



EMPLOYMENT TRIBUNALS

Claimant: Mr S Zajota

Respondent: Umbrella Company Ltd

Heard at: London Central

On: 06 September 2022

**Before: Tribunal Judge J E Plowright acting as an Employment Judge
(sitting alone)**

Appearances

For the Claimant: In person

For the Respondent: Mr A Burgess (Legal Consultant)

RESERVED JUDGMENT

1. The claim for unauthorised deduction of wages is not well founded and is dismissed.

REASONS

Claims and Issues

1. By a Claim Form presented on 31 March 2022, the claimant brought a claim for unauthorised deduction of wages. The claim relates to the claimant's period of employment for the respondent from 31 January 2022. The claimant had worked for the respondent in 2021 but makes no claim in relation to that period of employment.
2. The claimant claims that there have been unauthorised deductions from his wages in that he should not be paying Employer's National Insurance or the

Apprenticeship Levy and that these should be paid by his employer and not by him.

3. The issue in the case is as follows:

4.1 Did the respondent fail to pay the claimant wages that were lawfully owed to him?

Procedure, documents and evidence heard

4. The tribunal heard evidence from the claimant and from Mr P Langham (the director of the respondent company).
5. In terms of documentation, I had before me a final hearing bundle consisting of 193 pages. I also had witness statements from both the claimant and Mr Langham.
6. The case had previously been listed for an Open Preliminary Hearing on 24 May 2022 to determine who was the correct respondent in this case as the claimant had made claims against both Osborne Richardson Limited and Umbrella Company Limited. At that hearing, it was decided that the correct respondent was Umbrella Company Limited because Osborne Richardson Ltd were a recruitment agency whereas Umbrella Company Limited were the claimant's employer.

The Facts

7. On 26 May 2021, the claimant was employed by Umbrella Company Limited, a payroll company, via a recruitment agency, Osborne Richardson, and assigned to the London Borough of Brent as a Nuisance Control Officer for a period of nine weeks. The assignment rate was £35 per hour.
8. On 15 June 2021, the claimant was provided with a contract of employment from Umbrella Company Limited. At section 3.2 of that contract, the following is stated:

"3.2 Salary: We will pay you at the applicable National Minimum Wage (or, if applicable, the National Living Wage) rate, to commence when the first Client Assignment commences...

...

3.5. Additional Pay: To the extent that your gross taxable pay (excluding holiday pay) exceeds your salary (calculated at the applicable National Minimum Wage (or, if applicable, the National Living Wage) rate, it constitutes your additional pay which is identified separately on your payslip."
9. The claimant agreed to the terms and conditions set out in this employment contract. The claimant was also sent a take home pay illustration.
10. In respect of the work he did the claimant was issued with payslips and reconciliation statements.

11. The payslips show the claimant's basic pay (at a rate of £8.91 per hour), holiday pay and additional pay. There are then deductions for tax and National Insurance.
12. For example, the payslip processed on 02 July 2021 for the week ending 30 May 2021 shows the following:

Payments

• Basic Pay	22 units	Rate: £8.91	Amount: £196.02
• Holiday Pay	1 unit	Rate: £72.88	Amount: £72.88
• Additional Pay	1 unit	Rate: £407.80	Amount: £407.80

Deductions

• Tax	Amount: £86.80
• National Insurance	Amount: £59.12

13. The reconciliation statements show the basic pay at the relevant assignment rate, less the company costs.
14. For example, the reconciliation statement processed on 02 July 2021 for the week ending 30 May 2021 shows the following:

Company Receipts

• Basic Pay	22 units	Rate £35.00	Amount: £770.00
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Less Company Costs

• Company Margin:	Amount: £20.00
• Employer's NIC	Amount: £69.92
• Holiday Provision	Amount: £72.88
• Apprenticeship Levy	Amount: £3.88

Total	Amount: £166.18
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<u>Receipts Less Costs</u>	Amount: £603.82
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<u>Add Holiday pay taken for this period</u>	Amount: £72.88
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<u>Gross For Tax</u>	Amount: £676.70
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15. In September 2021, the claimant's assignment came to an end and he stopped working for Umbrella Company Ltd.
16. On 31 January 2022, the claimant was again employed by Umbrella Company Limited, via the same recruitment agency, Osborne Richardson, and assigned to the London Borough of Camden as an Environmental Health Officer for a period of twelve weeks. The assignment rate was £40 per hour. That assignment rate

has subsequently increased to £40.47 and then to £41.44. The claimant continues to work for the respondent to date in this capacity.

