work done, presumably, before that date. I have already noted: that it said in his claim form that he has been paid £60 in relation to the weekend of 11 to 12 August 2018; that in the written record of the preliminary hearing of April 2020, Judge V Butler wrote that the claimant was claiming for work done up to 12 August 2018; that in the claim form it is stated that the claimant was expecting to be paid on 17 August 2018, and on that date he could only have been expecting payment for the week ending 12 August 2018. Until he produced his statement, in August 2020, he didn't appear to be making any claim for work done after that week.

29. Putting all of that together, my conclusions are:

    29.1 it looks as if the claimant may be mistaken when he tells me today that he worked on the site after 12 August 2018. In any event, I am not satisfied that he did;

    29.2 I am also, I am afraid, not satisfied that if the claimant worked on 11 and 12 August 2018, he was working for the respondent. The burden of proof is on him to show that whatever work he was doing was for the respondent. He has failed to satisfy me that anything he did that weekend was done under his (unwritten) contract with

the respondent rather than under the side arrangement with Beechwood Joinery that he clearly had.

30. That means the claim relating to the period after 5 August 2018 fails, leaving just the claim for 20 hours' time-and-a-half for work done, described by the claimant as overtime, during the week from 30 July to 5 August 2018.

31. I asked the claimant early on in the hearing why he felt he was entitled to time-and-a-half for weekends or 'overtime': why any uplift at all and why that uplift rather than something else – double time or time-and-a-quarter, say. The claimant has never suggested that he had any written or oral agreement with the respondent to that effect.

32. The first thing the claimant said in response to my question was that when he was working on site someone called Luke told him he would get extra for working weekends. Luke did not say how much extra and did not mention time-and-a-half specifically.

33. Luke was placed with Beechwood Joinery by the respondent alongside the claimant. He was a Joiner. The claimant has referred to him as the claimant's supervisor, but he clearly was not anyone's supervisor in any formal sense. He was, if you like, senior to the claimant in the hierarchy in that he was 'skilled labour' whereas the claimant was 'general labour' and was paid at a higher hourly rate and he no doubt told the claimant what to do from time to time. But he was not somebody who was authorised to enter into a contract on behalf of the respondent to pay any particular sum for particular work to the claimant. And even on the claimant's case, there was no agreement to pay the claimant any particular amount for weekend work. If Luke did suggest to the claimant that he would get extra for working weekends, then that fits with Beechwood Joinery paying the claimant £60. It is, moreover, consistent with there being a 'side arrangement' with Beechwood Joinery. It does not support the claimant's claim for extra money from the respondent.

34. Even if Luke had had the authority to make contractual promises on the respondent's behalf and had unequivocally said to the claimant that, in consideration for the claimant working at weekends, the respondent would pay him extra money, there would be no legally binding agreement to pay. This is because a promise to pay an unspecified extra amount is insufficiently clear. There is no evidence of a custom and practice to the effect that 'extra' meant time-and-a-half. For there to be a valid contract, the terms of that contract have to be sufficiently clear. There is no evidence at all of any express or implied agreement that the claimant or anyone else should get, specifically, time-and-a-half from the respondent for weekend or 'overtime' working.

35. The second thing that the claimant relies on in relation to the claim for 'overtime' is that on the respondent's time sheets there is provision for different rates for days and nights. I do not follow the claimant's argument here. There is no suggestion that there was any night work as such; nor is there any suggestion on the relevant time sheets that night work was claimed for, let alone that there was an entitlement to a particular rate – time-and-a-half – for working particular hours or particular days; and the claimant is not claiming for nights but for weekends. So this takes the claimant's claim nowhere.

36. Another thing the claimant has relied on is the fact that the respondent's arrangements with its clients – and this can be seen from invoices between the respondent and Beechwood – potentially entitles the respondent to charge extra (but not necessarily time-and-a-half) for supplying labour at weekends and/or at particular times and in particular circumstances. However, there is no basis in the evidence for suggesting that that has any bearing at all on what the claimant was entitled to be paid by the respondent. The respondent can enter into whatever arrangements it likes with its own clients. And those arrangements are separate from, and do not affect, the arrangements it has with the individuals the respondent engages.

37. The claimant has also raised what he sees as inconsistencies in the dates on various documents, in particular as to what day weeks end on. I am afraid, again, that I do not think he has a good point here. There is no relevant inconsistency. In the invoices presented by the respondent to Beechwood Joinery, the week ran from Saturday to Friday. It would be like that because of the particular invoicing arrangements the respondent had with that company. The time sheets relevant to the work that the claimant and those like him did have the week starting on Monday and ending on Sunday. Those time sheets serve a different purpose from the respondent's invoices. There is no rule saying the week has to start on Monday or on Saturday, or on any other day in all circumstances, in connection with everything. It just depends on what the particular arrangement is and what is convenient in the particular circumstances.

38. Even if there were a relevant inconsistency, I do not see how it would logically follow from it that the claimant was entitled to additional money for working at weekends, let alone to time-and-a-half.

39. The final things the claimant referred to were:

    39.1 his belief that there is a right to additional money for working overtime in legislation. When I asked him what legislation, he said the Working Time Directive. I explained to him that the Working Time Directive, whatever else it does, does not give any such right;

    39.2 the fact that he was self-employed and so could charge whatever he liked for his services. If the claimant was truly self-employed – and not, as he was, a worker under the Construction Industry Scheme – he would not have been able to bring a claim in the Employment Tribunal. Putting that to one side, he is right that in principle he could have agreed anything with the respondent that the respondent was willing to agree with him. But he has not been saying that he had an express agreement with anyone acting on behalf of the respondent for him to be paid time-and-a-half for weekends. The only evidence I have seen is of a practice of paying £9.50 per hour to those doing the job the claimant was doing. There is no evidence of any discussions with the respondent about it paying him any specific rate other than £9.50 per hour. And it paid him at that rate for the only work I am satisfied he did for the respondent.

