EMPLOYMENT TRIBUNALS

Claimant: Ms S Platt

Respondent: Advantage Angels Ltd

Heard at: Watford Employment Tribunal (in public; by video)

On: **1 February 2022**

Before: Employment Judge Quill (sitting alone)

Appearances
For the claimant: In Person
For the respondent: Ms M Hodgson, director

JUDGMENT

(1) The claim for unauthorised deduction from wages, contrary to section 13 of the Employment Rights Act 1996, is well-founded. The Respondent must pay the sum of £600 gross to the Claimant. (This judgment will be satisfied if the Respondent is obliged to make PAYE deductions, and pays the net sum to the Claimant, provided that the Respondent properly accounts to HMRC for any such deduction. Otherwise, the Respondent must pay the gross amount to the Claimant who must then account to HMRC).

(2) The Respondent is ordered to pay £30.80 to the Claimant as damages for breach of contract.

(3) The claim for consequential losses (interest on loans) is not within the jurisdiction of the tribunal and is dismissed.

REASONS

Introduction

1. The decision was given orally and the Claimant requested written reasons.

2. The Claimant is a nurse and the Respondent is a company which arranges the supply of nurses to clients.

The Hearing and the Evidence

3. This was a hearing which took place fully remotely by video. We started slightly later than the 12 PM intended start time as I was finishing off the previous case as the parties joined the hearing room.

4. The only person who gave witness evidence was the claimant. She had prepared two witness statements and she testified to the truth of both of those and she answered such questions as I had and the respondent's representative had.

5. There was no live witness from the respondent but I took into account a document headed statement of Rebecca Watkins which was dated 26 January 2022. I was told that Ms Watkins had resigned from the respondent's employment today. I gave it such weight as I saw fit in the circumstances, taking into account that she did not give evidence.

6. The documents which I had were those attached to the respondent's representatives emails of 27 January 2022 at 10:02 AM and 26 January 2022 at 11:07 AM and also the documents which were appended to each of the claimant's statements.

7. The evidence and submissions finished slightly after 1pm and we adjourned. I gave judgment and reasons at 2pm.

The Claims and the Issues

8. The claim which I have to decide is for "arrears of pay" and "other payments". The details are in box 9.2 of the claim form. The claimant sets out she is owed money for 26 April 2021 and also for 5 May 2021. The form says 5 April, but that is a typo.

9. The sums claimed are 12 hours at £25 per hour (so £300) for each shift, plus £10.40 mileage for 26 April and £20.40 mileage for £20.40 for 5 May.

10. In addition, the claimant claimed consequential losses being the costs of loans which she had incurred. However, those alleged consequential losses do not form a claim within the jurisdiction of the employment tribunal and I therefore did not need to make any findings of fact about the respondent's contention that the loans were necessary for other reasons, and not because of the non-payments.

11. The respondent's position is does not that it does not dispute that the claimant did work the two shifts in question or that the hourly rate was £25 an hour. The two issues that it disputes are: firstly, mileage allowance; secondly, more significantly, it denies that it had a contract with the claimant and states instead that the contract was with a limited company which the claimant controlled.

The Law

12. Part II of the Employment Rights act 1996 sets out the tribunal's jurisdiction in relation to claims for unauthorised deduction from wages. Section 13 sets out the right and specifies that it applies to "wages of a worker". Wages are defined in section 27, which says, in part:

> 27.— Meaning of "wages" etc.
>
> (1) In this Part "wages", in relation to a worker, means any sums payable to the worker in connection with his employment, including—
>
> (a) any fee, bonus, commission, holiday pay or other emolument referable to his employment, whether payable under his contract or otherwise,

….

but excluding any payments within subsection (2).

(2) Those payments are—

(b) any payment in respect of expenses incurred by the worker in carrying out his employment,

13. A deduction includes a complete non-payment on the relevant occasion, as well making a payment which is less than the full amount properly payable.