17. On 31 January 2022, the respondent emailed the claimant a take home pay illustration explaining the deductions to be made including Employer's National Insurance and the Apprenticeship Levy.
18. On 31 January 2022, the claimant replied to that email asking why he would be paying employer's National Insurance contributions along with the Apprenticeship Levy.
19. On 01 February 2022, the respondent emailed the claimant in the following terms:

"...When you go through an Umbrella company you'll be given an assignment rate from the agency/end client which includes your employers costs (Employers NI, Apprenticeship Levy, Holiday Pay and also Pension contribution). This will be uplifted as these will have to be included within your rate of pay. These contributions are deducted before your gross pay is generated, at this point you'll pay your employee's NI and also income tax. After these contributions you will be left with your net pay."

20. On 01 February 2022, the claimant then emailed Robert Talbot, of Osborne Richardson stating the following:

"Hi Robert, we confirmed in another email chain that there is no longer any LTD rate, IR35 eliminated that concept for a contractor. Also this was not presented to me as a LTD rate, and also you know that I am not doing this contract as a LTD company but as an individual employee ... in this case for Umbrella. Co .uk"

21. On 01 February 2022, Robert Talbot replied to that email stating the following:

"Thanks Seymour, yes, there at LTD rates and PAYE. Often we state LTD rate as Umbrella to save confusion as you can get LTD rates that are inside IR35 (so people can't use their LTD companies). I can assure you that there is no swindle going on and Umbrella.co.uk are not taking that money from you, the HMRC are."

22. On 01 February 2022, the respondent company also sent the claimant an email with a copy of the employment contract. That email stated the following:

"Thank you for choosing our services. Attached is your employment contract in which our terms and conditions can be found. Please read the contract carefully."

"Once you are happy, please click on 'reply' to this email, type in 'I accept the terms' and click 'send'..."

23. During the course of his evidence, Mr Langham initially stated that the claimant would have had to have replied to that email, otherwise he would not have been able to commence employment with the respondent. However, he acknowledged that a copy of the claimant's email was not within the bundle of documents. He indicated that he could obtain that email response from the

company's records and, at the request of the claimant, I adjourned the case for fifteen minutes in order for him to obtain this email. However, when we resumed the hearing, Mr Langham acknowledged that the claimant had not replied to that email. Mr Langham went on to state that once someone has signed a contract with the respondent on a previous occasion, there is no need for them to sign and accept the new terms. He said that he thought that in the past they had received legal advice that if the terms have not changed then an employee is deemed to have accepted the terms.

24. The assignment rate was £40 per hour increasing to £40.47 per hour in May 2022. The contract was in the same terms as his previous contract and made it clear at section 3.2 that he would be paid the National Minimum Wage (or, if applicable, the National Living Wage).
25. On 07 February 2022, the claimant emailed Robert Talbot, from Osborne Richardson, in the following terms:

"Hi Robert,

I did not sign up to do this contract as a limited company, therefore I was not quoted a LTD rate. Nor did Osborne Richardson advertised it as such to me.

As my P45 can attest, I have been a PAYE employee within IR35 for the last few years in accordance with the HMRC changes.

In light of this I am not required to pay Employers National Insurance nor Apprenticeship levy. That is the purview of Umbrella.co.uk

If this cannot be agreed with the present employer, ie: umbrella.co.uk, I will have no choice but to seek employment for this contract through another umbrella company.

Please let me have your comments on this."

26. On 08 February 2022, Robert Talbot, from Osborne Richardson, emailed the claimant in the following terms:

"Thanks for the email Seymour,

Yes, we always deal in LTD rates and we pay the Umbrella companies LTD and they convert your pay into PAYE (taking out all NI and income tax).

When I first mentioned the role I said it was £40 Umbrella (see attached) which is the same as LTD, the employers NI (and other deductions) need to be taken out.

I can assure you this is the normal process and what the Councils want as they have stated the role inside IR35. We have paid you like this for contracts at Brent, LBTH, Wandsworth and Mid Sussex, why are you not happy with it now? You are more than welcome to change Umbrellas however they will do the exact same thing as the role is inside IR35.

What has brought this about Seymour? What has changed that you are not happy? I can assure you it is correct and no one is trying to swindle you. Please call if you have any questions and we can discuss further.”

