



EMPLOYMENT TRIBUNALS

Claimant: Mr J Choro Padoh
Respondent: Sussex Partnership NHS Foundation Trust
Heard at: London South (Croydon) by CVP
On: 28 August 2020
Before: Employment Judge Tsamados (sitting alone)

Representation

Claimant: in person
Respondent: Mr A Young, Counsel

This has been a remote hearing which was not objected to by the parties. The form of remote hearing was video by Cloud Video Platform (CVP). A face to face hearing was not held because it was not practical because of the Covid-19 virus.

JUDGMENT

The Claimant's has not suffered unauthorised deductions from wages. His claim is dismissed.

REASONS

Today's hearing

1. Today's hearing was originally intended to be an in person full hearing of the claim listed for three hours. However, it was converted to a video hearing in line with the Practice Direction as to the future conduct of hearings in the light of the COVID-19 pandemic, which was issued by the President of the Employment Tribunals on 18 March 2020 as amended.
2. I conducted the hearing remotely from the Employment Tribunal using the Ministry of Justice's Cloud Video Platform (CVP).

Claim & Issues

1. By a Claim Form presented to the Employment Tribunal on 18 November 2019, following a period of Early Conciliation between 17 October and 17 November 2019, the Claimant brought a complaint of unauthorised deduction from wages in respect of wages which he claimed were owing during a period of suspension from work. The Claimant was employed by the Respondent as a Bank Support Worker from 30 October 2010 onwards.
2. In its Response presented to the Employment Tribunal on 30 October 2019, the Respondent denies the claim on the basis that he was not entitled to be paid during the period of suspension because of the nature of his employment as a Bank Worker.
3. The issues before me were to determine: (a) whether the Claimant had a contractual right to be paid wages between the period 13 August to 25 September 2019 inclusive, and if so, in what amount; and (b) whether the Respondent made a deduction from any wages which were contractually authorised.

Evidence

4. The Respondent provided me with an electronic bundle of documents which consisted of 134 pages and a witness statement from Miss Lauren D'Souza which consisted of 8 pages. At the start of the hearing I confirmed that the Claimant had copies of these documents and that he had no others who wish to rely upon.
5. I heard evidence from the Claimant orally and from Mr Sousa by reference to her witness statement and in oral testimony. I would add that the Claimant had joined the CVP hearing from Sierra Leone.
6. The Respondent had also provided written submissions running to 11 pages and a bundle of authorities running to 77 pages, and a corrected witness statement from Miss D'Souza. These had been sent by email prior to the hearing. I did not have a copy of these documents but during the hearing a further copy was emailed to the Tribunal and forwarded to me for my consideration.
7. I heard submissions from both parties at the end of evidence and then adjourned to reach my decision. When I recommenced the CVP hearing to give my Judgment and Reasons, the Claimant was not present and despite attempts to contact him to join him to the hearing either by video link or by telephone this did not prove possible. After a period of about 15 minutes I proceeded to give my Judgment and Reasons.
8. Given the Claimant's absence I have provided written reasons.

Findings

9. I set out below the findings of fact I considered relevant and necessary to determine the issues that I was required to decide. I do not seek to set out each detail provided to the Tribunal, nor make findings on every matter in dispute between the parties. I have, however, considered all the evidence provided to me and have borne it all in mind.
10. The basic facts relating to the claim are largely undisputed. What is in dispute is the Claimant's employment status and whether he was entitled to be paid during the period he was suspended from work.
11. The Claimant is employed by the Respondent as a Bank Support Worker. He

initially worked for the Respondent from 2004 onwards and then left to go to University. He returned to work for the Respondent on 30 October 2010 and continues to work for them.

