EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4105470/2020

Held via Cloud Video Platform (CVP) on 8 January 2021

Employment Judge B Campbell

Mr S J Taylor	**Claimant**
Simple Digital Solutions Limited	**Respondent**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the tribunal is that:

(a) the claims for a redundancy payment and for breach of contract (in respect of notice pay) are dismissed;

(b) it is found that the respondent made an unauthorised deduction from wages contrary to section 13 of the Employment Rights Act 1996 and is ordered to pay to the claimant the sum of £1,348.00 in this respect.

REASONS

The issues

1. This claim arises out of the claimant's employment by the respondent which began on 1 May 2015 and ended on 31 July 2020 by reason of redundancy. The claimant presented a claim to the Employment Tribunal alleging that certain sums of money were due to him for various reasons, detailed below.

2. The parties had made some progress towards resolving the issues as they were set out in the original claim and response forms, and by the time of the hearing they were as follows:

2.1. Was the claimant due the further sum of £633 in respect of statutory redundancy pay, on the basis that a period of service beginning on 1 April 2014 with a different employer should have counted towards his continuous service period with the respondent;

2.2. Was the claimant entitled to a further week's notice pay of £442 gross on the same basis as in 2.1 above;

2.3. Was the claimant entitled to be reimbursed £200 in respect of deductions made from his pay as a float to cover parking charges or fines which he might incur on behalf of the respondent; and

2.4. Was the claimant entitled to any salary for July 2020, his last month of service with the respondent, and if so was he subject to an unlawful deduction of his pay contrary to section 13 of the Employment Rights Act 1996 by not being paid what he was due.

Findings in fact

3. Evidence was heard from the claimant, Mr Vincent Moore who is the Chairman and a director and shareholder of the respondent, and Mr Graeme Magee the respondent's accountant. Each witness was found to be credible and helpful in the evidence they gave. Their frankness in relation to a number of matters also assisted.

4. Below are the findings of fact which were made as they are relevant to the above issues.

5. The respondent's business involves selling IT, printing and reprographics equipment and providing related services to commercial customers. The claimant was employed by the respondent as a Storeman and Driver. Latterly he was based at the respondent's premises at Scotland Street in Glasgow. He reported to an Operations Manager. The claimant had always undertaken substantially the same duties since he began performing them directly for the respondent on 1 May 2015.

6. The respondent's business was affected by the Covid-19 pandemic in March 2020. Mr Moore briefed staff on 24 March 2020 that the respondent's offices would be temporarily closing with immediate effect and staff were placed on furlough under the government's Coronavirus Job Retention Scheme. This included the claimant and he remained on furlough, receiving 80% of his normal pay, from that time until his employment ended.

7. In late June 2020 the claimant received an email from Georgina Moore, the respondent's HR Director asking him to come to a meeting on 1 July 2020. The claimant attended and it was explained to him that the respondent was now considering making redundancies. As an alternative to the commencement of a formal consultation process, the offer of voluntary redundancy was made to him and he expressed a degree of openness, albeit nothing was agreed at that time. Ms Moore emailed the claimant on 9 July 2020, referring back to the meeting and providing some details of how the voluntary redundancy option would work, including a calculation of the sums he would receive in relation to redundancy pay, pay in lieu of notice and accrued holidays. Those amounts were as follows:

   7.1. Redundancy pay – 5 years at 1.5 weeks per year (given the claimant's age being over 41) x £442.31 per week = £3,317.33. This sum would be paid free of deductions.

   7.2. Pay in lieu of notice - £442.31 per week x 5 weeks = £2,211.55. This sum would be subject to income tax and National Insurance deductions.

   7.3. Accrued holidays – calculated at £1,857.69. This sum would be subject to income tax and National Insurance deductions.

8. The claimant replied to Ms Moore's email on 10 July 2020 to ask when the above sums would be paid, and specifically whether they would be paid on 31 July along with monthly salary or on a different date. The respondent pays its employees monthly on the last working day of each month.