14. The definition of employee and worker as per section 230 of the Employment Rights Act 1996 is:

230.— Employees, workers etc.

(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.

15. The two parts of s230(3) are sometimes called limb (a) and limb (b). If someone is an employee, then they are a worker, because that is limb (a). Someone who is an employee is not within limb (b), because it refers to "any other contract". So, to be within limb (b), the claimant has to show that there was a contract between them and the employer, show that the contract required them to work personally (ie show that there was no right to send a substitute) and show that the contract was not one in which they were in business on own account, and for which the Respondent was their client.

16. The Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 gives employment tribunals jurisdiction over a breach of contract claims up to a maximum limit of 25,000. The conditions are that the Claimant must be a former employee (and not a current employee) of the Respondent and that the claim arises or is outstanding on the termination of the employee's employment

Findings of fact

17. In 2020, the Claimant incorporated Stephanie Platt Ltd.

18. On 12 March 2021, the claimant filled out a form for the respondent called Advantage Angels Contract Services Information. In the form, she stated her own name and not the name of her limited company. She stated her own national insurance number and a self-assessment reference number for tax purposes. She also included bank details and the bank details were the account name of Stephanie Platt Ltd.

19. The claimant also had email exchanges with Rebecca Watkins, who was, at the relevant time, Director of Operations and Compliance for the respondent. (Whether she was actually a company director, or was just an employee with "director" in her job title is not relevant). On 18 March 2021, the Claimant asked for a breakdown of rates for "ltd nurses". I infer this was a reference to nurses who would be paid via an intermediary company – whether an umbrella company or a personal service company. Ms Watkins replied with those rates.

20. Upon considering her position, and taking account of her understanding of how she would be affected by the IR35 guidance and legislation, the claimant decided that she did not wish to provide her services via her limited company. She decided that she preferred to contract directly with the respondent and to be treated as PAYE. That is, her preference was that the Respondent's payroll department would make PAYE deductions and pay her net.

21. She discussed and agreed this with Ms Watkins. She did her first shift on 26th of April 2021. This was to be paid at £25 per hour. Although the respondent would not usually have paid mileage for a PAYE individual, they were short of nurses and Ms Watkins informed the claimant that she would agree to that the Respondent would pay mileage.

22. To the extent that the respondent disputes that Ms Watkins had authority to reach such an agreement with the claimant, my finding is that her title, Director of Operations and Compliance, appeared underneath her name in her email signature in correspondence sent to the claimant. A reasonable person would take it from that title that Ms Watkins was authorised, on behalf of the company, to make agreements about what the respondent would pay. I am satisfied that the claimant did believe that Ms Watkins was authorised to agree that the Respondent would pay mileage (and, of course, that she would be PAYE).

23. To the extent (if at all) that Ms Watkins written 26 January 2022 document implies that she was going to pay the mileage directly to the Claimant out of her own pocket., I reject that. That is not stated in the contemporaneous documents and in any event is inherently implausible. If, instead, what Ms Watkins is seeking to say is that she decided that her own commission would be reduced to allow the claimant to receive the mileage without increasing the cost to the client (or reducing the profit margin to the Respondent), then that is more plausible. However, even if that is the case, then it does not change the fact that the agreement to pay mileage to the Claimant was made by Ms Watkins on behalf of the respondent.

24. The agreement of £25 an hour and mileage rate and paid break was confirmed by a text message exchange between the claimant and Ms Watkins around 23 April 2021.

25. The claimant completed the full shift on 26 April. It was 12 hours including the paid break as also agreed in the text message.

26. The claimant submitted her timesheet to Dawn Stockley of the respondent on 30 April 2021 and Ms Stockley replied to acknowledge receipt and to confirm that mileage would be paid for that shift. The timesheet was in the name of the claimant, not the claimant's limited company, and Ms Stockley raised no query over that.

27. On 4 May 2021, the claimant sent some further information to the respondent by email including a new starter form. This checklist was signed and dated 2 May

2021 by the claimant. It was in the claimant's name only and not that of the company. No queries were raised at the time by Ms Stockley or by Ms Watkins or by any of the Respondent's other employees.

28. At the same time, the Claimant stated that she had not yet provided her bank details and told Ms Stockley that she was to be paid weekly, as had been discussed and agreed with Ms Watkins. Ms Stockley replied to acknowledge receipt of the checklist, asked for the bank details to be sent to her and said that she would confirm with head office that the claimant was to be paid weekly.

29. On 5 May, the claimant did another shift and again submitted her timesheet as before, in her own personal name. The 5 May shift was also 12 hours in total at 25 per hour. This time the mileage claim was for £20.40. The rate of 20 pence per mile, as agreed, with Ms Watkins, was the same.

30. On 11 May, the claimant sent a chaser to Ms Stockley seeking the payment. Ms Stockley replied to say that she would enquire of head office. She also asked the Claimant to re-submit the time sheet for 5 May, which the Claimant did. Ms Stockley acknowledge receipt at 13:47 and said she would send it on to head office. No query was raised over the time sheet, and there was no suggestion that the Respondent would not pay.

31. On 17 May, the claimant sent an email to Ms Stockley and suggesting that she would take legal action over the non-payment. On 17 May, Ms Watkins emailed the claimant to say that Ms Stockley had left the respondent's employment. She, Ms Watkins, apologised that Ms Stockley had not (Ms Watkins claimed) forwarded the timesheets for processing and Ms Watkins said that was the reason that payment had not been made. She apologised for the lack of communication. There was no suggestion from Ms Watkins that the reason payment had not been made was that the respondent believed that the claimant should be treated as having contracted via a company rather than as an individual.

32. On 23 May, Ms Watkins wrote to the claimant again to say that future contact should be with her directly and thanked the claimant for her continued hard work. I emphasise the word "continued". There was no suggestion in the email that any further work would only be offered to a limited company or that the respondent believed that that had been the agreement for the past work.

33. A further exchange on 24 May resulted in Ms Watkins noting that the Claimant had, in Ms Watkins' words, "resigned" and she stated that payments would be made to her once the Respondent's property was returned to it. This was a reference to the uniform and lanyard that the Claimant was required to wear. The Claimant replied to say that she had sent them first class on 18 May.

34. On 24 May, Ms Watkins wrote to the claimant to say that once the company received all of its property back, she, Ms Watkins, would arrange payment of outstanding monies.

35. On 26 May, the claimant sent an email to Ms Watkins which could potentially be described as a letter before action. She stated she was sending it on the advice of her union to give the respondent a final opportunity to pay the claimant's wages and mileage prior to the commencement of legal action.

36. About 40 minutes or so after the claimant's email, Ms Watkins replied to say that as soon as the respondent received its property back from the claimant any

outstanding monies would be paid. She stated the claimant should refer to the terms and conditions on the respondent's website, but did not expressly suggest any reason for non-payment other than the uniform/property issues. My inference from the context is that the Respondent was seeking to rely on a clause entitling it to withhold payment pending return of its property. In any event, the email did not suggest that the agreement was with the claimant's company, not with the claimant as an individual (and nor did it suggest that, if that were the case, the payment would not be made, or that the Claimant need anything else to trigger the payment).

Analysis and conclusions.

37. The Respondent argues that (a) its contract was with Stephanie Platt Ltd and (b) it could not pay for the 26 April and 5 May 2021 in the absence of an invoice from Stephanie Platt Ltd. It also argues that the dispute is not within the jurisdiction of the tribunal, and is a matter for the county court.

38. As per my findings of fact, I am satisfied that the Claimant and Ms Watkins reached an agreement that the Claimant would contract with the Respondent as an individual and that she would be PAYE. The Claimant's evidence is credible and is consistent with the contemporaneous documents. The Respondent's representative's suggestion that the Claimant is simply trying to take advantage of Ms Watkins' non-availability is misplaced because the Claimant's position has been consistent throughout, and she had no way of knowing that Ms Watkins would be unavailable. The Respondent's two arguments (that an invoice was required, and that the invoice had to be from the company, because it was the company with which it had contracted) are not consistent with the contemporaneous documents.

