



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4100180/2020

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Held via telephone conference call on 17 July 2020

Employment Judge L Doherty

10 **Ms C Sikowski**

**Claimant
Represented by:
Mr A McKenzie -
Friend**

15 **Liquid Friday Ltd**

**Respondent
Represented by:
Mr W Lane -
Solicitor**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Tribunal does not have jurisdiction to consider the claimant's claim under Section 13 of the Employment Rights Act 1996 (the ERA), which is excluded by the provisions of Section 13(4) of the ERA.

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REASONS

1. The claimant presented a claim under Section 13 of the ERA on 13 January 2020. The claimant was resisted on the basis of the Tribunal did not have jurisdiction to determine the claim, as the claim fell within the exceptions provided for in section 14 (3) of the ERA. A Preliminary Hearing (PH) was fixed to determine this preliminary issue.
2. Mr McKenzie appeared on behalf of the claimant, and Mr Lane appeared for the respondents. The hearing took place virtually by way of the HMC TS video cloud platform.
3. Both sides lodged documentary productions, and the claimant give evidence on her own behalf.

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4. There was a preliminary issue at the commencement of the hearing. Mr McKenzie sought to add Sanctuary Personnel Limited (Sanctuary) as a second respondent to the proceedings. He explained that Liquid Friday Ltd is an umbrella company. Sanctuary obtain the contracts, and then passes them to Liquid Friday. In the claimant's case she commenced employment with the respondent's in or around January or February 2019. Her employment with them came to an end in August/September 2019, when she again became employed by Sanctuary. Mr McKenzie explained that one of the factors which underpins this case is that the respondents deducted UK tax and national insurance from the claimant for a period when she was working in Guernsey, when they should not have done so. He explained that Sanctuary did not make deductions of UK tax and national insurance when the claimant commenced her employment with them, although he went on to explain that they had commenced doing so in February 2020.
5. This claim was presented to the Tribunal in January 2020 and therefore it is only matters which precede the date of presentation of the claim which are before the Tribunal. On that basis, it did not appear to the Tribunal consistent with the overriding objective in the Tribunal Rules to sist Sanctuary as a second respondent to the proceedings at this stage, as on the face of it they are not a party who are potentially liable for the claim which is currently before it.

Findings in Fact

6. The claimant was offered a contract of employment with the respondents in around January 2019 (page 45-58 of the Respondent's bundle of documents).
7. In terms of the contract of employment, the claimant was paid an hourly rate of £38.50 per hour. The claimant received a document from the respondents headed 'Take Home Pay Illustration' (page 64 to 66 of the respondent's bundle). The document stated that it provided a breakdown of the claimant's estimated take-home pay based on information which she had provided the respondents. Take-home pay was estimated at £908.68, based on a 35 hour working week and a charge out rate of £38.50 per hour.

8. The claimant commenced working in around February 2019. Her place of work was Guernsey. She regularly worked more than 35 hours per week. The claimant was paid less than she expected she should have been paid. The claimant received payslips from her employer, which she found confusing and difficult to understand. Wage slips are produced at pages 67 to 84 of the Respondents bundle. The claimant contacted the respondents querying what she was paid, and was told to look at the advice which was provided online. The claimant was unable to do this as she did not have access to the Internet.
9. Throughout her employment with the respondents, the respondent's deducted UK tax and National Insurance from the claimant's wages, which was paid to the UK Inland Revenue.
10. The claimant received a statement from the States of Guernsey Revenue Service on 12 August 2019 (page 85 of the respondent's bundle) which identified tax which was due to them. The claimant paid this tax to the States of Guernsey Revenue Service.
11. On 7 June 2019 the States of Guernsey Human Resources Department wrote to the claimant advising, among other things that accommodation had been allocated to her, and that the cost of that would be hundred and £188 per week.
12. The letter stated: *'Please note your agency will be invoiced for your accommodation but you will be expected to pay this cost to them directly'*.
13. The respondents made deductions in respect of the accommodation costs of £188 per week from the claimant's wages.

