



IN THE EMPLOYMENT TRIBUNAL (SCOTLAND) AT EDINBURGH

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Judgment of the Employment Tribunal in Case No: 4112482/2021 Heard at
Edinburgh on the Cloud Based Video Platform (CVP) and with the assistance
of a French Language Interpreter, on 18th January 2023 at 10.30 am

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Employment Judge J G d'Inverno

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Mr M Diop

Claimant
in Person

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FCS Recruitment Ltd

Respondent
Represented by:
Mr Millar, Solicitor

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JUDGMENT OF THE EMPLOYMENT **TRIBUNAL**

The Judgment of the Employment Tribunal is;

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(First) During his engagement with the respondent, the claimant was an
independent sub contractor operating under the Construction Industry
Scheme ("CIS").

(Second) The sums paid to the claimant during his engagement in relation to the services provided by him, were the sums properly payable to him under contract.

5 (Third) The claimant's claim is dismissed.

10 **Employment Judge: J d'Inverno**
Date of Judgment: 24 January 2023
Entered in register: 25 January 2023
and copied to parties

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I confirm that this is my Judgment in the case of Diop v FCS Recruitment Ltd and that I have signed the Judgment by electronic signature.

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REASONS

1. This case called, on the Cloud Based Video Platform, for Final Hearing on 18th January 2023 at 10.30 am. At the request of the claimant there was in
25 attendance at the Hearing a French Language Interpreter to whom the Employment Judge administered the "Oath of Fidelity in Administration". The respondent's Director, Mr Mark Poli, gave evidence on oath and answered questions put by the claimant in cross examination and questions from the Tribunal.

Procedural Background

2. On 7th December 2022 Employment Judge Cowen issued Case Management Orders directed towards preparing the case for Hearing Three of the Orders
35 of 7th December provided:-

“3. The claimant shall file with the Tribunal and serve on the respondent a witness statement explaining the claimants position on;

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- i) whether he was a ‘worker’ or ‘employee’ for the respondent,
 - ii) the entitlement and calculation of the sum of £1800 claimed in his email of 16th September 2022”.

3. A sanction was attached to that Order in the following terms:-

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“UNLESS PARAGRAPH 3 OF THIS ORDER IS COMPLIED WITH BY 6 JANUARY 2023, THE CLAIMANT WILL NOT BE ALLOWED TO RELY ON ANY ORAL EVIDENCE AT THE FINAL HEARING.”

15 4. The claimant failed to comply with the Order. The Tribunal extended the time for compliance calling upon the claimant to comply. The claimant failed to comply with the Order within the extended time period.

20 5. By correspondence dated 12th January 2023 the Tribunal, upon the direction of Employment Judge Macleod, confirmed that the sanction attached to the 7th December 22 Order had now been applied and the claimant was accordingly not permitted to lead evidence at today’s Hearing in relation to either of the above matters.

25 6. At the outset of the Hearing the Employment Judge reiterated, for the record and for the claimant’s benefit, the above history of events and explained to the claimant that in consequence his participation in the evidential part of the Hearing would be restricted to his putting questions in cross examination of the respondent’s witness. The claimant confirmed that he understood the same.

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7. In accordance with the Tribunal’s earlier Direction the respondent’s representative lodged a joint bundle of documents to some of which reference was made in the course of evidence and submission.

8. On the morning of the Hearing, at approximately 09.37 hrs, the claimant sent, to the Tribunal and to the respondent's representative an email which he confirmed in exchange with the Employment Judge was intended to be viewed as a submission.
9. The claimant had also, on the preceding day sent some additional documents, some of which replicated documents already in the joint bundle, to the respondent's representative and to the Tribunal. Otherwise the documents comprised certain extracts from the claimant's bank statements, copies of the CIS sub contractor's payment statements and certificates, (already included in the joint bundle) and an email dated the 25th of June 2021 from the respondent confirming the claimant's acceptance for registration and in which they made reference to their trading name "MAP Recruitment".

The Issue

10. The issue for determination remained that set out by Employment Judge Hoey at paragraph 23 of his Orders and Note of 2nd September 2022; viz:-

"23. The issue to be determined by the Tribunal is therefore whether or not the sums paid to the claimant by the respondent during his engagement with the respondent (which is understood to have lasted around 6 weeks) were less than the sums properly payable to him in terms of his contract with the respondent."

11. In the course of Case Management Discussion conducted at the outset of the Hearing the Employment Judge confirmed with the parties that the same remained the issue for determination.

