



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr Ainsworth Baker

**Respondent:** MK Business Support Limited

**Heard at:** Cardiff

**On:** 9 May 2022

**Before:** Judge MM Thomas

## **Representation**

Claimant: Mr Baker, Litigant in Person

Respondent: Mr Szymanski, Employee of Respondent

## **RESERVED JUDGMENT**

### **The Judgment of the Tribunal is that:**

1. The Respondent did not make an unauthorised deduction from the Claimant's wages. The claim is dismissed.

### **Reasons**

#### **Issues**

1. The Claimant claims to have been a 'worker' for the Respondent and as such, claims for his unpaid wages to the sum of £700 for the period from 25 October 2021 to the 28 October 2021.
2. The Respondent refutes the Claimant's claim. It states that the Claimant was self-employed and the work undertaken for its client, Advanced Fire Protection Ltd ('Advanced Fire Protection') was on that basis. In short, the work undertaken by the Claimant from 25 October 2021 to the 28 October 2021 was not to the appropriate standard and as a result, the client withheld payment. Despite requests to return to rectify/remedy the work, the Claimant refused to do so. It is asserted that the Tribunal does not have jurisdiction as the Claimant was self-employed, and any claim that the Claimant asserts to have should be pursued within the small claims court.

#### **Proceedings to date**

3. Neither party was legally represented. The Respondent was represented by Mr M Szymanski, an employee of the Respondent. The Claimant had with him his friend, Mr R Martin, whose attendance was solely in a supportive capacity.
4. At the outset of the hearing the only documents before the Tribunal, and which the Claimant had also received, were the initial claim form (ET1), and the Respondent's response (ET3). Directions had been given by the Tribunal on 27 April 2022 for the Respondent to file and upload an electronic bundle of documents nevertheless, there was no record of a bundle having been uploaded. The Claimant had neither filed or served any further documents.
5. I addressed the documentation point with Mr Szymanski at the outset of the hearing. He stated that on 3 May 2022 a bundle along with a statement from himself had been uploaded. Further, that no bundle had been sent by him to the Claimant because he was not aware he had to send one. On a check of the Tribunal system, it was identified that the bundle and statement had been uploaded but erroneously linked to a different claim. That was remedied. The bundle and statement were then sent to myself and the Claimant. In regard to what had been stated by Mr Szymanski pertaining to not having sent copies to the Claimant, having checked the directions made, I could see that although the Respondent had been directed to upload the bundle and statement, it had not been directed that copies should also be sent to the Claimant. Therefore, Mr Szymanski's failure to do so was understandable.
6. In regard the bundle and statement, the Claimant, entirely reasonably, raised concerns about the lateness of receipt of those documents and his ability to not only be able to navigate them, but also process what was set out within them at such short receipt. His concerns in regard his ability to do this were also heightened by the fact that he was dyslexic. I indicated to him that I fully understood his concerns however, my view was that the best way forward would be for there to be a break for 30 minutes to allow both himself and myself to look at the documents and after that time, if there were still concerns, to address them then and, at that point, consider and discuss if necessary, the need to adjourn to another date.
7. Following the recess, on restarting, I discussed the bundle with the Claimant to identify any ongoing concerns that he may have with proceeding with the hearing because of the late service of the documentation.
8. I went through the bundle with him. The bundle in total was 20 pages in length. Pages 1 to 4 contained the self-assessment form which the Claimant had completed for the purposes of deduction of his tax, as such, it was a form, which he accepted, he was familiar with as he had been party to its completion. Pages 5 to 7 contained three short emails, first two dated 25

October 2021, and then the third, 5 November 2021. They were between Mr G McVeigh, the Respondent's fire protection specialist recruitment consultant ('Mr McVeigh'), to Mr Mark Hicks, operations manager of Advanced Fire Protection ('Mr Hicks') and vice versa. The former two emails related to concerns about the standard of the work completed by the Claimant, and the latter email attached photographs of the work. Pages 8 to 19 then consisted of photographs of the purported unsatisfactory work carried out by the Claimant. Finally, page 20, was a copy of Mr McVeigh's call log to the Claimant which included a call made on 8 November 2021, and a synopsis of what was said in the duration of the call. In summary, there were four documents which were effectively new documents to the Claimant, which were the emails, and the call log. I was satisfied that the Claimant understood what will set out within those documents and was able to ask and respond to questions raised in regard to them. Further, that there was no additional evidence that he wished to adduce in response to them that he would be precluded from being able to do, if we proceeded with the hearing.