12. In the early hours of 30 August 2019, the Claimant was contacted by the Respondent and advised that allegations of assault had been made against him by another Bank Worker. He was further advised that his booked bank shift for that evening was cancelled and that he would temporarily be removed from the Bank Register pending investigation. The Claimant had not booked any further shifts after the cancelled shift.
13. For the sake of completeness I would record that the Claimant attended hospital at 6:30 pm on 30 August 2019 at which he reported numbness throughout his body, he told the doctor attending him that he had a chest infection for which he had been prescribed antibiotics the day before and the doctor diagnosed concussion. The Claimant explained that by this time he knew that his shift had been cancelled and if it had not he would have attended the hospital much sooner that day, been given some painkillers and then have been able to attend work for his shift at 8.30 pm.
14. The Respondent took the action to cancel the Claimant shift and temporarily remove him from the Bank Register in accordance with the Bank Workers Handbook, of which I have been provided with the 2018 edition within the bundle. This allows for a Bank Worker to be removed from the Bank Register and for a fact-finding investigation to be undertaken (at page 128 of the bundle).
15. During the investigation, the other Bank Worker involved in the incident did not respond to any communication from the Respondent. There were no other witnesses to the alleged incident. The Claimant had provided a statement in which he claimed he was the victim of assault by the Bank Worker. As a result of all of this, the Respondent decided to reinstate the Claimant to the Bank Register which took effect as of 26 September 2019.
16. The Claimant had written to the Respondent by letter dated 16 September 2019 requesting to be paid his average weekly wage during the period of investigation (at page 48 of the bundle). He also turned up unannounced to the HR Department where he was told by the Senior HR adviser that because he was a Bank Worker, he was not entitled to be paid during the fact-finding process.
17. The Claimant's position is that he is an employee albeit employed on a zero hours contract and as such the Respondent has no right to suspend him without pay. Given that he usually worked 50 hours a week he has calculated an average figure of weekly pay to which he should be entitled and has applied this to the suspension period of 30 August to 25 September 2019.
18. The Respondent's position is that the Claimant is not an employee and, in any event, he was not entitled to be paid when he did not work. It points to the best evidence of the relationship as being contained within the 2018 Handbook. This contains an express provision allowing the Respondent to suspend a bank worker without payment for shifts (at pages 128-129 of the bundle).
19. The Claimant accepts that he was employed as a Bank Support Worker both in his evidence to the Tribunal as well as within documents within the bundle in which he refers to himself as Bank Staff or Bank Worker printed stated on his pay-slips (at pages 53-64 and 93-100 of the bundle).
20. The Claimant accepts that his contract was zero hours within his Claim Form (at

page 9 of the bundle) and as well as in his letter to the Respondent dated 16 September 2019 (at page 48 of the bundle).

21. Whilst the Claimant worked for the Respondent regularly, there were substantial breaks between his periods of work. The Claimant acknowledged that he would not be paid if he was not working and if he was "travelling", as he put it. Miss D'Souza gave evidence by reference to the details of shift work by the Claimant between 26 September and 27 December 2019 contained within the documents at pages 89-92 of the bundle. This was supported by the pay-slips set out within the bundle which indicate varying hours of work (at pages 53-64 of the bundle). I accepted on the evidence I heard that the Claimant had no set pattern and/or regular hours of work and it was open to him to decide when and whether or not to work for the Respondent. I can see that there are significant. Indeed, there are varying lengths between 3 and up to 12 weeks when the Claimant undertook no work for the Respondent.
22. Whilst neither party has been able to locate the Claimant's initial engagement letter or any contractual documentation going back to 2010, the Claimant accepted in evidence that he would have received an initial engagement letter setting out the terms of the relationship between the parties. He also accepted that this could have included a document such as the Bank Workers Handbook in force at that time. The Claimant further accepted by reference to the 2018 Handbook in the bundle that he had access to the Respondent's intranet where the Handbook was available in electronic format. In addition, the Claimant accepted that if he needed to know about matters to do with the employment relationship which he could not find locally (ie on site), he would look for it in the intranet.
23. From the evidence I heard I accepted the following. The Claimant was subject to control by the Respondent. Whilst it is more relevant to worker status than employee status under the legislation, the Claimant had to undertake work personally and could not send someone else in substitution for himself. I also accepted that the Claimant was obliged to turn up for work when he was booked for a shift. In addition, I can see from his payslips that he is taxed on a PAYE basis and pays National Insurance contributions on that basis.
24. Nevertheless, on the basis of the evidence available to me it is clear that the Claimant is a Bank Worker employed on a casual basis under a zero hours contract and that there is no mutuality of obligation. I do not accept that given the number of years that the Claimant has worked for the Respondent that he was unaware of the nature of this relationship, although his case before me is that there is a difference between offering to work and being accepted for work, and then having that work taken away in these circumstances.
25. The relationship is such that the Claimant indicates when he can work with no obligation to do so and the Respondent indicates whether it will provide the work on those occasions with no obligation to do so. It is only if the work is undertaken that the Claimant can expect to receive payment.
26. I accept that the best evidence of the relationship in the absence of anything else and on the basis of the Claimant's evidence must be the 2018 Handbook which contains an express clause allowing the Respondent to suspend a Bank Worker in certain circumstances and to remove them from the Bank Register pending, in this case, investigation of an allegation made.