Findings in Fact

- 5 12. On the documentary and oral evidence presented, the Tribunal made the following essential Findings in Fact restricted to those relevant and necessary for the determination of the issue.
- io 13. The respondent FCS Recruitment Ltd with trading name "MAP Recruitment", carries on the business of an employment agency whose function it is to liaise with clients to identify work opportunities and then to approach those who have "signed up", that is registered with the company, in order to offer, on behalf of its clients those engagements on the particular terms, including hourly rate of payment, specified by the clients.
- 15 14. The claimant, through the respondents website registered himself as a "Self Employed Construction Industry Scheme ("CIS") sub contractor". The claimant further completed and submitted his registration form in paper form containing the same representation. On the registration form (page 22 of the bundle) the claimant ticked the box indicating that he was a self employed sub contractor.
- 20 15. The claimant also supplied the respondents with a unique tax payer reference number ("UTR number") at the point of registration, the same being something which is provided by Her Majesty's Revenue and Customs, only to self employed individuals or sub contractors.
- 25 16. The respondent is a relatively small company and the respondent's Director, Mr Poli, engaged personally with the claimant in his dealings with the respondent.
- 3-0 17. In or around the end of June 2021 there were a number of assignments on offer by clients of the respondent via the agency in the Edinburgh area. The claimant made contact with the respondents and applied for an assignment in Leith which had been offered by the client with an hourly rate of £12 per hour.

The assignment which the claimant applied for had, however, already been filled before the claimant made his application.

18. The claimant was made aware that that assignment had been filled.

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19. The claimant was offered a different short term assignment at the rate of £11.90 per hour in Newhaven, a location very proximate to Leith. The claimant accepted that assignment.

10 20. The respondent's client was "Linear Projects" and the construction work was to be carried out on a site at Victoria Primary School. The work was to commence on the 23rd of June 2021 and, as part of the required pre-start induction, an Assignment Details Form (produced at page 23 of the bundle) was provided to the claimant by Linear Projects. That Form records that the
15 agreed contract rate for that work, with that client, in that location was £11.90 per hour and not, £12 per hour as asserted by the claimant.

21. The Assignment Details Form, provided by the respondent's client Linear Projects to the claimant in respect of the work, specifies that the name of the
20 hirer and the nature of their business was "Linear Projects - Commercial Construction Fit Out Contractor", on the one hand, and that the name of the agency worker/contractor was the claimant "Mamadou Diop", on the other.

22. In order to register with the respondent, the claimant completed and entered
25 into "Agreement to Terms" (produced at page 24 of the bundle and signed by the claimant on the 28th of June 2021).

23. The terms, agreed to in writing by the claimant included at paragraph 3 the following:

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"Please note that a maximum of £20 for bookkeeping and payroll services will be charged weekly and deducted from your contract rate. This service includes a dedicated support team for pay related matters, preparing and processing self billing invoices, income

5 *statements and timesheets, verification of UTR and tax banding with HMRC This service can be provided by "Payformance" or, if you would prefer, a provider of your choice, (in this case you would need to notify us in writing with the provider's details in order that they are approved to ensure their compliance.) Please note should you wish to withdraw from this service, then under the Employment Agencies Act 1973 (Reg 5) you have the right to cancel by sending an email to Marc at MAPRecruit.co.uk giving 7 days notice. You should also note there are no refunds or rebates payable through this*

10 *service".*

24. Clause 4 provides:-

15 *"4. / have read, understood and accept the enclosed terms and conditions of the contract for services that by accepting the provisions of this agreement I become a sub contractor of FCS Recruitment Ltd until such time as either terminates the agreement in writing. "*

20 25. "Payformance Limited", the company who provided the service referred to in Clause 3 of the Agreement for the services provided the necessary "Sub Contractor Payment Certificate" on a weekly basis to the claimant and also, a monthly "CIS Sub Contractor's Payment Statement". Those certificates and statements are produced at pages 26 to 35 of the bundle.

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26. The Sub Contractor Payment Certificates, supplied weekly to the claimant, state on their face that the sum of £20 has been deducted from the money paid to the claimant as a "payroll processing fee". Those Certificates were emailed to the claimant each week. A list of all the emails sent to the claimant, and the detail of what was attached to each, is produced at page 25

30 of the bundle. The email address to which the Certificates were sent was the same email address as that provided by the claimant to the respondent when he registered.