9. In relation to Mr Szymanski's statement, his statement, although three pages in length, the relevant substance of it was set out in just over 1½ pages. In total it ran to 7 paragraphs. The first page in the main set out the title of the proceedings, and the third page, its date and Mr Szymanski's signature.
10. Further, what was set out in the statement effectively repeated that which had already been set out within the ET3, there was nothing new raised within it that had not previously been raised. I suggested that Mr Szymanski read his statement aloud to the Claimant and after doing so, that there be a short break in the proceedings to allow the Claimant an opportunity to consider and process what was in it, and to think about the questions he may wish to put. In summary, having borne in mind at all times the overriding objective and the need to ensure the Claimant's full participation in the proceedings and his earlier concerns about the late receipt of the bundle and statement, nevertheless, having considered the documents, I could not identify a reason to adjourn the hearing despite the short receipt of them. Equally, the Claimant raised no further concerns in regard to them or continuing.
11. In the course of the hearing the Claimant submitted two further documents via email. One document was a character reference in relation to himself, and the second, was a letter that he had written to Mr McVeigh in relation to the outstanding payment. In addition, I requested that the Claimant submit post hearing two further documents which he had shown to the Tribunal in the course of the hearing however, at the time of writing this decision I am not aware if they have been submitted. Both documents were shown to myself and Mr Szymanski by video link. I made a full note of the contents of each document. One document was the payment slip for the first week of work that he undertook, and the second, was a confirmation message from the

Respondent in relation to his acceptance of the work for Advanced Fire Protection.

12. The Claimant and Mr Szymanski both gave evidence under oath. Both attended remotely via video link. No further witnesses were called.
13. I took time to explain to both parties the format that would be adopted for the hearing, and what would be required of them. I reiterated what my role was. I also explained to the Claimant that the burden of proof was upon him to prove his claim and losses.
14. At the end of the hearing, I reserved my judgment, in the main, because of time delays caused as a result of initial issues establishing the video link, and then because of the documentation problems. As a result, there was insufficient time to give an oral judgment.

### **Background**

15. The Claimant claims that he had 'worker status' with the Respondent. In short, the Respondent offered him a carpentry job at £175 a day with Advanced Fire Protection fitting fire doors. He accepted it. The job was four days a week. He had an unpaid induction on the 18 October 2021 and then started with Advanced Fire Protection on 19 October 2021. At hearing the Claimant showed over video link the message from the Respondent confirming the work, rate of pay, need to attend an induction session and the contact information. The work was based in Barry in care homes. The first week he was in Barry, and the second week in Barry Island. He was paid for his work the first week, 19 October to 23 October 2021. He returned to the job the following week, 25 October 2021. He worked until the 28 October 2021 and was then 'laid off' as the other fire doors that needed fitted were not ready.
16. On the contrary, the Respondent asserts that it is a recruitment agency. The Claimant was one of its registered candidates seeking employment. In short, the Respondent matches candidates with job vacancies. The Respondent's client, Advanced Fire Protection needed a carpenter to fit fire doors on a self-employed basis over two weeks, four days each week, from 19 October 2021 to 28 October 2021 at a rate of pay of £175 a day. The work was subject to the Claimant undertaking an unpaid induction with the client on 18 October 2021. No written or oral contract was entered into between the Respondent and the Claimant, as the Respondent's role was no more than to connect the candidate, that is the Claimant, with the client. The amount of payment to a candidate was and is non-negotiable, it is the advertised rate. In short, the candidate is offered the work, it is for the candidate to choose whether or not he/ she accepts it at that rate. The Claimant was offered the work which he accepted. It was then for him to contact the client, Advanced Fire Protection, to make further arrangements about it.

17. Any monies then to be paid to the Claimant for work undertaken for the client were processed through a third party payroll company, Crest Plus Operations Ltd ('Crest Plus'). The Claimant was registered with them as a construction industry scheme contractor. As such, under the construction industry scheme, tax was deducted at source at 20% from monies earned, which was referred to at hearing as a CIS deduction ('construction industry scheme deduction'). I was referred to the form completed by the Claimant in regard to the same (pages 1- 4).
18. The Claimant undertook the work for Advanced Fire Protection having attended the induction. The Respondent's contact there was Mr Hicks. The next occasion that there was any substantive contact between the Respondent and the Claimant was on the 8 November 2021, and that was by Mr McVeigh when he spoke to the Claimant about the standard of his work and, in short, advised him that the client was not prepared to pay him unless he went back and rectified it. The Claimant maintained there was nothing wrong with the work, and refused to go back.
19. As a result, Advanced Fire Protection withheld payment. Further, no recruitment fee was paid to the Respondent.