9. Copies of the above email exchange was provided to the tribunal by the parties. The email dialogue between the claimant and Ms Moore continued, although copies were not available. On 17 July 2020 the claimant confirmed to Ms Moore by email that he would take the voluntary redundancy option. He said that this was on the condition that he received his salary in full.

10. The claimant's employment ended on 31 July 2020. The respondent paid the claimant the total net sum of £6,555.28 on that date. The respondent's practice of providing monthly payslips was to email them to employees' work accounts. The claimant did not have access to his account from the time he was put on furlough and so was unable to see how the payment he had received had been calculated and which deductions had been made. A copy of the relevant payslip, dated 5 August 2020, was available to the tribunal. It showed that the claimant had been paid the sums referred to at paragraphs 7.1 to 7.3 above, subject to deductions where appropriate, plus £200 referred to as 'Refund of Deposit', which was also subject to deductions. This last entry represented the respondent refunding the claimant for four deductions of £50 each made from his monthly pay in the months September to December 2019 inclusive. Those deductions were made so that the respondent could pay parking fines or similar charges in the event that the claimant incurred them. The claimant had incurred no such charges by the time he left the respondent's employment.

11. It was necessary for the tribunal to look at some matters taking place before the claimant began performing services for the respondent on 1 May 2015. The claimant was employed by the company XLTEC Solutions Limited ('XLTEC') from 1 April 2014 until a date in 2015 which is unclear, but which would have fallen between 1 March and 30 April 2015. The business of XLTEC at the time was similar to the business later carried on by the respondent. Mr Moore was a director and senior employee of XLTEC and owned 50% of its share capital. The other 50% was owned by his brother, Kevin Moore. The claimant's role with XLTEC was Storeman and it was substantially the same as the role he held with the respondent, albeit with

fewer driving duties at the outset. He reported to the same Operations Manager.

12. In the early part of 2015 XLTEC found itself in serious financial difficulty as a result of a company to which it had loaned a substantial sum immediately ceasing to trade. There was no prospect of the debt being repaid. After meetings with its own lender and solicitors around February 2015, XLTEC decided to appoint insolvency practitioners, initially in an advisory capacity. The firm of KPMG were engaged and advised XLTEC to 'get its ducks in a row', to transfer what it could of value out of the company and then wind it up.

13. There was at least one briefing to the staff of XLTEC in relation to what was happening around this time. The claimant's recollection is that Mr Moore met with employees as a group in the company's boardroom. He stated that Mr Moore told staff the company was going into liquidation and business would continue as 'Simple Digital', and that the staff would be transferred over as a whole. He recalls that Mr Moore said there may be a small number of redundancies, but for the majority their roles and conditions would be the same. The claimant said the meeting happened 'well before' 2 April 2015, the date when a letter was sent to him by KPMG as referred to below. Mr Moore cannot remember any details of such a meeting, although he believed that representatives of KPMG had met with staff at a time when he was not present himself. He cannot be clear on the date, although believes it would have been some time in March 2015 given that KPMG were not fully involved before then. The claimant's evidence is preferred in relation to the details of the staff briefing which took place. It is more likely that he would have the more reliable recollection, being more personally affected by what was being announced, and attending the meeting when Mr Moore did not.

14. The claimant received a letter dated 2 April 2015 from KPMG which confirmed that two of its officers had been appointed as provisional liquidators of XLTEC on 26 March 2015. The letter was generic and addressed 'Dear Sir/Madam'. It stated:

"I understand that, prior to our appointment as Provisional Liquidators, your contract of employment transferred from the Company to Simple Digital Solutions Limited."

15. The claimant did not receive any communication around this time indicating that his employment had ended. He received no notice pay or P45. He did not receive anything in writing from either the liquidators (other than the letter of 2 April 2015 above) or the respondent to explain what was happening with his employment. He was given no written confirmation of particulars of employment by the respondent around that time, or on any later date up until the time he left its service. He was paid by the respondent from 1 May 2015 onwards.