Note on Evidence

14. There were no material issues of credibility or reliability in relation to the evidence given by the claimant.

Submissions*Claimant's Submissions*

15. Mr McKenzie referred the Tribunal to Tolley's Revenue Law on Double Taxation. He submitted that HMRC did not hold sway on Guernsey. The deductions made in respect of HMRC tax and national insurance were illegal.
16. Mr McKenzie submitted that the respondent's position that the Tribunal lacks jurisdiction to consider this claim was incorrect. It does have jurisdiction to consider the claim, and the problem relates to the claimant's treatment by the respondents for the purposes of tax. She should not have been subjected to double taxation. It was relevant that when the claimant commenced employment with Sanctuary, they did not deduct employers' tax and national insurance in respect of the later part of the Guernsey contract.
17. Mr McKenzie submitted that the respondent had obtained expensive legal advice on the taxation position, which advice he submitted was wrong. The respondents misapplied the 91 day rule. As has been advised to the respondents, who claimed to have legal advice, the 91 day rule of continuous employment on the Island does not apply. The 91 day rule states that continuous employment on the island means local tax default rules apply, as was the case with the claimant. The respondent's failure to grasp that this advice was based on aggregate days worked, not continuous days worked, which in the claimant's case was significantly more than 91 days on a continuous basis.
18. The claimant had received payslips which were confusing, particularly around the deductions of £188 in respect of accommodation costs, including how this was dealt with for tax purposes.
19. The claimant had never earned the amounts identified in the Take Home Pay Illustration despite the fact that she had regularly worked in excess of 40 hours per week

Respondent's Submissions

20. Mr Lane for the respondents submitted that there was a jurisdictional issue, and that the Tribunal lacked the jurisdiction to consider this claim in terms of section 14 (3) of the ERA.
- 5 21. Mr Lane understood that the claimant's claim comprised essentially of three elements. The first was a complaint that the respondent subjected the claimant to double taxation, specifically, UK and Guernsey taxation. The second was that a complaint that the respondent rendered the claimant unable to access various expenses and allowances, and thirdly, a complaint
10 that the respondent unlawfully deducted rental payments from the claimant's wages.
22. Dealing firstly with the double taxation point, Mr Lane submitted that it was agreed between the parties that UK income tax had been deducted in line with the PAYE legislation. There was no challenge to the amount deducted,
15 and that was the amount calculated by HMRC, rightly or wrongly. That gave rise to section 14 (3) of the ERA. Mr Lane submitted the Tribunal does not have jurisdiction where amount is deducted by a public authority. The Tribunal does not have jurisdiction to look behind HMRC's calculation of the amount deducted. That has to be challenged to HMRC itself. The respondent's
20 deducted UK tax, which they accounted for to HMRC, and it is out with the Tribunal's jurisdiction to hear a challenge to those sums deducted.
23. Mr Lane submitted that the position in relation to the Guernsey tax was that a demand was issued by the Guernsey Revenue. The claimant paid that tax directly to the Guernsey Revenue, and therefore those sums clearly fall out
25 with the scope of a Section 13 claim.
24. Mr Lane submitted that there appeared to be a complaint about the manner in which the claimant's employment was structured, which meant she was unable to claim allowances, but this again was not a matter which could be the subject of a complaint and that section 13 of the ERA.

25. In relation to the deduction of £188 in respect of rent, it was accepted by the claimant that she had received a letter from the States of Guernsey Human Resources service confirming the costs to her of accommodation on Guernsey; that her agency would be invoiced for the accommodation costs and she was expected to pay the costs directly. On that basis there could be no illegal deduction in respect of the costs of accommodation of £188 per week.

Consideration

26. Section 13 of the ERA provides;

10 “(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 the relevant provision of the workers contract, or*

15 (b) *the worker has previously signified in writing his agreement or consent to the making of the deduction.”*

27. Section 14 of the ERA provides;

(1) *Section 13 does not apply to deduction for workers’ wages made by his employer for the purpose of the deduction is reimbursement of the employer in respect of –*

(a) *an overpayment of wages, or*

(b) *an overpayment in respect of expenses incurred by the worker in carrying out his employment made for any reason by the employer to the worker.*

25 (2)

(3) *Section 13 does not apply to a deduction from a workers wages made by his employer in pursuance of a requirement imposed on the employer by a statutory provision to deduct and pay over to a public*

authority amounts determined by that authority as being due to from the worker if the deduction is made in accordance with the relevant dermination of that authority.

28. There was no clear identification from terms of the claim lodged as to what
5 sums exactly were said to be illegal deductions from wages. The Tribunal understood however the claimant in general terms identified double taxation, and deductions made in respect of rent of £188 as being illegal deductions.
29. The claimant complains that she was subjected to double taxation, being
10 taxed both under the UK, and the Guernsey tax regimes. Mr McKenzie referred the Tribunal to Tolley on Tax, and made submissions as to why the respondent's treatment of the claimant for the purposes of tax was incorrect, and could not be sustained. This was particularly so he submitted as they had misapplied the rules in terms of the claimants working, the claimant having worked more than 91 consecutive days. When she was subsequently
15 employed by Sanctuary, they did not subject her to double taxation.
30. The ability of this Tribunal to determine a claim of unauthorised deductions from wages, is determined by statutory provisions of the ERA, including sections 13 and 14, of that Act.
31. Section 13 of the ERA creates the right not to suffer an unauthorised
20 deduction from wages. Section 14 (3) makes it clear that section 13 does not apply to the deduction made by an employer in pursuance of a requirement imposed on the employer by a statutory provision to deduct and pay over to public authority amounts determined by the authority as being due. That exception covers PAYE tax and national insurance contributions, and
25 therefore amounts deducted in respect of UK tax and national insurance are caught by the section 14 (3) exception. That is the case notwithstanding the fact that the claimant may have been treated differently for tax purposes by the respondents and Sanctuary. It is not open to this Tribunal to examine the rights and wrongs of the claimant's treatment for the purposes of tax. This
30 Tribunal is not in a position to offer any comment on that, and it is a matter which the claimant must pursue via other routes.

32. In terms of the tax which the claimant paid directly to the Guernsey Revenue Service, it is not suggested that any deduction was made from her salary in respect of this such as would fall within the ambit of section 13 (1), and the Tribunal has no power to consider a complaint about sums paid directly to the Guernsey Revenue service by the claimant.
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33. The Tribunal considered the position relation to deductions made of accommodation costs of £188. The Tribunal was satisfied the claimant had a liability to pay States of Guernsey Human Resources £188 per week in respect of accommodation costs while in Guernsey as assessed by that authority. It was satisfied that the States of Guernsey Human Resources Department had advised her that she was responsible for these accommodation costs, and that she would be expected to account for accommodation costs directly to the respondent, whom they invoiced. In the circumstances the Tribunal was satisfied that the deduction made in respect of accommodation costs was a deduction in respect of an amount determined by a public authority as being due by the claimant, and therefore the Tribunal's jurisdiction to consider any complaint in relation to this is excluded by the terms of section 14 (3).
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34. Mr Lane made submissions about a potential complaint before the Tribunal about the manner in which the claimant's employment was structured with the respondent. In the event it is intended that there is a complaint before the Tribunal about the manner in which the claimant's employment was structured which prevented her from claiming from claiming allowances which she considered should have been available to her, that does not comprise a claim under section 13 of the ERA, or claim which this Tribunal has the power to consider.
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35. On that basis the Tribunal concluded it does not have jurisdiction to consider the claim under Section 13 of the ERA.

5 Employment Judge: L Doherty
Date of Judgment: 20 July 2020
Entered in register: 23 July 2020
And copied to parties

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