### **The Law**

20. Section 230(3) of the Employment Rights Act 1996 (ERA) defines a 'worker' as 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 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 '.*
21. In summary, condensing the statutory definition into its constituent elements, for an individual to fall within the definition of a 'worker'
  - (a) there must be a contract, be that express or implied, and, if express, written or oral;
  - (b) the contract must provide for the individual to carry out personal services; and
  - (c) those services must be for the benefit of another party to the contract who must not be a client or customer of the individual's profession or business undertaking.

**The facts and my findings**

22. Mr Szymanski's evidence is that there was no contract between the Respondent and the Claimant because as a recruitment agency it is working for their client, in this instance, Advanced Fire Protection. The candidate is merely someone who is put forward for the work that the client is offering. The candidate is under no obligation to accept the work. Similarly, whether the client accepts the candidate for the work is a matter for the client. Further, the candidate does not pay the Respondent's fee as a recruiter, it is the client that pays it if the candidate meets the criteria.
23. The Claimant's position is that he registered with the Respondent for work. He refers to the Respondent as an 'agency'. In oral evidence he confirms that he was at the time registered with other agencies although, this was the first time that he had worked 'with the' Respondent. Although at the hearing, he stated that he had been 'laid off' at the end of the second week, he also confirmed that the work was for the specified period, 19 October 2021 to 28 October 2021.
24. In employment law, the terms employer, employee, worker and self-employed have specific definitions. Throughout the course of the hearing the Claimant, and this is no criticism of him, used the terms employer, employee, worker and self-employed however, when considering his claim, there is only one issue to determine, which is, the employment status of the Claimant with the Respondent, was it as a worker, or self-employed. Therefore, in the instances when the Claimant in evidence referred to Advanced Fire Protection as being his employer, I have considered such terminology to be used in error and considered his claim on the basis asserted, that of a 'worker' of the Respondent not Advanced Fire Protection. In closing submissions, I asked the Claimant to clarify for me why he considered that he was a person with worker status, his response was, because he did a service for the Respondent, 'they get the job' and he would go and do it. However, the provision of services alone, and then going and doing the work requested does not necessarily equate to the Claimant having worker status. The starting point, when considering the statutory position, is whether there was in the first instance, a contract between the parties.
25. It is not an issue that there was no written contract, nevertheless, as set out above at paragraph 20, a contract can be oral, similarly, the terms do not have to be expressly agreed, they can be implied.
26. One of the requirements for the formation of a contract is that the parties must intend their agreement to create legal relations. One of the key questions when 'worker status' is asserted is the determination of whether the relationship is one of subordination, dependence and integration into the Respondent's business (**Uber BV and ors v Aslam and ors 2021 ICR 657, Dewhurst v CitySprint UK Ltd ET Case No.2202512/16**).

27. It was not in issue that the Claimant was under no obligation to accept work from the Respondent. Further, the facts established that during the time that the Claimant worked at Advanced Fire Protection, the Respondent had no control over his work, the hours he worked, or where he worked. In regard to remuneration, the Respondent advertised the rate provided by their client, a rate which was non-negotiable. As to payment, the agreed rate was what was paid to the Claimant. The Claimant did not have to pay any monies to the Respondent. The Respondent's recruiter's fee was paid by Advanced Fire Protection however, its payment, like the Claimant's, was subject to Advanced Fire Protection's approval of the Claimant's work. Further, and significantly the Claimant was not dependant on the Respondent as its sole source of income (**Suhail v Barking Havering and Redbridge University Hospitals NHS Trust and anor EAT 0536/13**). As confirmed in oral evidence, the Claimant was registered with other agencies in short, he confirmed, that he was not exclusive to the Respondent, he was free to work for any other organisation and actively marketed himself to other agencies and did so, on a self-employed basis.
28. In summary, other than introducing the Claimant to the Respondent, the Respondent thereafter played no further role other than, raising the invoice for the work, which was then processed through Crest Plus. In the course of the hearing, the Claimant showed to me over the video link a copy of the payment slip he had received for his first week's work which he maintained showed that he had effectively been paid through the PAYE scheme by the Respondent. That was not the case, what it showed was a payment of £700 with a '*CIS deduction*', and a final payment of £544.
29. In general, I have found the Claimant's evidence inconsistent and confused. Albeit he asserted that he had never been self-employed, he nevertheless then went on to state that that had been his status for 30 years, and although Advanced Fire Protection had asked for him to '*go direct*' with it, he had refused because he wanted to remain self-employed and work through the agencies. When I sought clarification on this, the Claimant's then evidence was that he was only ever self-employed for tax purposes, but otherwise was a worker. Similarly, I found his evidence inconsistent in relation to the telephone contact made by Mr McVeigh on 8 November 2021 in regard the unsatisfactory work. Initially, the Claimant denied that there had been any contact. However, when it was then put to him what was set out in the call log (page 20), he accepted that he has been contacted however, did not accept that there was anything wrong with the work undertaken, and refused to go back to remedy/ rectify.
30. I find that the Claimant's claim falls at the first hurdle, on the first limb of the test. In summary, the Claimant could provide his services as infrequently or as often as he wanted for the Respondent. He was not subject to the