27. I find as a fact that the claimant was aware of the terms of the contract and, although he did not sign the contract, he nevertheless continued to work for the respondent, in the full knowledge of the terms of the contract.
28. The claimant was thereafter issued with payslips and reconciliation statements. These reflect both what is stated in the take home pay illustration that was sent to the claimant and also the examples of the payslip and reconciliation statement that I have already given.
29. On 28 February 2022, the claimant commenced early conciliation with ACAS.
30. On 02 March 2022, the early conciliation procedure came to an end.
31. On 31 March 2022, the claimant lodged a Claim Form with the tribunal.

The Law

32. Section 13(1) of the Employment Rights Act 1996 provides that an employer shall not make a deduction from wages of a worker employed by them unless 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 the worker has previously signified in writing his agreement or consent to the making of the deduction.
33. Wages are defined in section 27 of the Employment Rights Act 1996 as any sums payable to the worker in connection with his employment.
34. An employee has a right to complain to an Employment Tribunal of an unlawful deduction from wages pursuant to Section 23 of the Employment Rights Act 1996.

Conclusions

35. The claimant was provided with work through a recruitment agency, Osborne Richardson. In 2021, he was assigned to the London Borough of Brent and in 2022, he was assigned to the London Borough of Camden. However, on each occasion, the claimant was employed by Umbrella Company Limited, who operate as a payroll company.
36. An 'assignment rate' was given for the claimant. From that assignment rate, the respondent would make deductions and then pay the claimant his gross salary.
37. The claimant's claim relates to his most recent employment with the respondent which commenced on 31 January 2022.
38. The claimant argues that Employer's National Insurance and the Apprenticeship Levy were deducted from his wages.

39. However, I find that Employer's National Insurance and the Apprenticeship Levy were not deducted from his wages.
40. The end client, most recently the London Borough of Camden, would pay an assignment rate to the respondent company. That assignment rate has changed over time. When he was assigned to the London Borough of Brent in 2021, the assignment rate was £35 per hour. When he was initially assigned to the London Borough of Camden in 2022, the assignment rate was £40 per hour, and that later increased slightly.
41. The assignment rate is not the same as the claimant's wages. The assignment rate is the fee paid to the respondent by the end client and then it is the respondent's obligation as the claimant's employer to make relevant deductions from that fee, which include Employers' National Insurance and the Apprenticeship Levy before determining the claimant's gross salary. Once the claimant's gross salary is determined, the respondent then deducts tax and National Insurance, leaving the claimant with his Net Pay.
42. In an email from the respondent to the claimant on 01 February 2022 this was explained to the claimant in the following terms:

"When you go through an Umbrella company you'll be given an assignment rate from the agency/end client which includes your employers costs (Employers NI, Apprenticeship Levy, Holiday Pay and also Pension contribution). This will be uplifted as these will have to be included within your rate of pay. These contributions are deducted before your gross pay is generated, at this point you'll pay your employee's NI and also income tax. After these contributions you will be left with your net pay."
43. The contracts of employment also make it clear that the claimant will be paid at the National Minimum Wage (or if applicable the National Living Wage). This is precisely what the claimant was paid as his basic salary.
44. The claimant did not sign his most recent contract for the assignment in 2022 with the London Borough of Camden (although he did sign the earlier contract with the London Borough of Brent).
45. Firstly, the fact that he did not sign the most recent contract in 2022 is not relevant to the issue that I have to determine which is whether or not the assignment rate constitutes the claimant's wages. The assignment rate is not the claimant's wages, it is a fee paid to the respondent by the end client. The claimant's wages are the gross salary he receives once all the relevant deductions have been taken from the assignment rate.
46. In any event, the claimant was fully aware of the respondent's position and how his gross pay was calculated with reference to the assignment rate.
47. He had previously worked for the respondent in 2021 and knew from experience that deductions would be made from the assignment rate. He was sent an illustration of how his take home pay would work. He had previously received payslips and reconciliation statements which set out precisely how the deductions were made. The deductions had been explained to the claimant via email. He continued to receive payslips and reconciliation statements during the

course of his employment in 2022 for the respondent. Even though he did not sign the contract, he commenced work for the respondent, fully aware of how the pay system operated and he continues to do so to this date and so has agreed to the terms of the contract by his conduct.

48. For the reasons I have given, I find that the respondent has not made any unauthorised deductions from the claimant's wages and the claim is dismissed.

Date: 15/09/22

Tribunal Judge J E Plowright acting as an Employment Judge

Sent to the parties on:

15/09/2022

For the Tribunal: