



EMPLOYMENT TRIBUNALS

Claimant: Mr W Mitchell

Respondent: Magna Asset Management Ltd

Heard at: London Central Employment Tribunal **On:** 25 January 2021 at 10am

Before: Employment Judge Hopton

Appearances (by video):

For the Claimant: In person

For the Respondent: Did not attend

JUDGMENT

The judgement of the tribunal is that:

1. The respondent made an authorised deduction from wages by failing to pay the claimant wages in November. The respondent is ordered to pay to the claimant the sum of **£11,250** gross, being the total payment due to him.
2. The Tribunal does not have jurisdiction to hear the breach of contract claim for expenses under article 3 Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994. This part of the claim is dismissed.

REASONS

1. This was a remote hearing to which the parties did not object. The form of remote hearing was V, video, by Cloud Video Platform. A face to face hearing was not held because it was not practicable due to the coronavirus pandemic and the temporary closure of Victory House.
2. The documents available to me were: the claimant's ET1, a copy of the claimant's last invoice to the respondent, and copies of his expenses. The Respondent did not appear at the hearing to defend the claim, and has not served a response. The

ET1 was served on the correct address, the company is still active and there was no good reason why the respondent did not attend.

Preliminary issue – employment status

3. The claimant claims arrears of pay and unpaid expenses. He told me he was not an employee.
4. The claimant has a private limited company, W J M Construction, through which he invoiced the respondent for his work.
5. A preliminary issue was whether he was a worker under s230(3) Employment Rights Act 1996, otherwise known as a “limb (b) worker” who:
“has entered into or works under.... 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”.

The claimant’s employment terms

6. The claimant was headhunted by Mr Rod Davensac, with whom he has worked many times before. Mr Davensac contacted the claimant in June 2019 and asked him to come to work at the respondent company.
7. The claimant discussed pay and other terms of work with Mr Davensac, but nothing was put in writing. He then had an interview with Mr Oliver Mason, one of the respondent’s two Directors at which he discussed his experience, the role and where the current projects were and where future projects would be. Following this interview, the claimant was engaged as a Development Manager and started work the following week.
8. The claimant therefore had an oral contract with the respondent which intended to create legal relations and which covered his rate of pay, his job title and the scope of his work.
9. The claimant had hoped to be employed directly by the respondent, but it was not willing at that stage.
10. The claimant was told by the respondent to send invoices for payment to: Absolute Lyon Way LLP, C/O Magna Asset Management Ltd, at the respondent’s registered address. He believes that employees were also paid their wages via Absolute Lyon Way LLP.
11. The claimant submits company accounts for W J M Construction to HMRC once a year.
12. The claimant is the only person associated with W J M Construction. He does not employ any other person.

13. The claimant worked solely for the respondent from June 2019 until the respondent terminated the engagement in November 2019. Until termination, the claimant had expected to carry on working for the respondent indefinitely because he was aware the company had a number of other projects in the pipeline.
14. The claimant was not free to work for others whilst engaged with the respondent. His only work was with them.
15. The claimant always performed the work personally, he did not have the right to substitute someone else.
16. The claimant did not take sick leave. He was paid as normal for occasional days off.
17. He told me that there was no premium attached to his rate of pay. He would have expected the same rate of pay if he had been an employee of the respondent.
18. The claimant was required to wear 5 point PPE on site. This was provided to the claimant by the respondent and consisted of gloves, safety glasses, boots, helmet and Hi-Viz. The Hi-Viz had the respondent's company logo on it.
19. Stationary and other office equipment was supplied by the respondent to the claimant. This included pens, diaries and USB sticks, all of which were branded with the respondent's logo.
20. The claimant was the respondent's representative on site. His role was to deal with problems as they arose. He would report back to Construction Director, Rod Davensac and attend meetings with Mr Davensac and other employees. He was treated the same as the employees. He was given instructions by Mr Davensac which he had to follow.
21. The claimant was sent an email terminating his contract in November 2020. This is reproduced in the ET1. It starts: *"Dear Wayne Re Your Contract with M Project Management Ltd"*. It goes on to refer to difficult trading conditions and the need to protect investor funds and creditors. It says *"... your position with the company must be made redundant/terminated, with immediate effect. The company is presently pursuing a corporate and financial restructuring that if successful we will be able to offer your future employment or settle any financial obligations due to you."* It goes on to say that if restructuring is successful *"any loss (sic) salary will be reimbursed."* The tone of the email and much of the language used suggests an employee or worker relationship, and is in accordance with the claimant's statement that he was treated the same as an employee. Although not conclusive, the email therefore gives an indication that the respondent viewed the claimant as a worker.

Conclusion on employment status

22. I applied *Autoclenz Ltd v Belcher and ors* 2011 ICR 1157, SC and the guidance in *Byrne Brothers (Formwork) Ltd v Baird and ors* 2002 ICR 667, EAT. I considered the true agreement between the parties, the degree of control exercised by the respondent, the exclusivity of the engagement and its duration, the method of payment, what equipment the claimant supplied, and the level of risk undertaken.
23. I concluded that, although there were a number of elements that made it possible the claimant was not a worker, such as that he needed to send an invoice via his company in order to be paid, and that his company files accounts with HMRC, on balance, the factors that suggests he was a worker outweigh those that suggest he was not. Specifically: he was required to perform work personally and there was no power for him to substitute another; he was not free to work for others whilst engaged with the respondent; he was required to wear company branded clothing and use other company equipment; he was paid the same as an employee would have been paid in his position and did not receive a higher amount due to company overheads; he was paid for occasional days off; at the start of his engagement the claimant anticipated his work for the respondent would last indefinitely. The claimant's degree of dependence on the respondent was essentially the same as that of an employee.
24. Regarding the oral contract between the parties, from the evidence available – which was essentially that the claimant had a chat with two representatives of the respondent and agreed he could start work the following week, and taking into account *Autoclenz* and the relative bargaining power of the parties, I concluded that the contract was with the claimant personally rather than W J M Construction.
25. The only difference between the claimant's engagement and that of the respondent's employees was that he invoiced the respondent in order to be paid, and he did not have a written contract of employment. In all other respects he was treated as a directly employed. The respondent was therefore not a client or customer of any profession or business undertaking carried on by the claimant (s230(3) ERA 1996). The seemingly triangular relationship between the claimant, the claimant's company and the respondent was artificial and for pay and tax purposes only. The reality was that the claimant worked directly for the respondent.
26. I therefore concluded on the balance of probabilities that the true agreement between the parties was that the respondent had a direct legal relationship with the claimant for personal service, rather than a legal relationship with the claimant's company, and that the claimant was a "limb b" worker under the statutory definition in s230(3) ERA 1996.
27. I considered whether the claimant was an employee, and concluded he was not because of the two distinctions mentioned above (regarding written contracts of employment and the method of payment of wages), and because he told me he was not an employee. I took into account the lower boundary for worker status referred to in *Byrne Brothers*. As the claimant is a worker, he is able to bring a claim for unlawful deduction from wages under s.13 ERA 1996.

Unlawful deduction from wages

28. The claimant was paid as normal until November. He referred me to an invoice he had sent the respondent on 25 November 2019, which has not been paid. This lists his wages as £11,250. This is the net amount owed to the claimant.

Breach of contract – unpaid expenses

29. The claimant is not an employee. The tribunal therefore does not have jurisdiction to hear his breach of contract claim for unpaid expenses as it is not a claim that may be heard under article 3 Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994.

Employment Judge Hopton

_____25th January 2021_____

Date

JUDGMENT & REASONS SENT TO THE PARTIES ON

02/02/2021..

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FOR THE TRIBUNAL OFFICE