40. In conclusion, the claimant's claim for 'overtime' – for time-and-a-half at weekends – fails.

41. There is one further issue I should address that was raised during the hearing and peripherally raised in the claimant's 'statement', which is dated 29 August 2018. The claimant has referred to his two wage slips from the respondent. They have some deductions on them, for what are described as 'fees', of £7.13 in one and £25.00 in the other. Mr Judge has explained that those deductions are for fees charged by a company called Swift Pay which administers, or does the paperwork related to, the Construction Industry Scheme on behalf of individuals like the claimant. For convenience sake, those fees are paid by the respondent on those individuals' behalf out of their pay. (I am familiar with this kind of arrangement from other cases and from my former professional practice). However, under the Employment Rights Act 1996, the respondent is only entitled to make deductions of this kind if there was an agreement in writing with the claimant to make such deductions. There does not seem to have been such a written agreement.

42. The claimant had an agreement with Swift Pay, evidenced by a registration form he signed. But the form says nothing about these deductions being made by the respondent, and is not an agreement with the respondent anyway.

43. On the face of it, the £7.13 and £25.00 are unauthorised deductions. But before I do anything about them, I have to ask myself whether there is any claim for them before the Tribunal. We discussed this during the hearing. The claimant's position is that the Tribunal should consider them because he has claimed them in his witness statement. But somebody's claim is what is set out in their claim form, subject to any amendment to the claim form that is permitted. This claim is not made, or hinted at, in the claimant's claim form. Given the low value of the claim, Employment Judge V Butler might well have permitted the claimant to add it had he told her he was claiming it, but he did not do that.

44. I do not see how the respondent could possibly have known that that issue was going to come up until it received the claimant's statement. Even then, all it says in the statement is that the pay slips each include a deduction for fees. The claimant did not state that he was asking for re-payment of the amount of these fees as part of his claim. The first time that became clear was when he was cross-examining Mr Judge, which was after he himself had given all his evidence.

45. In my view, the claim for this £30-odd is not before the Tribunal. And had the claimant made an amendment application to add it (which he didn't), I would not have given him permission to amend because such a claim would be well out of time. The fact that the claim is for a small sum of money does not mean I can ignore time limits. If a claim is out of time, the Tribunal has no power to deal with it, however small it is.

46. Something else mentioned in the claimant's statement and which he cross-examined Mr Judge about, and which may be something he wants to make a claim about, is that he is schedule D for tax and that any CIS tax refund must be claimed by or via the respondent. In relation to that:

    46.1 the fact that the claimant may be schedule D does not stop the respondent from making deductions under the CIS scheme. In fact, as I understand it, the respondent is obliged by HMRC to make the relevant deductions;

46.2 if the claimant has overpaid tax and national insurance, he may well be entitled to money back from HMRC, but the respondent has not made unauthorised deductions. Deductions for tax and national insurance are permitted deductions under the Employment Rights Act 1996.

47. Mr Judge for the respondent said that the fees the claimant paid to Swift Pay were partly for Swift Pay's help in claiming back overpaid tax and that the claimant could certainly have gone to them in April 2019 and they would have helped him. I do not know whether that is right, and I do not know what Swift Pay's position would be now. But I can say that an overpayment of tax and national insurance is not an unauthorised deduction or a matter between the claimant and the respondent, but something between the claimant and HMRC (and Swift Pay, if they will assist him).

48. In summary, for all those reasons, the whole of the claimant's claim against the respondent fails and is dismissed.

Postscript

After I gave judgment, the claimant raised two matters.

The first was that he wanted confirmation that Swift Pay would assist him to get a tax refund from HMRC. I explained I could not provide that confirmation and Mr Judge did not give it either.

The second was to ask me whether I was unconcerned about what the claimant saw as clear evidence of fraud that had emerged during the hearing.

What the claimant was referring to was evidence from Mr Judge that: people on construction sites practically never worked full days at weekends and he thought it highly unlikely that the claimant had worked the weekend hours his time sheet suggested he had; it wasn't necessary to pay enhanced hourly rates to incentivise people to work on construction sites at weekends, because there was an accepted general practice in the industry of paying people for weekend work as if they had worked full days when they hadn't.

The claimant took this as Mr Judge admitting to fraud by the respondent. It wasn't; and I told the claimant so and explained why.

The respondent invoiced its client, Beechwood Joinery, on the basis of the time sheets that Beechwood Joinery had itself provided to the respondent. If those timesheets overstated the hours worked at weekends, that was a matter for Beechwood Joinery. Beechwood Joinery cannot have been defrauding itself and the respondent was not defrauding Beechwood Joinery by basing its invoices on information provided deliberately by that company. The arrangements between Beechwood Joinery and its employer, Paragon, were matters for those two companies.

If a practice is understood and accepted by everyone involved, nobody is getting defrauded.

In addition, the claimant disputed that he had worked fewer hours than were claimed on his timesheets, but if the respondent had invoiced Beechwood Joinery for the claimant's services, knowingly on the basis of inaccurate timesheets, for more hours than the claimant had worked, and if that was a fraudulent claim, then the claimant would have been part of that

fraud, as (in this imagined scenario where there was fraud) the claimant would know he was getting paid for hours he had not worked and for which he was not entitled to payment.

EMPLOYMENT JUDGE CAMP

21 October 2020