EMPLOYMENT TRIBUNALS

COVID-19 Statement on behalf of Sir Keith Lindblom, Senior President of Tribunals

This has been a remote hearing which has been not objected to by the parties. A face-to-face hearing was not held because it was not practicable and all issues could be determined in a remote hearing. The documents that I was referred to comprised of a bundle of documents from the Claimant.

Claimant		**Respondent**
Mr Amir Jafar Gholi	v	Studio 137 Limited

Heard at: Reading (via CVP) **On:** 9 July 2021

Before: Employment Judge Smeaton

Appearances:

For the Claimant: In person (with the assistance of Ms Jefs, his sister)
For the Respondent: Mr Bhagat Singh Lotay (director)

RESERVED JUDGMENT

1. The Respondent has made an unauthorised deduction from the Claimant's wages contrary to Part II of the ERA 1996 and is ordered to pay the Claimant the net sum of £3,165.

REASONS

Introduction

1. The Claimant, Mr Gholi, commenced working for the Respondent on 29 June 2020 as a Production Manager/Cabinet Maker. He worked until 22 July 2020, when he was told that his services were no longer required.

2. By a claim form dated 15 November 2020, the Claimant brought a claim against the Respondent and another company (Kings Designs Limited) for unauthorised deductions of wages ("UDW") (Part II ERA 1996). In the ET1, box 10.1 was ticked indicating that the Claimant wished for a copy of the form to be sent to the relevant regulator in respect of a protected disclosure claim. No particulars of such a claim were given.

3. The Claimant raised various complaints in his claim form about conduct of the Respondent and, in particular, regarding alleged breaches of the Companies Act 2006. I explained to the Claimant at the hearing that the Tribunal does not have jurisdiction to hear such complaints. The Claimant also claimed for injury to feelings, the return of tools/equipment left at the Respondent's premises and the cost of purchasing a laptop, printer and paper in preparation for this claim. I also explained to the Claimant that the Tribunal does not have the power to make such orders.

4. By order dated 30 November 2020, the claim against Kings Designs Ltd, was rejected. The Claimant had not complied with the requirement at rule 10(1)(c) of the Employment Tribunal Rules of Procedure 2013 since no early conciliation number was provided in respect of that respondent. I note, in any event, that Kings Designs Limited was dissolved prior to the date on which the Claimant maintains he was employed by them.

5. The Respondent responded to the claim on 23 December 2020. In summary, the Respondent maintains that the Tribunal has no jurisdiction to consider the claim because the Claimant is a self-employed contractor.

<u>The hearing</u>

6. The final hearing took place via CVP over one day during which I heard evidence from the Claimant and, on behalf of the Respondent, from Mr Lotay (the Respondent's Director).

7. Both parties appeared unrepresented. The Claimant was assisted by his sister, Ms Jefs. He gave evidence with the assistance of a Farsi interpreter.

8. I did my best to ensure a level playing field between the parties and a fair hearing by asking such questions of both the Claimant and Mr Lotay as I considered pertinent to determining the issues I had to decide. I took care to ask open questions and not to lead or cross-examine either individual.

9. I was provided with a bundle from the Claimant comprising 44 pages. I was also provided with an amended bundle comprising 42 pages. The only difference I could identify between the bundles was to the introduction/narrative document at the beginning of the bundles. The Respondent did not submit any documents in evidence.

<u>The claim</u>

10. The matter was listed for a final hearing to be heard over three hours.

11. At the outset of the hearing, and having considered the Claimant's bundle of documents and amended bundle of documents, I outlined the claims with the parties as I understood them to be as follows:

    (a) a claim of automatic unfair dismissal (s.103A ERA 1996); and
    (b) a claim for UDW (s.13 ERA 1996).

12. Neither party suggested that my understanding was incorrect. I acknowledge,

however, that neither party was legally represented.

13. Upon considering the file further after the hearing, it became clear to me that in fact the Claimant had brought a claim for UDW only and did not have permission to bring a claim for automatic unfair dismissal, as referred to in his bundle of documents. The claim for automatic unfair dismissal (relying on s.103A ERA 1996) was not raised until the Claimant lodged his bundle of documents with the Tribunal in May 2020.

14. Accordingly, in order to consider such a claim, I must determine whether the Claimant ought to be given permission to amend his claim.

15. Under rule 29 of the Tribunal Rules 2013, combined with the general power in rule 31 to regulate procedure in the manner I consider fair and having regard to the overriding objective, I have the power to grant an amendment in these circumstances notwithstanding that no specific application was made by the Claimant.

16. In considering whether to allow the Claimant to amend his claim, I apply the well-established principles set down in Selkent Bus Co Ltd v Moore [1996] ICR 836 and associated case law. I must carry out a careful balancing exercise of all relevant factors, having regard to the interests of justice and to the relative hardship that would be caused to the parties by granting or refusing the amendment. Relevant considerations include:

    (a) the nature of the amendment – the Tribunal is much more likely to grant an application which is simply a re-labelling of the claim than a substantial amendment to include a new cause of action;
    (b) the applicability of time limits – if a new complaint or cause of action is proposed to be added, the Tribunal must consider whether it is out of time and if so whether time should be extended; and
    (c) the timing and manner of the application.

