EMPLOYMENT TRIBUNALS

Claimant: **Mr M Tuduran**

Respondent: **Complete Joinery (Midlands) Ltd**

Heard via CVP in the Midlands (East) Region

On: **20 August 2021**

Before: **Employment Judge Ayre (sitting alone)**

Representation
Claimant: **In person**
Respondent: **Ms. Kerry, Finance Director**

RESERVED JUDGMENT

1. The claimant was an employee of the respondent.

2. The claim for unlawful deduction from wages succeeds.

3. The respondent is ordered to pay the sum of £1,300 to the claimant in respect of the claim for unlawful deduction from wages.

4. The respondent failed to provide the claimant with a written statement of employment particulars.

5. The respondent is ordered to pay to the claimant an additional sum of two weeks' pay, namely £1,300 under section 38 of the Employment Act 2002.

REASONS

Background and Issues

1. The claimant worked for the respondent as a joiner for a short period of time in February 2021. There is a dispute as to how long he worked for the respondent – the claimant says two weeks, the respondent says one day.

2. On 10 April 2021 the claimant issued a claim for unpaid wages, following a period of early conciliation which started on 19th March and ended on 23 March 2021. The respondent defends the claim.

3. The grounds upon which the respondent defends the claim are that the claimant:-

   a. Was engaged as a self-employed sub-contractor;
   b. Did not work the hours that he claims to have worked;
   c. Failed to submit timesheets setting out the hours that he worked; and
   d. The claimant's work was not approved by the respondent's client.

4. The issues that fell to be determined at the hearing were:-

   a. Was the claimant an employee of the respondent within the meaning of section 230 of the Employment Rights Act 1996 ("**the ERA**")?
   b. If not, was the claimant a worker of the respondent within the meaning of section 230 of the ERA?
   c. If the claimant was an employee or a worker of the respondent:-
      i. How many hours and days did the claimant work for the respondent?
      ii. What sums is the claimant entitled to be paid for the hours that he worked?

5. The parties agreed that the daily rate of pay for the claimant was £130. The respondent admits that the claimant was not paid anything for the work that he carried out.

Proceedings

6. There was an agreed bundle of documents running to 125 pages.

7. I heard evidence from the claimant and, on behalf of the respondent, from Ms. Kerry. There was a significant conflict of evidence between the claimant and Ms Kerry. On balance, I prefer the evidence of the claimant, who I found to be a more credible witness. Ms Kerry was not present on site at any time during the period when the claimant was working for the respondent, and her evidence of what she thought had happened on site was therefore third hand. She accepted in evidence that she did not know what days the claimant had worked, despite having written in the Response form that the claimant only worked for one day. She insisted that the claimant was told about the timesheet requirement at induction, despite the fact that she was not present at that induction, and had no direct knowledge of what was said.

8. Ms Kerry also gave evidence that at times was contradictory. For example, on one occasion she wrote to the Tribunal saying that the claimant had been paid. She accepted today that he had not been paid

and suggested that the reference to the claimant having been paid was a 'typo'. I find that explanation difficult to believe.

Findings of Fact

9. In early 2021 the respondent placed a job advertisement on a website known as 'Indeed'. The advert stated as follows:-

   "*Carpenter and Joiner*
   Complete Joinery (Midlands) Ltd
   Derby
   Employment actively reviewed candidates 3 days ago
   Urgently needed…
   Salary
   £130 a day
   Job type
   Full-time
   Contract…"

10. The claimant applied for the position on 18 January 2021. On Friday 12 February 2021 Mr Shaun Kerry, director of the respondent, called the claimant. The claimant recorded the call without Mr Kerry's knowledge.

11. During the call Mr Kerry told the claimant that the respondent worked for a company called Top Hat building modular houses for IKEA in a factory, that it was a 5 year contract and that they were looking for a few joiners to start work the following Monday.

12. Mr Kerry explained that the work would be at a factory in Derby and would not involve any travelling. The claimant asked if he needed power tools or more than basic tools, and he was told that he would just need basic hand tools. Mr Kerry then said that the claimant would be paid a week in hand and would fill in a timesheet.