Respondent's control which was reflected in what ultimately happened. In short, the work undertaken was not completed to the client's satisfaction and despite asking the Claimant to rectify, when he refused, there was nothing that the Respondent could do about it. In summary, I find that this was not a dependent work relationship, nor a relationship of subordination or integration. In short, I find that there was no contractual agreement between the Respondent and the Claimant. As such, he was self-employed and therefore, has no claim for an unauthorised deduction of wages in this jurisdiction.

31. However, if I am wrong on the contractual point, and I move to the second limb of the test, which concerns the provision of services, my finding would still be the same. In short, the evidence of self-employment when considered in the round, far outweighs the evidence of the status of a worker. As previously stated, other than the Respondent directing the Claimant to the client, the Respondent had no further control over his work, the quality of his work, or even ultimately for him to return to rectify the work that was done.
32. The facts are the Claimant attended the induction with Advanced Fire Protection. Mr Hicks told him the work he was required to do, and where he was required to do it. At both sites at which he worked; he was left to get on with the work. He used his own van and work tools. He confirmed that there was a '*working foreman*' at each of the sites who was undertaking the same job as he, however, the foreman did not supervise his work, he merely directed him to where the work needed to be done at the particular site and left him to it. The Claimant was not expected to sign in or out at any particular time. When he finished the work he had been instructed to do, he left. He did not have to seek anyone's approval. Similarly, for the purposes of payment for the work, the Claimant completed the self-assessment tax form with Crest Plus in which he identified himself as self-employed and received his first week of pay on that basis. Considering other factors that could potentially also point to worker status, the Respondent took no responsibility to ensure that the Claimant had appropriate liability insurance for working on the site. The Claimant despite contending he was a worker, makes no reference to ever discussing with Respondent holiday entitlement. Further, I find of significance, that when the Respondent needed the Claimant to go back to rectify the works, they were unable to require him to do so.

### **Conclusion**

33. There is no need to recite any further of the evidence that has led me to my conclusion in relation to the claim therefore, albeit I may not refer directly to any further points made by either of the parties, I have considered all the evidence in the round.
34. As stated at the outset, the burden of proof is on the Claimant to show to the required standard of proof, that is, that it is 'more likely than not,' that he was



a worker and as such, the Respondent's failure to pay him the money owed for the work undertaken between 25 October 2021 and 28 October 2021 was an unauthorised deduction of wages.

35. I find that the Claimant has failed to discharge the burden of proof and met the relevant standard of proof. In the first instance, I find that there was no contract. Alternatively, if I am wrong on that, I find that the evidence in support of self-employment far outweighs that in support of worker status.
36. As the Claimant was self-employed the Tribunal have no jurisdiction in relation to the outstanding payment which the Claimant asserts is due to him from the Respondent. As part of its response, the Respondent asserted as an alternative, that the claim should be struck out on that basis however, although asserted, it made no application in respect of the same.
37. Whether I strike out the claim or find that there has not been an unauthorised deduction of wages has effectively the same outcome, the claim comes to an end. As the claim was premised on the basis that it was an unauthorised deduction of wages, I dismiss it on that basis. Nevertheless, I accept that the alternative would be strike out for want of jurisdiction, which is, the Tribunal does not have jurisdiction on the basis of my finding that the Claimant was self-employed.

Employment Judge Thomas

Date 23 May 2022

Reserved judgment & REASONS SENT TO THE PARTIES ON 27 May 2022

FOR THE EMPLOYMENT TRIBUNALS OFFICE Mr N Roche