17. It is clear here that the Claimant seeks to add a new and substantially different head of claim. There is no mention of a claim for automatic unfair dismissal in the claim form or to facts which might found such a claim. Box 10.1 is not part of the pleaded case in terms of setting out the factual basis on which the claim relies. Ticking that box does not, on its own, give rise to the making of a whistleblowing complaint (Mr E Petrica v Central London Community NHS Trust UKEAT/0059/20/AT).

18. The claim is out of time. A claim under s.103A ERA 1996 must be presented to the tribunal before the end of three months beginning with the effective date of termination (s.111(2)(a) ERA 1996). Tribunals have a discretion to extend the time limit if the Claimant can show that it was not reasonably practicable to present the claim in time and it was brought within a reasonable period of time thereafter (s.111(2)(b) ERA 1996)).

19. The Claimant's contract with the Respondent was terminated on 22 July 2020. The Claimant commenced ACAS Early Conciliation on 16 October 2020. The ACAS Early Conciliation certificate was issued on 13 November 2020. The claim form was lodged on 15 November 2020. It was not until 19 April 2021 that the Claimant sent the Respondent a bundle of documents in

which he indicated, for the first time, that he considered himself to have been automatically unfairly dismissed. It was not until 5 May 2021 that the Claimant sent that bundle of documents to the Tribunal.

20. On 16 June 2021, Employment Judge Anstis wrote to the Claimant indicating that, if he wished to amend his claim, he must make an application setting out what the management is and why it has not been made earlier. I note that, when considering the file initially, I had mistakenly understood this direction to relate to the Claimant's application to rely on an amended bundle of documents. In any event, no such application was made. The Claimant indicated at the hearing that he had not received that order and referred to his recent ill-health. The order is correctly addressed to the Claimant's address.

21. Even taking 5 May 2021 (the date on which the bundle of documents referring to a claim for automatic unfair dismissal was lodged) as the relevant date, it is clear that the claim is considerably out of time. The last date on which the claim could have been presented was 13 December 2020. The claim is out of time by just under five months.

22. I then turn to consider whether time should be extended. In considering whether it was reasonably practicable to bring the claim in time, the relevant test '*is not simply a matter of looking at what was possible but to ask whether, on the facts of the case as found, it was reasonable to expect that which was possible to have been done'* (Asda Stores Ltd v Kauser EAT 0165/07 per Lady Smith).

23. The Claimant stated in his original bundle of documents that the delay was because he was not aware of his rights and was hoping for an easy and acceptable solution to avoid complicated court processes. He stated that his claim had developed over time because his understanding about his rights has increased upon further research. I note that English is not the Claimant's first language and that he has only been living in the United Kingdom ("UK") for a short period of time. The Claimant also indicated that he had been mentally unwell dealing with the stress of this claim and the impact of the Covid-19 pandemic. I was not shown any medical evidence in this respect.

24. Where a claimant pleads ignorance of his rights, the correct test is not whether he knew of his rights but whether he ought to have known of them.

25. Notwithstanding the Claimant's difficulties with English and his unfamiliarity with the English legal system, I find that it was reasonably practicable for the Claimant to bring the complaint of automatic unfair dismissal in time. The Claimant is clearly an intelligent and able man who, having turned his mind to this matter, was able to research and understand the legal position and his rights. In the circumstances, the explanation for delay does not explain why he could not have known of his right to claim automatic unfair dismissal earlier.

26. The fact that the claim is out of time (and that time does not fall to be extended) does not mean that the application must necessarily be refused. The Tribunal retains a discretion to permit the amendment. The factor of time is, however, an important and potentially decisive one weighing against

allowing the amendment (Transport and General Workers' Union v Safeway Stores Ltd EAT 0092/07) (see also the Presidential Guidance on General Case Management at paragraph 11.1). The greater the difference between the factual and legal issues raised by the amended claim in comparison to the original, however, the less likely the out of time amendment will be permitted.

27. The difference between the factual and legal issues raised by the amended claim is significant here. I have found there to be no good reason for the delay, which is significant. The amendment raises completely new factual matters requiring different areas of factual enquiry. Mr Lotay was not given the opportunity of preparing for the claim on the basis that it was anything other than a claim for unauthorised deductions of wages.

28. In all the circumstances, I find that the balance of prejudice weighs against granting permission to amend the claim. Accordingly, the only claim before the Tribunal is for unauthorised deductions of wages.

Issues

29. In order for the Tribunal to have jurisdiction to consider a claim for unauthorised deductions from wages, the Claimant must establish that he is an employee or worker within the meaning of s.230 ERA 1996. If he is not, the claim must fail.

30. Accordingly, the issues falling for consideration are as follows:

    (1) was the Claimant a worker within the meaning of s.230 ERA 1996;
    (2) if he was what, if anything, was properly payable to the Claimant between 29 June 2020 and 22 July 2020;
    (3) did the Respondent make unauthorised deductions from the Claimant's wages contrary to s.13 ERA 1996.