13. Mr Kerry told the claimant that it was "*5 years work*", and that the hours of work were 7am to 4 pm Monday to Thursday, and 10-3 on Friday. The claimant asked whether there was a probationary period and Mr Kerry replied that there wasn't and that "*if you fit in with all of us, we will keep you in for as long as you want to be with us".*

14. The claimant said that he was interested and able to start the following Monday. Mr Kerry asked if the claimant has a CSCS card, and the claimant said that he did.

15. There was no discussion during the telephone call of the nature of the claimant's engagement, or whether it was to be on a self-employed basis, as an employee or as a worker.

16. The claimant attended work on Monday 15th February. He was asked to complete a 'New Starter Form' and did so. The form contained personal details including his national insurance number and his 'subcontractor-UTR' number, and his bank details. He attended an induction with the

workplace manager, was shown around the factory and met his supervisor. He then began work.

17. On the top right hand side of the form under the words 'New Starter Form' were the words "Subcontractor / Employee". The word 'Employee' had been deleted by hand. After the claimant had completed his part of the form, it was sent to Ms Kerry who completed the rest. The claimant's evidence at the hearing was that the word 'employee' had not been deleted at the time he signed the form, and he believed that Ms Kerry had deleted it after he'd signed the form. Ms Kerry's evidence was that she had not deleted the word, although she accepted that she had made other amendments to the form after the claimant had signed it.

18. On balance I accept the claimant's evidence on this point. I found him to be a more credible witness than Ms Kerry for the reasons set out above.

19. The claimant attended an induction on the morning of 15th February with the site manager. Neither Mr nor Ms Kerry were present during the induction or, indeed, at any other time when the claimant was on site.

20. The respondent produced in evidence a 'Weekly Sub-Contractor Timesheet' which Ms Kerry told me that contractors were required to complete each week in order to be paid. The claimant told me that he had not been told about the timesheet process at the induction or provided with a timesheet to fill in. He did not know that he had to fill in the timesheet.

21. The claimant considered himself to be an employee of the respondent. He signed a log-in form every morning when arriving on site, and then signed out again when leaving. I preferred the claimant's evidence on this issue also.

22. The claimant worked for the respondent for two weeks. He did not complete time sheets showing the hours that he worked. Ms Kerry suggested that he had not actually completed two weeks' work, but she was not present on site so could not give direct evidence of the hours that the claimant worked. To her credit, she acknowledged in evidence that she did not know what hours the claimant had worked.

23. I accept the claimant's oral evidence on the issue of hours worked. His oral evidence was also consistent with the route planner records contained within the bundle and which showed that he had repeatedly travelled from his home address to Top Hat's premises in Derby at times that were consistent with him travelling to and from work.

24. On Saturday 27 February, having not been paid after two weeks' work, the claimant telephoned Mr Kerry to ask if everything was in order, and was told that he would be paid on Monday 1st March. The claimant replied that he would not return to work until he had been paid, as he'd had bad experiences in similar situations.

25. The claimant was not paid on Monday 1st March. He phoned the respondent again on 3rd March. He was told that there was a problem with his bank details because of his handwriting. The claimant asked why no one had contacted him to provide them with the right details, and Ms Kerry

stated that if the claimant wanted to keep his job he should 'mind his attitude'.

26. The claimant subsequently sent his bank details in by email and text, but was still not paid. Finally, he called Mr Kerry and said that if he was not paid he would go to court. Mr Kerry laughed.

27. On 4th March Ms Kerry sent a memo to all of the respondent's staff. In the memo she wrote:-

"*Firstly, please accept my apologies for some of you receiving your payments late. This is not normal practice and was due to an administration error… By way of reminder, please ensure your timesheet is completed in full at the end of each week… It is <u>your</u> responsibility to make sure your timesheets are completed, handed in and approved. <u>Incomplete or missing timesheets **will** delay pay</u>..."*

28. This memo was sent several days after the claimant stopped working for the respondent and the claimant therefore did not receive it. Whilst I acknowledge that the memo does indicate that the respondent expected its workers to complete timesheets, it is not, in my view, evidence that the claimant was told he needed to complete timesheets in order to be paid. Ms Kerry's evidence was that timesheets had to be completed by each sub-contractor, approved by the client and site manager, and that they would then be sent to the accountant to generate payslips and make the payment. The respondent did not receive any completed timesheets from the claimant.

