



EMPLOYMENT TRIBUNALS

Claimant: Mr Dale R Holmes

Respondents: (1) Niyaa People Ltd
(2) Umbrella Company Ltd

Heard at: Employment Tribunal | HMCTS | 13th Floor, Centre City Tower, 5-7 Hill Street,
Birmingham, B5 4UU (by CVP) **On:** 29 June 2022

Before: Employment Judge Hena (sitting alone)

Representation

Claimant: Ms Van De Berg, Counsel

Respondent 1: Mr Taylor, Solicitor

Respondent 2: Ms Younes – Litigation Consultant

RESERVED JUDGMENT

The Tribunal makes the following findings in respect of this claim:

1. The claimant was employed by the first respondent (referred to as respondent 1 in the judgment) in this matter at the relevant time.
2. The claimant's claim for unlawful deduction of wages pursuant to s.23(1)(a) of the Employment Rights Act 1996 has not been made out.
3. The first respondent is ordered to pay the claimant 1 weeks' notice pay of £1,065.60.
4. The claimant's claim for financial loss has not been made out.

REASONS

Preliminary Matters

Are the claimant's claim for expenses a new issue?

5. The respondent 1 and 2 objected to the claimant's claim for expenses in relation to his vehicle on the basis that this was not in the ET1 but introduced in the schedule of loss and witness statement.
6. The claimant's position was that whilst it was not pleaded in the particulars it is listed in the losses and in the evidence at page 104 it mentioned the need for a suitable company vehicle.
7. It was determined that the claimant could argue the issue and there may be force in his argument that whilst it was explicitly argued it could be inferred as a contractual loss.

Claims and Issues

8. The claims and issues in this matter are:

13.1 Who was the claimant's employer?

13.2 Was there an unlawful deduction of the claimant's wages for the sum of £2,604.80 for 8 weeks pay due to a shortfall in the hourly rate paid to the claimant?

13.3 Is the claimant owed notice pay for the sum of £1,065.60?

13.4 Has the claimant introduced a new issue? Is he owed expenses of £4,500 associated with a vehicle he purchased for his last assignment?

Evidence

9. The evidence of the claimant can be summarised as;

- Before adopting his statement paragraph 6 was amended to state that his assignment with Reed ended in June 2021 not July.
- He entered into an employment contract with respondent 2 as a workflow manager only in February 2021.
- After finished that assignment he claims respondent 2 found him no other work assignment.
- In August 2021 approached by respondent 1 – they said saw his CV online started assignment with Persimmons then Taylor Wimpey Contact Centre.
- He was never sent the assignment details before he started the position – which is why he asked for it afterwards.
- He was told his position was fending by a client.
- The claimant believes respondent 1 to be his employer as he had no contact with respondent 2 during this period.
- He became suspicious of wages not being paid properly when respondent 1 accidentally sent him details of 2 pay assignments with Taylor Wimpey. He believes he was underpaid, and it should have been £22.50
- The claimant also believes respondent 1 failed to give him proper notice and he was led to believe he would be needed for 4 years and purchased a car appropriate for site terrain for this role.

10. The first respondent's evidence in response can be summarised as;

- They have a contract with respondent 2 whereby they help allocate work assignments.
- They gave such an assignment to the claimant and that respondent 2 was the agency with the overarching employment contract.
- Respondent 2 would do all the pay and tax deductions for their client – the claimant.
- They were not required to give notice but in any event the claimant had 1 weeks' notice of the assignment ending.
- They believe the overarching contract makes clear that the ending of an assignment does not mean the overarching employment contract ends.
- The error regarding the assignment details sent to the claimant was that the contract between them and their client detailed the hourly pay they had agreed. This is hourly rate plus VAT they take and then they give the claimant an appropriate amount. The second assignment was for the claimant which details

£18.50 – it is clearly for claimant as it does not mention VAT and not signed like the other one by NIYAA Ltd manager.

11. The second respondent's evidence in response can be summarised as follows:

- They have an overarching employment contract but were not the claimant's employer.
- The assignment serves as an employment contract, and they have no idea what was agreed as it was between respondent 1 and the claimant.
- They can only know when an assignment ends when their client, respondent 1 informs them, they then update, and adjust/cease pay to the claimant – respondent 1 did not do this.
- They cannot comment on the hourly rate as they had no details of the assignment, but the claimant knew he was being paid £18.50 and never complained until after the assignment ended.

Fact Findings First Claimant

12. The Tribunal found the following in relation to each issue relating to the first claimant;

(a) *Who was the claimant's employer?*

13. The evidence was not clear from either respondent as to how exactly the claimant commenced working with the respondent 1, respondent 2 in evidence did not state that they had approached respondent 1 about the claimant and his suitability for any roles they may have.

14. Further to this neither respondent disputed the claimant's account that respondent 1 had in fact approached him. It is also of significance that whilst respondent 2 states they processed the PAYE for respondent 1 they gave evidence to say that they were not informed by respondent 1 that the assignment had come to an end. If it was part of his employment contract for them to secure him another assignment you would expect notification so that they could then work with the claimant to secure him more work.