The law

31. The protection of wages provisions in part II of the ERA 1996 apply to workers as defined at s.230(3) ERA 1996:

    'In this Act "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…'

32. The term 'worker' is more inclusive than 'employee' (s.230(1) ERA 1996), only excluding the clearly self-employed.

33. In *Cotswold Developments Construction Ltd v Williams* [2006] IRLR 181, Langstaff J concluded that "… a focus on whether the purported worker

actively markets his services as an independent person to the world in general (a person who will thus have a client or customer) on the one hand, or whether he is recruited by the principal to work for that principal as an integral part of the principal's operations, will in most cases demonstrate on which side of the line a given person falls”. This is often called the ‘integration test’.

34. S.13 ERA 1996 provides protection of wages for workers:

    (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.

Findings of fact

35. Having heard the evidence and closing submissions from both parties, I made the following findings of fact.

36. The Claimant was engaged by the Respondent from 29 June 2020 to 22 July 2020 as a Production Manager/ Cabinet Maker. The job was advertised through indeed.co.uk. The role required carpentry work and managerial responsibilities, overseeing a team of workers to ensure designs were built to plan.

37. At the time of applying for the role, the Claimant was employed by another company earning £15 per hour. He was unhappy in that role because he was being required to work in circumstances which he felt were contrary to the nationwide lockdown imposed in March 2020 in response to the Covid-19 Pandemic.

38. The Claimant has been working as a carpenter for approximately 20 years. For the majority of that time he was working outside of the UK. He is clearly an experienced carpenter.

39. The Claimant responded to the job advert on indeed.co.uk and attended an interview with Mr Lotay. The Claimant maintains that, at that interview, he was told that he would receive £17 hour and that his normal working hours would be 7.30 to 17.30 with the possibility to work paid overtime.

40. By contrast, Mr Lotay maintains that the Claimant was engaged on a one month’s unpaid probationary basis and that, if successful, he would thereafter receive £30,000 gross per annum. Mr Lotay maintained that the Claimant was told he would be engaged as a self-employed contractor, responsible for his own tax and national insurance.

41. No contract was provided to the Claimant. There is nothing in writing to support either party’s position.

42. I prefer the evidence of the Claimant on this issue. He evidence was credible

and consistent. By contrast, there is no suggestion in the ET3 that the Claimant was engaged on an unpaid probationary basis. I accept that the Claimant was unlikely to have left a role in which he was being paid £15 an hour for a role in which he was expected to work for free for (at least) one month, even if he was having some difficulties in that role. The Claimant was an experienced carpenter with references, including an informal reference from a friend already working for the Respondent. He was not a trainee or newly qualified carpenter looking for a 'leg up'.

43. The Claimant commenced work on 29 June 2020. He worked at the Respondent's premises alongside other carpenters. As production manager, he was responsible for overseeing the production of particular products and ensuring they were built to specification by him and others. I accept that the Claimant undertook to perform personally any work or services for the Respondent.

44. In carrying out his work, the Claimant used some of his own tools but also the Respondent's more significant machinery.

45. The Claimant's instructions came from Mr Lotay. I was shown an example of a daily task list that was provided to the Claimant setting out the work that was required to be done on a particular day.

46. The Claimant worked under the management of Mr Lotay. I reject Mr Lotay's evidence that the Claimant was free to organise his time as he wished, so long as the work was done. That is not consistent with the role of Production Manager, whose job included overseeing other workers as well as making the products. It is also not consistent with a written instruction to the Claimant, sent by Mr Lotay in July 2020, in which the Claimant and other workers were told they are no longer to take morning breaks. Mr Lotay's evidence was that the Claimant requested this instruction because he was concerned that other workers were taking too long for a morning break. That may well be so, but the fact remains that Mr Lotay was dictating the times of breaks to individuals, including the Claimant.

47. I do not accept that the Respondent was a client or customer of the Claimant's business. The Claimant responded to a job advert not a tender. He worked full-time for the Respondent on an ongoing basis. He did not submit invoices for his work.

48. In all the circumstances, I accept that the Claimant was a worker within the meaning of s.230(3) ERA 1996.

49. I accept that between 29 June 2020 and 22 July 2020 the Claimant worked the hours as set out in the table at 'attachment 1' to his bundle of documents. Mr Lotay was unable to challenge those figures, explaining that he did not monitor the Claimant's hours. It was agreed between the parties that the Claimant had not received any payment for the work he did for the Respondent. The Claimant did not give authorisation for any deductions to be made from that sum. Accordingly, payment in the sum of £3,165 remains outstanding.

Conclusions

50. In light of the above, my conclusions are as follows:

    (a) The Claimant was a worker within the meaning of s.230(3) ERA 1996;
    (b) The Respondent made an unauthorised deduction from his wages between 29 June 2020 and 22 July 2020 in the sum of £3,165 net.

____

Employment Judge Smeaton

Date: 18 August 2021

Judgment sent to the parties on

13/9/2021

N Gotecha
For the Tribunal office