29. On Monday 15th March the claimant drove to work and spoke to HR. He was told that they would talk to Mr Kerry, and did not mention that the claimant had to fill out a timesheet.

30. The claimant rang Mr Kerry and Ms Kerry again on 19th March in a further attempt to get paid for the work he had done.

31. At no point was the claimant told that the respondent or its client, Top Hat, was unhappy with the claimant's work, or that the reason he had not been paid was because he had not submitted timesheets.

32. In its response to the claim the respondent wrote that the claimant was not employed by the respondent, but was offered work as a subcontractor, and only worked for one day.

33. In her evidence Ms Kerry said that the claimant had telephoned her at home on the evening of 26th February, had become abusive and aggressive, demanding money over the telephone, and subjecting her to a 'string of abuse'. The claimant's evidence was that he had not spoken to Ms Kerry that evening. I prefer the claimant's evidence on that issue.

34. In an email sent to the Tribunal on 22 July 2021 Ms Kerry wrote, amongst other things, that:" *The claimant in question has been paid for completed works*".

35. The claimant was not provided with a written statement of employment terms. At no time did the respondent tell him, either verbally or in writing, that they considered him to be self-employed. Ms Kerry's evidence to the Tribunal was that the respondent did not have written contracts in place with sub-contractors

36. The claimant had previously worked as a sub-contractor and gave evidence that he understood the term 'sub-contractor' to mean self-employed. He is a member of the Construction Industry Scheme under which tax is deducted from payments to those working in the construction industry and paid to HMRC.

37. The claimant believed that he was an employee, because of the way in which the job advertisement was presented, and because there was no mention of him being self-employed. He gave evidence, which I accept, that he considered this contract to be different from the others he had worked to because the advert stated that the role was on a 'full time contract', the salary was fixed per day, and there was no mention of sub-contracting. The way in which the work was carried out was also different. He worked in a factory where homes were built on a conveyer belt. He did the same job over and over again. He was not allowed to come and go as he pleased, and had to work set hours dictated by the respondent.

38. The claimant provided his own basic hand tools, but took far fewer tools to work than he normally would, as there were lockers on site with specialist tools that the claimant could and did use.

39. There was no evidence before me of the claimant being able to send someone else in to work – he had to turn up personally to work.

The Law

40. Section 13 of the Employment Rights Act 1996 ("the ERA") provides that:-

"*(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….*

(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."

41. Section 230 of the ERA provides the definition of employee, employment and worker as follows:

"(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.

(3) In this Act "worker" (except in the phrases "shop worker" and "betting 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;

and any reference to a worker's contract shall be construed accordingly.

(4) In this Act "employer", in relation to an employee or a worker, means the person by whom the employee or worker is (or, where the employment has ceased, was) employed.

(5) In this Act "employment"—

> *(a) in relation to an employee, means (except for the purposes of section 171) employment under a contract of employment, and*
>
> *(b) in relation to a worker, means employment under his contract;*
>
> *and "employed" shall be construed accordingly…"*

42. Section 1 of the ERA provides as follows:-

"(1) *Where a worker begins employment with an employer, the employer shall give to the worker a written statement of particulars of employment.*

(2)…(b) the statement must be given not later than the beginning of the employment…"

43. Section 38 of the Employment Act 2002 gives the Employment Tribunal the power in certain proceedings (including complaints of unlawful deduction from wages), where it finds in favour of the claimant, to make an award of between two and four weeks' pay if the employer was in breach of its duty under section 1 of the ERA to provide a written statement of employment particulars.

44. In reaching my decision on the question of employment status, I have considered a number of cases, and in particular :-

a. *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* [1968] 2 QB 497, in particular the judgment of

McKenna J which set out the conditions required for a contract of service, namely that:"(i) The servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master. (ii) He agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient degree to make that other master. (iii) The other provisions of the contract are consistent with its being a contract of service."

b. . *Bates van Winkelhof v Clyde & Co LLP and anor (Public Concern at Work intervening)* 2014 ICR 730 and *Hospital Medical Group Ltd v Westwood* 2013 ICR 415 in which it was established that the following are necessary for an individual to fall within the definition of 'worker':-

i. There must be a contract, whether written or oral and whether express or implied;
ii. The contract must provide for the individual to carry out personal services; and
iii. Those services must be for the benefit of any other party to the contract who must not be a client or customer of the individual's profession or business undertaking.