Relevant Law

27. Section 13 of the Employment Rights Act 1996

“(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...”

28. Section 230 of the Employment Rights act 1996

“(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.”

29. In order to bring a complaint of unauthorised deduction from wages a claimant must in the very least be a worker in law although they could also be an employee. If the claimant is self-employed he cannot bring a claim for the Employment Tribunal.

30. There is no clear guidance given by case law by which Tribunals are able to distinguish between those who are employed and those who are self-employed. An ‘employee’ is defined simply as someone who has entered into, or works under, a contract of employment (section 230(1) ERA 1996). A ‘contract of employment’ means ‘a contract of service or apprenticeship, whether express or implied, and (if it is express), whether it is oral or in writing’ (section 230(2) ERA 1996).

31. There is no single test which determines whether a person is employed or self-employed although there have been a large number of cases which have tried to establish the approach to be adopted to determine this issue. The usual approach taken is referred to as the multiple test which requires all aspects of the relationship to be considered and then to ask whether it could be said that the

person was carrying on a business on his/her own account (**O'Kelly v Trusthouse Forte plc** [1983] IRLR 369,CA). The multiple test requires the consideration of a number of factors.

32. The first consideration is whether there is a mutual obligation to supply and perform work, ie is the employer contractually obliged to provide work and the person obliged to carry it out? This is the most important single factor. If no such obligation exists, then the person is not an employee (**Carmichael v National Power plc** [2000] IRLR 43, HL).
33. It is also a vital component that the Respondent has a sufficient framework of 'control' over the person, although direct supervision and control is absent in many kinds of employment today (**Montgomery v Johnson Underwood Ltd** [2001] IRLR 269, CA) If the person controls when, where and how he performs the work, this degree of autonomy would suggest that she is self-employed. However, if the employer has the power to tell the person when, where and how to perform, it would indicate that the person is an employee (**Ready Mixed Concrete (South East) v Minister of Pensions and National Insurance** [1968] 2 QB 497).
34. Another factor is that the other provisions of the contract must be consistent with its being a contract of service. We need to consider the purpose of the contract and what the parties intended when they formed it. It is the nature of the agreement and the actual performance of the contract which counts, not simply the label attached to the relationship by the parties.
35. The method and mode of payment to the person could be a relevant factor. If pay is referable to a period of time rather than productivity, this suggests that the person is more likely to be an employee. He is also more likely to be an employee if he gets paid sick leave and is subject to the usual disciplinary and grievance procedures. However, again this is not necessarily conclusive of employee status.
36. The above assumes that it is clear what the contract terms are, but this may not be the case. When deciding what terms have been agreed between the parties, the first step is to look at any written contract. This can be a problem. People sometimes sign pro forma contracts which are designed to prevent them from being an employee, eg by stating that there is no mutuality of obligations or that they have the right to send along a substitute (see below). However, if there is evidence of the true nature of the agreement this should be considered.
37. If the person is an employee then they will also satisfy the definition of worker. But sometimes the problem is to prove that the person is a worker as opposed to self-employed.
38. The definition of worker within section 230 is wider than the restrictive definition of employee. It covers those who have entered into, or work under, a contract of employment and any other contract 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.
39. A worker is different from someone who is self-employed. Self-employed individuals can make their own choices as to what work they do and when and where they do it. They work for themselves. Although the practical realities of getting work mean they must satisfy (often quite stringent) requirements of those who engage their services, ultimately the choices are their own to make (**O'Brien v Ministry of Justice** [2013] IRLR 315, SC).