15. With regards to the overarching employment contract the claimant had with respondent 2, there are issues in that it is specifically in the name of the Reed assignment he had had with them. Whilst it states that the contract does not end on the termination of the assignment it indicates it ends if no assignment has been secured within 8 weeks' time. The evidence was that the respondent 2 will do this eventually but not exactly within 8 weeks' time. It is the claimant's evidence he never contacted respondent 2 to inform them after the 8 weeks lapsed about working with respondent 1 and were only aware of their involvement when he raised a complaint about the termination of his position.

16. The Tribunal finds the evidence of the claimant on the issue to be consistent and in line with the evidence of both respondents. The lapse of time in the claimant securing an assignment had terminated the employment contract. Respondent 1 approached the claimant outside of respondent 2's knowledge. It just so happened respondent 2 worked with respondent 1 in processing their PAYE. However, it appears from the evidence of respondent 2 they are separate operations and they themselves did not believe, initially, they were the employer of the claimant.

17. Given the above findings the Tribunal finds that respondent 1 to be the employer of the claimant during the relevant period when he was assigned to Taylor Wimpey Homes.

(b) Was there an unlawful deduction of the claimant's wages for the sum of £2,604.80 for 8 weeks pay due to a shortfall in the hourly rate paid to the claimant?

18. The claimant contends that the two job specifications he received from respondent 1 shows that he was paid the incorrect hourly rate. One stated £18.50 which is what he received and the other states £22.50 plus VAT. It is the claimant's case that the latter is the rate he had agreed to work for with respondent 1.

19. The Tribunal believes the evidence is that the two documents sent to the claimant by respondent 1 was an error and that the hourly rate of £22.50 plus VAT could not have been for him as his evidence is that he is not VAT registered. This indicates the rate of £22.50 plus VAT is the agreement between respondent 1 and Taylor Wimpey Homes. From this rate they then give the claimant £18.50 per hour which is more than the £15.00 per hour that respondent 1 said was too low and they urged the client to increase to get people to take up the role.

20. The Tribunal finds that the claimant had all the information before him that his hourly pay was £18.50 and did not raise an issue that he felt he was being underpaid until seeing the two hourly rates from respondent 1.

21. Given the above findings it is the Tribunal's finding that there has been no unlawful deduction of wages in the form of an underpayment by respondent 1, the employer of the claimant.

(c) Is the claimant owed notice pay for the sum of £1,065.60?

22. The Tribunal finds that any notice owed to the claimant lies with respondent 1, who was his employer at the relevant time and not with respondent 2. It is the claimant's position that the agreement with respondent 1 includes written notice of 1 week and that in this case it was the claimant telling respondent 1 that his assignment appeared to be coming to an end and no formal notice given.

23. Evidence from respondent 1 was that it is nice to give notice but not always possible when an assignment finishes with a client, they can terminate it immediately. If that's the case, then the position must come to an end. This is the case with respondent 1's industry – construction.

24. Whilst it is accepted that respondent 1's client may terminate immediately as they simply have no more work, but the agreement states notice of 1 week which can include written notice. If their industry is such that it can be immediate termination, then their agreements must specify this. Instead, they rely on the contract the claimant had with respondent 2, but this does not apply to them, for reasons specified above they are the employer and should have specified immediate termination to be the case in the assignment.

25. The Tribunal finds that respondent 1 had no intention of providing the claimant with notice and did not feel they needed to. It is found that respondent 1 should have provided the claimant with 1 week' written notice.

(d) Has the claimant introduced a new issue? Is he owed expenses of £4,500 associated with a vehicle her purchased for his last assignment?

26. The Tribunal finds that the issue of expenses is not entirely new and in line with the initial claim – these are expenses as a result of claim for wages and notice. It does form part of contractual losses. In any event the respondent's have had sufficient time to prepare their position with regards to these losses.

27. However, the Tribunal agrees with the position of respondent 2 on this issue, whilst it is agreed the job specification states the person should have a suitable vehicle for the role it was open for the claimant to not accept the job on this basis. The roles provided to him by respondent 1 were based on his skills and meeting the requirements of the role. If he did not meet that requirement, then it was not a job role suitable for him.

28. It is the claimant's position that respondent 1 led him to believe the assignment was going to last for some time which is why he purchased the vehicle. Even if respondent 1 had done so, without having anything in writing to that affect and understanding the nature of the respondent 1's business he chose to take a risk in investing in a vehicle.

29. The Tribunal also finds it is not a loss to him financially as he has the vehicle and has been making use of it outside of his role with Taylor Wimpey. He can sell the vehicle or keep making use of it, but it is not a loss as a result of any actions of respondent 1 or 2.

Employment Judge Hena

Date: 29 June 2022

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

.....4th August 2022.....

.....Eamonn Murphy.....

FOR EMPLOYMENT TRIBUNALS