16. The respondent purchased the customer contracts of XLTEC, which numbered around 300-350. These were the only or main assets of value. In doing so the respondent was able to take on the role of supplier to the former customers of XLTEC. It took until the beginning of May 2015 to have the contracts assigned, whereupon the respondent began performing them using the same staff that had been involved at XLTEC, including the claimant. The respondent initially operated from the same premises at Cumbernauld as XLTEC had been using, before moving to the Scotland Street premises in November 2015. The claimant worked at the same store with the respondent as he had with XLTEC and his hours, pay and other main terms did not change.

17. By the time of the appointment of liquidators to XLTEC the respondent already existed as a company. Its shares were 100% owned by a Mr Thomas O'Neill. Vincent Moore took on a role only as an employee at that time. Mr Moore acquired the respondent's shares from Mr O'Neill in September or October 2015 via a holding company named Simple Group Holdings Limited. He became a director of the respondent in March 2016.

Analysis and conclusions

Was there a relevant transfer from XLTEC to the respondent

18. The parties are in dispute over what is the correct reference period of continuous service on which to base the claimant's notice and statutory redundancy entitlement. The claimant argues that his service with XLTEC from 1 April 2014 should be taken into account because his contract of employment with that company transferred to the respondent under the Transfer of Undertakings (Protection of Employment) Regulations 2006 (**'TUPE'**). If he is correct then he was due to be credited with a further one full year of service in those calculations, as he has claimed. The respondent says that any potential transfer under TUPE would have involved a transferor which was subject to a type of insolvency proceedings falling within Regulation 8(7), namely *"bankruptcy proceedings or any analogous insolvency proceedings which have been instituted with a view to the liquidation of the assets of the transferor".* The consequence of this would be that some rights normally provided to employees would be disapplied, and service with XLTEC would not count towards continuous service with the respondent.

19. The evidence in this claim suggests that there was a relevant transfer within the meaning of Regulation 3(1) of TUPE. There was an acquisition by the respondent of an undertaking within the scope of Regulation 3(1)(a) which was constituted primarily by its complete list of customer contracts which had material value and its workforce. That was an entity which retained its identity. There was insufficient evidence on which to determine whether there had been a service provision change within the terms of Regulation 3(1)(b) given the large number of customers, or service recipients, involved.

When did any relevant transfer occur?

20. A key consideration in this claim is when any relevant transfer occurred. That can only be on a single date, not over a period of time. On the evidence before the tribunal it is found that a relevant transfer happened on a date after the provisional liquidators were appointed to XLTEC on 26 March 2015. On the balance of probability this occurred on 1 May 2015 when the process of

assigning the customer contracts of XLTEC to the respondent was completed, allowing them to begin dealing with those customers and to start engaging the former employees of XLTEC in that process. Before that point the respondent did not have any legal interest in those contracts and could not perform them or earn payment under them. Also on that date, the claimant and other former employees of XLTEC who were re-engaged began working for the respondent in the sense of attending a workplace and performing duties, for which they were subsequently paid. Before that date this did not happen.

21. The important effect is that a relevant transfer in this case occurred at a time when Regulation 8(7) of TUPE would have applied. A necessary consequence of that is that Regulations 4 and 7 are not engaged. Of particular relevance is that Regulation 4(1) which would have otherwise obliged the respondent to recognise the claimant's contract with XLTEC, including his period of service with that company, is disapplied.

22. The claimant's service with XLTEC did not therefore count towards his period of continuous service with the respondent by virtue of TUPE when it came to calculating his entitlement to notice and redundancy pay in July 2020.

Was there a transfer of the claimant's employment between 'associated employers'?

23. It was necessary on the facts to examine whether the claimant's contract of employment had transferred between 'associated employers' as defined in section 231 of the Employment Rights Act 1996 (the 'Act') in a way which would have obliged the respondent to recognise the claimant's period of service with XLTEC notwithstanding the findings above.