40. There are 3 key elements to the definition of worker in the legislation: 1) there must be a contract between the individual and the 'employer'; 2) the individual must be required to work 'personally' for the employer; and 3) the individual must not be working for someone who is in reality his/her client or customer. As long as these apply it does not matter if the individual is in business on his/her own account (**Hospital Medical Group Ltd v Westwood** [2012] IRLR 834 CA.)
41. As a general rule a good distinction will be the difference between an individual who markets his/her services to the world in general and someone who works in a subordinate position in circumstances where s/he is integrated into the employer's business (**Windle & Anor v SS for Justice** [2014] IRLR 914, EAT). Although there are some borderline situations where it is difficult to determine whether a person is a worker, recent case law has the effect that the definition should widely apply.
42. It is particularly important that the person is required to do the work 'personally'. Someone who is allowed to send a substitute to work in his/her place (**Premier Groundworks Ltd v Jozsa** UKEAT/0494/08 applying **Express & Echo Publications Ltd v Tanton** [1999] IRLR 367, CA.)
43. It is also important to consider the true contractual position. Although any written contract will be the starting point, it may be possible to prove that the document does not reflect the true agreement between the parties. But this will need strong evidence.
44. For the sake of completeness, the definition of worker excludes people who carry on a business or profession where the other party is a client. This would exclude professionals such as solicitors, doctors and dentists and also sole traders and taxi drivers. There can be marginal situations where the person is not in one of these obvious categories yet is working for more than one 'employer' at the same time. This does not necessarily mean the person is treating the employer as a client. A good indicator in many, but not all cases, is to consider the extent to which the individual is integrated into the employer's business (see **Westwood** above).

Conclusions

45. I considered the submissions of both parties and have taken them into account.
46. In particular I considered the case of **Rice Shack v Obi** UKEAT/0240/17 which the Claimant relies upon as being identical to his case and the Respondent distinguishes for the reasons set out at paragraph 23 of its written submissions.
47. Having considered that case I do not accept that the Claimant can rely upon it in the way that he seeks to. The Employment Tribunal at first instance in that case found that Miss Obi, who was a zero hours contract worker, was entitled to be paid during a period of suspension, this matter having been reached by way of a concession between the parties. However, the point on appeal to the Employment Appeal Tribunal was whether she was entitled to receive her wages for the period of suspension when in fact she had taken another job during that period. The first matter, as to her right to be paid during the period of suspension was not dealt with by Employment Appeal Tribunal. It is dealt with in very little detail within the Judgment and in any event that part of the decision is taken at Employment Tribunal level and so does not set a precedent but is only of persuasive value, if I were able to determine the rationale for that decision. At its highest it was a finding based on a concession by the parties.
48. Having applied the usual tests for determining employment status as set out

above, I conclude that in the circumstances set out in the above findings the Claimant is not an employee but is a worker for the purposes of section 230 of the Employment Rights Act 1996, this giving the Tribunal the jurisdiction to hear his claim of unauthorised deduction from wages.

49. However, I further conclude that the Claimant had no entitlement to be paid during the period of his suspension. The nature of his employment relationship is such that he is only entitled to be paid for work that he has undertaken.
50. The Respondent was entitled to suspend the Claimant from the Bank Register pending investigation of what appeared to be a very serious incident and to prevent the Claimant from booking further shifts until the matter had been resolved. The Respondent was entitled to cancel any pre-book shifts for the same reason.
51. This means that in determining what was properly payable under section 13(3) of the Employment Rights Act 1996 the answer is that the Claimant was not entitled to be paid and so there is no unauthorised deduction from wages. The claim is therefore dismissed.

Employment Judge Tsamados
16 October 2020