EMPLOYMENT TRIBUNALS

Claimant: **Mr N Allen**

Respondent: **Riatex Ltd**

Heard : via Cloud Video Platform in the Midlands (East) region

On: 17 December 2021

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

Representatives:

Claimant: In person
Respondent: Mr A Adam, Fleet Director

JUDGMENT

1. The respondent made an unlawful deduction from the claimant's wages in the sum of £825 and is required to pay that sum, less any tax and national insurance that may be due on it, to the claimant.

REASONS

Background

1. On 19th March 2021, following a period of early conciliation that started on 2 February 2021 and ended on 8 March 2021, the claimant issued a claim for arrears of pay.

2. The claimant says that he worked for the respondent as a delivery driver for a total of 5.5 days between 26 October 2020 and 4 November 2020. The first 3.5 days were spent training, and the last 2 days were spent delivering parcels. He claims to be entitled to 5.5 days' pay for the time he spent training and driving, at a rate of £150 a day, giving a total of £825.

3. The respondent defends the claim. In a response that was submitted late, but accepted by the Tribunal due to the explanation provided for the delay, it

challenges the sums claimed by the respondent and submits that the claimant was self employed.

The Proceedings

4. The hearing was listed to start at 10 am today and to take place via Cloud Video Platform. The claimant joined the hearing by 10 am. The respondent did not join.

5. At 10.10 I asked a member of Tribunal staff to call the respondent on the telephone number provided in the Response form. That number was engaged. I asked the Tribunal staff to try calling again and to send an email to the respondent.

6. At 10.38 am Mr Adam joined the hearing. He explained that the notice of hearing had been sent to a colleague who had since left the respondent's employment.

7. I heard evidence under oath from the claimant and from Mr Adam on behalf of the respondent. Neither party wished to rely upon any documents.

The Issues

8. The issues that fell to be decided at the hearing are as follows:-

    a. Was the claimant self-employed, a worker or employed by the respondent?

    b. If the claimant was an employee or a worker of the respondent, did the respondent make an unlawful deduction from the claimant's wages?

    c. If the respondent did make an unlawful deduction from the claimant's wages what sums should it be ordered to pay to the claimant?

Findings of Fact

9. The respondent is a small business which has a franchise agreement with DPD to provide deliveries on their behalf. It has 5 office based staff and a number of drivers, which varies from month to month between 35 and 80.

10. The claimant has been a delivery driver / courier for 20 years and applied for a job with the respondent last year. He had an interview for the role with a manager whose name he could not remember. He gave evidence, which I accept, that during this interview the manager told him that the wages would be between £150 and £220 a day.

11. The claimant was required to undergo three days' training before he could start driving and delivering parcels. He was told that he would be paid the normal rate for the days that he spent training. The training was due to start on a Monday in October but was cancelled at the last moment and the

claimant (and others on the course) were sent home. They were told that they would receive half a day's pay for the lost training course.

12. The claimant then attended training for three days later in that week. The claimant could not recall the exact dates of the training but was certain that they were in October.

13. After completing his training, the claimant worked for two days as a delivery driver delivering parcels for DPD. The respondent provided the claimant with a van and paid for the petrol for the van. The respondent also provided the claimant with a scanning machine to scan in parcels and with a DPD uniform, which he was required to wear.

14. The claimant was told what time to be at work (8 am) and what route to drive. All of the equipment that he needed to do the job was provided by the respondent, he did not have to provide or pay for anything.

15. There was no discussion with the claimant as to what his employment status was, and he was not provided with a contract or any other paperwork.

16. At the start of his second day as a driver for the respondent a manager from DPD told the claimant that he was not happy with him because one of his parcels had been delivered a couple of minutes late. The manager was rude and aggressive towards the claimant. One of the respondent's managers, 'Jonathan' had to step in.

17. Later that day, having reflected on what had happened, the claimant sent a text message to Jonathan saying that he was not happy with the way he had been treated and spoken to, and that he didn't think the job was for him. The claimant completed his deliveries for that day, and then contacted the respondent and made arrangements to return the van and the uniform the following day.

18. The claimant has not been paid anything at all for either the training or the work that he carried out for the respondent. It was agreed at the start of his employment that he would be paid between £150 and £220 for each day of driving and training.

19. The claimant said that when he completed his claim form, he had initially thought he was self-employed because 'courriers normally are'. There had been no discussion between him and the respondent as to what his employment status would be. Having taken legal advice however he had formed the view that he was in fact employed, because the respondent provided his van and fuel and told him what time to start.

20. Mr Adam gave evidence on behalf of the respondent that in 2020 its drivers were considered to be self-employed, and were paid £40 a day for training, and either £80 or £100 a day for driving, depending on how many delivery stops they made. He accepted that the respondent provided vans and said that DPD provided the uniforms. He said that drivers were provided with written contracts and had to supply certain paperwork including their driving licence and DBS check before they could start work.

21. Mr Adam told me that he had not had any personal dealings with the claimant, and had not been involved in recruiting him or discussing his pay. All of his

evidence therefore was based on his understanding of what the respondent normally did, rather than on what was agreed with the claimant.

22. Whilst I accept that Mr Adam was giving evidence to the best of his knowledge and ability, he did not have any personal or direct knowledge of the arrangements between the respondent and the claimant. The claimant clearly did, and I found his evidence to be credible and consistent. I therefore accept the claimant's evidence.

The Relevant Law

23. 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."

24. 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…"

25. In *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* [1968] 2 QB 497, McKenna J 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."

26. In *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 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.

27. The key factors to be taken into account in determining whether an individual is an employee are:-

    a. The degree of control that the employer has over the way in which the work is performed;
    b. Whether there is mutuality of obligation between the parties – ie was the employer obliged to provide work and was the individual required to work if required; and
    c. Whether the employee has to do the work personally.
    d. Were the other terms of the contract consistent with there being an employment relationship?

28. Other relevant factors include:

    a. The intention of the parties;
    b. Custom and practice in the industry;
    c. The degree to which the individual is integrated into the employer's business;
    d. The arrangements for tax and national insurance;
    e. Whether benefits are provided; and
    f. The degree of financial risk taken by the individual.

Conclusions

29. I am satisfied, based upon the evidence before me, that the respondent exercised control over the way in which the claimant performed his work. The respondent told him when to start work, where to go to start work, and what to do when at work. It determined the claimant's route, and the claimant was required to drive the route given to him.

30. I find on balance that the claimant was required to provide personal service. There was no evidence to suggest that the claimant was allowed to send a substitute, and Mr Adam's evidence that the respondent checks driving licences and DBS checks suggests that drivers are required to do the driving and deliveries themselves.

31. On the limited evidence before me, it appears that there was some mutuality of obligation between the parties, in that the claimant was required to turn up for work and expected to work when the respondent told him to. There was nothing to suggest that the respondent was not under any obligation to offer work.

32. The respondent provided the claimant's work tools – specifically the van, petrol and scanning machine. The respondent also provided the claimant with a uniform which he was required to wear. The respondent provided training which the claimant had to complete before he could start work, and agreed to pay for that training at the claimant's normal daily rate.

33. The claimant was not required to provide any of his own tools or to take any financial risk. It was agreed that he would be paid a daily rate and there was no evidence to suggest that he was required to submit invoices in order to get paid, or that he was in business on his own account.

34. There was nothing in the arrangements between the parties that was, in my view, inconsistent with an employment relationship. I therefore find that the claimant was an employee of the respondent.

35. I also find that the claimant is entitled to be paid for 5.5 days, at a daily rate of £150, a total of £825, from which tax and national insurance should be deducted. The claimant attended three days' training, worked for 2 days as a delivery driver, and it was agreed that he would be paid for an additional half a day for the cancelled training.

36. The respondent has failed to pay the claimant anything and has made an unlawful deduction of £825 from the claimant's wages. The respondent is therefore ordered to pay the sum of £825, less tax and national insurance contributions, to the claimant.

Employment Judge Ayre

17 December 2021