24. Section 231 of the Act states that two legal persons are associated employers if:

> *'(a) one is a company of which the other (directly or indirectly) has control, or*
>
> *(b) both are companies of which a third person (directly or indirectly) has control; and "associated employer" shall be construed accordingly.'*

25. That provision has relevance here when read together with section 218(6) of the Act, which confirms as follows:

> *'218…(6) If an employee of an employer is taken into the employment of another employer who, at the time when the employee enters the second employer's employment, is an associated employer of the first employer—*
>
> *(a) the employee's period of employment at that time counts as a period of employment with the second employer, and*
>
> *(b) the change of employer does not break the continuity of the period of employment.'*

26. Consequentially, it was necessary to assess whether the claimant, when beginning work with the respondent on 1 May 2015, had transferred from one associated employer to another and was entitled by virtue of that to have the respondent give credit for his period of service with XLTEC.

27. The term 'control' as it relates to the relationship between associated companies equates to the majority of voting power by virtue of share ownership. On consideration of whether that factor was present in this case, it could be seen that XLTEC and the respondent were not associated employers at the relevant time. No single individual had majority voting power in respect of XLTEC as its shares were split equally between Vincent and Kevin Moore. In any event, at that time the shares in the respondent were entirely owned by Mr O'Neill who owned no shares in XLTEC at all. Only in September 2015 at the earliest did Vincent Moore acquire the respondent's shares.

28. It is therefore not possible to find on the evidence in this case that the claimant's service transferred between associated companies.

29. It is accordingly found that the respondent used the correct date of 1 May 2015 as marking the beginning of the claimant's continuous service period when calculating his entitlement to redundancy pay and notice pay in July

2020. The claimant is due no further sums in respect of either and his claims in that respect are dismissed.

Claim for payment of salary for July 2020

30. It is found that the claimant was entitled to be paid his salary for the full month of July 2020, but at the 80% rate applicable under the Coronavirus Job Retention Scheme.

31. The claimant's evidence was that he expected to receive this in addition to the specific sums offered as a redundancy package. The emails provided to the tribunal are consistent with that. Ms Moore, who did not give evidence, had described notice pay as 'Pay in lieu of notice' in her email of 9 July 2020. That term by its nature suggests that the claimant would not serve his notice period and instead would receive its monetary equivalent. It was not in dispute between the parties that the claimant's employment came to an end on 31 July 2020. It therefore follows that the claimant remained in employment until that date. There was no mention of him serving any particular part of July 2020 as notice. Had that been envisaged, there would either have to have been confirmation of the balance of the claimant's notice period which would not be served and which would be paid in lieu, or his termination date would have been extended to a date beyond 31 July 2020, by which all of his notice would have been served. Neither of those happened. There was therefore an unlawful deduction from his pay on contravention of section 13 of the Employment Rights Act 1996.

32. The claimant was on furlough for the whole of July 2020 and therefore is awarded compensation equivalent to 80% of his pay, which is the same as he received up until and including June 2020. His annual salary was £23,000 gross and his monthly pay was £1,916.67 gross. He was not a member of an occupational pension scheme. Under the CJRS he would still pay income tax and employee National Insurance contributions. Therefore he should be awarded an amount reflecting the net pay he would have received for the month. This is calculated at £1,348.00, arrived at by making deductions for income tax and employee national insurance contributions from a figure

equivalent to 80% of gross monthly pay. The respondent is therefore ordered to pay the claimant this sum.

Claim in respect of £200 deducted from pay

33. By the time of the hearing it could be seen that the claimant had been reimbursed in July 2020 for the total of £200 previously held back from his salary in four instalments. The claimant agreed that he had received the net sum of £6,550.28 shown in his July 2020 payslip, albeit that he did not have a copy of that when presenting his claim and so could not understand all of the details of how the sum had been arrived at. The payslip shows the £200 being repaid to him net of appropriate deductions and accordingly his claim in this respect is unsuccessful.

B Campbell
Employment Judge

22 January 2021
Date of Judgment

Date sent to parties **27 January 2021**