39. The Claimant agreed to do the work personally. There was no suggestion that she could or would send a substitute.

40. When the Claimant and the Respondent entered into the contract, it was not a contract in which the Respondent was the client of a business being operated by the Claimant. It was the Respondent which found the client for whom the work would be performed, and the Respondent which sought nurses to do that work. It was the Respondent which agreed with the client what rates the Respondent would receive and the Respondent which negotiated with the nurse (sometimes directly, as in the Claimant's case, sometimes through an intermediary) to agree what rate the nurse (or the intermediary) would receive. In the Claimant's case, part of what was agreed was that she would be PAYE. At the time, neither the Claimant nor the Respondent was treating the relationship as one in which the Claimant was contracting as someone in business on her own account.

41. The Claimant therefore is a worker within the definition in section 230(3) of the Employment Rights Act 1996. The right granted by section 13 applies to her.

42. She had the right to receive the payment for both shifts by no later than the end of May 2021. She had submitted her time sheets and bank details and new starter form. Although Ms Stockley required the Claimant to re-send some of the documents/information, she did so, and by no later than 13:47 on 11 May 2021, the Respondent had all the required information to make the payment, and, in May, made several promises to the Claimant that she would be paid promptly. In the hearing before me, the Respondent did not seek to rely on any argument that the

Claimant had failed to return its property (and neither supplied any factual evidence to support such a claim, nor pointed to any alleged contractual right to withhold payment) and nor is that a point raised in its ET3. The Respondent's stance was that, in fact, it was willing to pay the full £630.80 to the Claimant's company, provided only that she first supply an invoice.

43. Therefore, the Respondent made an unauthorised deduction from wages of £600 (gross) and the Claimant is entitled to have an order that they pay her that amount. If the respondent decides that it is lawfully obliged to make PAYE deductions from that sum, then it may do so, but may make no other deductions, and must account fully to HMRC for any such deduction. Otherwise, the respondent should pay the gross sum to the claimant and it will be for the claimant to account to HMRC.

44. Furthermore, I am satisfied that the Claimant contracted with the Respondent such that, for each of the two shifts in question, she was their employee. The Claimant was not necessarily an employee in between shifts, but, once she had accepted a particular job, she was obliged to do that work and the Respondent was obliged to pay both the hourly rate and the mileage. While, during each shift, the specific details of what she needed to do would be as required by the client (and while she would be exercising her own professional skill and judgment), I am satisfied that there was the necessary degree of control exercised by the Respondent, which told her where she had to go, and by what time, and which obliged her to be on time, work the full shift, and to carry out the client's instructions. She was required to wear a uniform and a company lanyard. Ms Watkins referred to the Claimant as having "resigned".

45. I would therefore, have potentially been willing to award damages for breach of employment contract in relation to the failure to pay £600 for the work done. However, I have already awarded that as a deduction, and the Claimant cannot have double recovery.

46. In relation to mileage, by virtue of section 27(2)(b) of the Employment Rights Act 1996, expenses are excluded from the definition of "wages". The two sums which the Claimant seeks for mileage fall within that definition, and therefore the claimant cannot be awarded that as unauthorised deduction from wages. However, each of the two sums - £10.40 for 26 April and £20.40 for 5 May - were calculated correctly in accordance with what had been agreed between the claimant and the respondent (£0.20 per mile) and she is therefore entitled to receive those sums as damages for breach of contract. They should be paid without deduction and no grossing up is necessary.

Employment Judge Quill

Date: 02.02.2022

JUDGMENT & REASONS SENT TO THE PARTIES ON

25/2/2022

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FOR EMPLOYMENT TRIBUNALS