Conclusions

45. There was a contract between the respondent and the claimant, the terms of which were set out in the job advertisement and during the conversation between the claimant and Mr Kerry on 12th February. The contract contained a number of express terms, including those relating to:-

a. Hours of work;
b. Rate of pay;
c. Place of work; and
d. Job title.

46. In essence, the claimant agreed that, in return for £130 a day, he would work as a joiner five days a week at the Top Hat site in Derby, at the instruction of the respondent.

47. There was no evidence before me to suggest that the claimant could send a substitute to work. On the contrary, the expectation was that the claimant would provide his services personally.

48. The claimant was expected to attend work every day at set hours and at a location specified by the respondent. He had an expectation that the respondent would provide him with work, given the comments made during his conversation with Mr Kerry about there being 'five years' work', and the claimant being able to work as long as he wanted, if he fitted in. Similarly, there was an expectation on the respondent's part that the claimant would turn up to work, and no evidence of the claimant being above to turn down work.

49. There was, therefore, a mutuality of obligation between the claimant and the respondent, in that the claimant was required to turn up to work, and the respondent to provide work.

50. It cannot be said that the claimant was in business on his own account. He did not submit invoices for the work he carried out, nor can it be said, in my view, that the respondent was a client of his. There was no evidence before me of the claimant being required to take out his own insurance, or taking any financial risk in relation to the work he carried out.

51. The claimant was required to work the hours specified by the respondent, at the location specified by the respondent. Whilst on site he was subject to the direction and control of the respondent's client. He was provided with an induction when he started work and worked at a set location on the conveyor belt in the factory, doing the same job over and over again.

52. He provided some of his own tools, but specialist equipment was provided for him.

53. At no point was the claimant told by the respondent that he would be a self-employed contractor. Quite simply, the point never came up. Whilst the respondent appeared to intend the claimant to be self-employed, they never communicated that intent to the claimant. In any event, the intent of one party to the contract is not conclusive on the issue, particularly when the other party to the contract had an entirely different intent and belief.

54. The claimant was asked to provide his Construction Industry Scheme tax number, but he was also asked to provide his National Insurance Number. The only written document that he was provided with included both the words 'Sub-Contractor' and 'Employee', and was clearly designed to be used for both.

55. In these circumstances, being asked to provide his CIS number at the same time as his National Insurance Number is not, in my view, an indication of self-employed status.

56. The respondent relied upon the claimant's failure to complete timesheets as justification for not paying the claimant. I accept the claimant's evidence that there was no mention of timesheets other than during the initial conversation he had with Mr Kerry on 12th February. Even if there were a requirement to complete time sheets, this in itself is not a factor that weighs in favour of the claimant being self-employed. Plenty of employees and workers (including most agency workers) are required to complete timesheets as evidence of the hours that they have worked.

57. In light of the above findings, I conclude that the claimant was an employee of the respondent.

58. If I am wrong on that, then I have no hesitation in finding that the claimant was a limb (b) worker under section 230(3)(b) of the ERA. He was obliged to provide services personally, was not in business on his own account and the respondent was not a customer of his.

59. I also find that the claimant worked for the respondent for ten working days, over a two week period, and that he is entitled to be paid £130 for each of those days, giving a total of £1,300. By failing to pay the claimant the sum of £1,300 the respondent made an unlawful deduction from the claimant's wages.

60. The respondent failed to provide the claimant with a written statement of employment particulars, contrary to section 1 of the Employment Rights Act 1996. I am therefore also making an award under section 38 of the Employment Act 2002. The minimum award that I can make under this section is two weeks' pay, and the maximum is four weeks' pay. Given that the claimant only worked for the respondent for two weeks, I am making an award of two weeks' pay, which comes to £1,300. It would not in my view be appropriate to award more given the brevity of the claimant's employment and the size of the award for unlawful deduction from wages.

61. For the reasons set out above, I find that the respondent has made an unlawful deduction of £1,300 from the claimant's wages. The respondent is ordered to pay that sum to the claimant, together with £1,300 awarded under section 38 of the Employment Act 2002, giving a total award of £2,600.

Employment Judge **Ayre**

Date: 18 September 2021