



EMPLOYMENT TRIBUNALS

Claimant: Mr Halloway Churchill

Respondent: True Trade Limited

Heard at: London Central Employment Tribunal **On:** 7th June at 10am

Before: Employment Judge Hopton

Appearances (by video):

For the Claimant: Ms Miller (Counsel)

For the Respondent: Mr M Frey (Chairman and CEO of True Trade Holdings) and Mr J De Pietro (CEO True Trade Limited) assisting Mr Frey

JUDGMENT

The judgment of the tribunal is that:

1. The respondent has made an unlawful deduction from the claimant's wages and is ordered to pay to the claimant the net sum of **£54,641.38** in respect of the amount unlawfully deducted.
2. The respondent failed to provide a written statement of particulars of the claimant's employment as required by section 1 of the Employment Rights Act 1996. The claimant is awarded four weeks' pay amounting to **£2,100** gross.

WRITTEN 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.
2. Written reasons were requested by the respondent, following oral judgment at the hearing.

Preliminary matters

3. At the start of the hearing at 10 am, the only parties present were the claimant and his representative, Ms Miller. The joining instructions for the hearing had been emailed to the respondent. Based on the respondent's lack of engagement with the claim (not submitting a response and not following any of the tribunal orders regarding preparation for the hearing) it appeared unlikely that a representative from the respondent would attend, and the hearing started at 10am. However, at around 10.13am, Mr De Pietro appeared for the respondent. He advised the tribunal that Mr Frey was attempting to join but was having technical difficulties. The tribunal adjourned until 10.30am to enable Mr Frey to join the hearing.
4. The respondent had not submitted an ET3 response form. It seems that the respondent's office address may have changed in between the ET1 being submitted by the claimant and served by the tribunal. However, it is reasonable to expect that the respondent would have organised mail forwarding from a previous address and the respondent was in any event fully aware of the claim and its progress, due to the claimant's representatives forwarding the notice of claim to the respondent by email, and including the respondent in all their correspondence with the Tribunal.
5. Before the respondent joined the hearing, Ms Miller alerted me to an email from the respondent, sent on Friday 4th June, requesting a postponement of today's hearing due to the limited internet and telephone access at Mr Frey's address in upstate New York. The email suggested a later date would enable Mr Frey to return to Long Island where communications were easier, and a later time would make the time difference easier to manage.
6. I considered this application to postpone. I took into account the *Selkent* principles, the overriding objective and the balance of injustice and hardship to the parties. The application to postpone was made very late – on the working day before the start of the hearing, despite the respondent having been aware of the claim and of the hearing for some weeks before. As no ET3 had been presented, under section 21 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, the respondent would only have been allowed to participate in the hearing to the extent permitted by the Tribunal in any event. A postponement at this stage would have further delayed resolution for the claimant following his termination date of 14th February 2020, over a year ago. I concluded that in all the circumstances, there would be more detriment to the claimant in permitting the application than detriment to the respondent by refusing it. The application to postpone was therefore refused. After this decision, the respondent did in fact join the hearing, despite some technical difficulties, so there was, in practice, no detriment to the respondent.

Procedure, documents and evidence heard

7. I was referred to the claimant's bundle of 125 pages, and a witness statement from the claimant numbering 28 paragraphs.
8. I asked the claimant some questions, in response to which I heard oral evidence from him. I did not permit the respondent to cross examine the claimant given its failure to defend the claim. However, I did allow the respondent to make submissions at the end of the hearing.

Claims and law

9. The claimant claims unlawful deduction from wages under section 13 Employment Rights Act 1996:

s.13(1) An employer shall not make a deduction from wages of a worker employed by him...

(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.

10. In order to claim under s.13, the claimant must show himself to be a worker of the respondent 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".

11. The claimant claims to be an employee under s230 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.

12. The claimant also claims a payment under s.38 Employment Act 2002 for failure to provide a statement of written particulars as required by section 1 Employment Rights Act 1996, which requires the employer to give the worker a written statement detailing certain conditions of employment:

s.38(3) EA 2002: if in the case of proceedings to which this section applies –

(a) the employment tribunal makes an award to the [a worker] in respect of the claim to which the proceedings relate, and

(b) when the proceedings were begun the employer was in breach of his duty to the [a worker] under section 1(1) or 4(1) of the Employment Rights Act 1996...

the tribunal must, subject to subsection (5) make an award of the minimum amount to be paid by the employer to the worker and may, if it considers it just and equitable in all the circumstances, increase the award by the higher amount instead.

Facts and conclusions

13. These findings are confined to the facts relevant to the legal issues.

14. The respondent business is foreign exchange and CSD brokerage. It is a company authorised by the FCA. True Trade Holdings is the parent company of True Trade Limited.
15. The claimant was initially engaged as a contractor to True Trade Limited under a consulting agreement, undated, but effective as of January 15th 2019. The claimant gave evidence this was effective for 3 months.
16. At a shareholders meeting in New York on the 20th May 2019, the claimant was voted in as CEO of True Trade Limited. There is an email in the bundle confirming a contract was in the process of being drafted regarding this appointment. This includes very brief details of the agreement between the parties relating to the claimant's appointment as CEO, listing the claimant's functional responsibilities as: CEO, Head of Compliance and Head of Sales, his base compensation as £15,000 GBP / Month, and brief details of sales compensation.
17. Mr Frey made it very clear that he does not consider that the claimant had an employment contract at all, and that no one was employed by True Trade Limited.
18. I accept the claimant's evidence on his employment status. He was under the control of the respondent, the respondent paid his income tax and national insurance. The claimant did not have the power to substitute another to undertake his work. He took phone calls with Mr Frey at inconvenient times, for example late on Christmas Eve and a long phone call on Boxing Day, which interrupted family celebrations. I accept the claimant's evidence that he would not have taken those calls if he had not been under the control of the respondent. I also accept his evidence that the FCA would not have accepted him as an authorised person and CEO, had he not been an employee. Taking into account also that the consulting agreement with the claimant was with True Trade Limited, the importance of the FCA requirements regarding being an employee referred to by the claimant, and the fact that none of the emails refer to the claimant not being an employee, which would be an important point for the respondent to clarify, I have concluded that the claimant was employed by True Trade Limited. There was an oral contract, backed up with some written details. The written contract was said to be on its way on a number of occasions, although it was never sent to the claimant. I conclude that this was an employment contract.
19. The claimant was also a worker. He had a contract with the respondent to do work solely for the respondent and was available to the respondent at unsociable times to perform that contract. He did not have a right to substitute another to do his work. True Trade Limited was not a client of his, he was personally undertaking work for it directly.
20. The claimant was due to be paid £15,000 per month under his contract. He worked as required under the contract. He was underpaid on some occasions and not paid at all on other occasions.
21. The respondent submitted that the claimant had not filed reports or been in the office to oversee other employees. The respondent's submission essentially was that the claimant had not done a good job, and that he had caused the respondent to suffer loss, so it should not have to pay him. The respondent did not ask the

tribunal to look at any evidence on this point and the point was unable to be put to the claimant as it was made during submissions. I was referred by the claimant to contemporaneous emails and text messages that demonstrated he had consistently asked to be paid and that the respondent had frequently said it had or would wire the money to him. I find that the claimant was working as CEO and for the hours expected of him. In the period leading up to the claimant's resignation there was a considerable amount of correspondence between the parties about pay or lack of pay. If the respondent had had genuine concerns about the claimant's performance, I find it would have raised these with the claimant consistently in the email and text discussions about pay. The respondent's failure to pay the claimant was therefore not connected to his performance. In any event, performance concerns are not relevant to the question of whether the claimant should be paid, as he was working as required under the contract, so entitled to be paid. Having read and listened to the claimant's evidence and seen the relevant documents in the bundle, including the schedule of loss, and in the absence of any contrary evidence, I find the respondent made an unlawful deduction from the claimant's wages.

22. The claimant therefore suffered a deduction from his wages in breach of section 13 ERA 1996. He is owed the full amount stated in the schedule of loss for unpaid wages. The schedule of loss uses net figures and the amount due is therefore **£54,641.38 net**.
23. Regarding the claimant's application under section 38 Employment Act 2002, no written statement of particulars as required by section 1 ERA 1996 was provided to the claimant. As the claimant has been successful in his claim for unlawful deductions from wages, I am therefore required to award the minimum amount of two weeks' statutory pay. I accept the claimant's submission to award the maximum amount of four weeks' statutory pay. I consider this just and equitable due to the long running failure of the respondent to provide such a statement, despite the claimant's repeated requests for the same. The claimant is therefore due **£2,100 gross** under this head of claim.

Employment Judge Hopton

_7th June 2021

JUDGMENT & REASONS SENT TO THE PARTIES ON

28/06/2021..

FOR THE TRIBUNAL OFFICE