27. At no point during his engagements did the claimant raise either with the respondent or with Payformance Limited any issue or question relating to the £20 deduction.
- 5 28. In terms of the "Agreement to Terms" document entered into by the claimant and produced at page 24 of the bundle, in signing and returning the form to the respondent as agent for Payformance Limited, the Claimant gave prior written authority for and permission in respect of the making of the deduction.
- 10 29. The claimant worked on the Victoria Primary Project at Newhaven from 23rd June until 8th August 2021. The claimant was thereafter offered and accepted a different project for the same client "Linear Projects", at the St James Centre in Edinburgh and at a higher hourly rate of £14.50. Having accepted the assignment and rate, the claimant started work on the new
15 project on the 9th of August 2021.
30. The Sub Contractor Payment Certificates issued by Payformance Limited also show on their face the deduction of CIS tax ("Construction Industry Tax) which, in terms of the Construction Industry Scheme (CIS) - gov.uk the
.iO contractor, who, in terms of the "agreement to terms" Clause 4 page 24 of the bundle is the respondent FCS Recruitment Ltd is obliged to deduct from payments due to a sub contractor, the claimant, in terms of the same agreement, and account to Her Majesty's Revenue and Customs therefore. The deductions count as an advance payment towards the sub contractor's
25 tax and National Insurance. The sub contractor, in this case the claimant remains responsible for ensuring that he ultimately pays the correct amount of tax and National Insurance contributions but is entitled to credit for the advance payments of Construction Industry Tax. The respondent outsources to Payformance Limited the implementation of its obligations due to
30 HM Revenue and Customs under the Scheme. Payformance Limited are a revenue approved provider of such services.
31. The obligation to make the deduction from payments otherwise due to the sub contractor arises out of the subordinate legislation which is the

“Construction Industry Scheme” and not out of contract *per se*. The default prescribed rate of deductions of CIT under the scheme is 20%.

- 5 32. The claimant was an independent sub contractor operating under the Construction Industry Scheme (“CIS”). A sub contractor who believes that he has paid too much tax and National Insurance contributions via CIS tax, may directly claim a refund from Her Majesty’s Revenue and Customs.

The Applicable Law

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33. The definition of employee, workers etc is contained in section 230 of the Employment Rights Act 1996 which provides:-

“230 Employees, workers etc.

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(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.*

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(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) —*

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(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;*

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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.

(6) *This section has effect subject to sections 43K [47B(3) and 49B(10)]; and for the purposes of Part XIII so far as relating to Part IVA or section 47B, "worker", "worker's contract" and, in relation to a worker, "employer", "employment" and "employed" have the extended meaning given by section 43K.*

(7) *This section has effect subject to section 75K(3) and (5)."*

34. Persons who are employees or workers are protected, in terms of section 13 of the Employment Rights Act 1996, from the making by their "employers" of unauthorised deductions from their wages. Section 13 of the Act provides:-

"13. Right not to suffer unauthorised deductions

(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. ”*

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(2) *In this section “relevant provision”, in relation to a workers contract, means a provision of the contract comprised—*

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(a) *in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or*

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(b) *in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.*

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(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.*

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(4) *Subsection (3) does not apply in so far as the deficiency is attributable to an error of any description on the part of the employer affecting the computation by him of the gross amount of the wages properly payable by him to the worker on that occasion.*

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(5) *For the purposes of this section a relevant provision of a worker's contract having effect by virtue of a variation of the contract does not*

operate to authorise the making of a deduction on account of any conduct of the worker, or any other event occurring, before the variation took effect

5 (6) *For the purposes of this section an agreement or consent signified by a worker does not operate to authorise the making of a deduction on account of any conduct of the worker, or any other event occurring, before the agreement or consent was signified.*

io (7) *This section does not affect any other statutory provision by virtue of which a sum payable to a worker by his employer but not constituting "wages" within the meaning of this Part is not to be subject to a deduction at the instance of the employer. "*

15 35. Section 13(1)(a) disapplies the protection in respect of deductions required or authorised to be made by virtue of a statutory provision (which would include the deduction of CIS tax under the CIS Scheme or required or authorised by a relevant provision of a worker's contract or, (b) where the worker has previously signified in writing his agreement or consent to the making of the
20 deduction.

36. The terms of Clause 3 of the agreement terms (page 24 of the bundle) fall into both those categories.

25 37. Otherwise, in terms of the law of contract, a party seeking to recover monies by way of implement (that is specific performance on obligation under a contract) or by way of damages for breach of contract, must first establish the contractual obligation upon which he/she relies and its breach.

30 Summary of Submissions

38. In submission the claimant reiterated his bald assertion, set out in his claim form, that he had been contracted to work for the respondent as an

employee, which failing as a worker at an hourly rate of £12 per hour, whereas he had been paid only at £11.90 per hour.

39. He stated in submission that he had not noticed the provisions in the documents which he signed relating to a deduction of the £20 charge in respect of administrative and processing services. He stated that the fact that deductions had been made from payments due to him in respect of tax must mean that he was an employee. He otherwise stated that he relied upon the email sent to the Tribunal at 9.37 on the morning of the Hearing as his submission, which email was in the following terms:-

“I am a Muslim African man and I have a wife and family back home, to support. The respondent that was MAP Recruitment Ltd, when I was offered and trading for the job, and the name shifted to FS Recruitment, see attached documents. Either way, I think I was a worker, even an employee, as I was provided with tools while I was trading and my hours were controlled by the respondent, Monday to Friday, 8am to 5pm. And this was mandatory, and I could not take or went to another worker finished when I wanted, plus according to my payslips, the respondent was deducting employment and other taxes, and company fee every week. Certainly I was not a self employed person.

So, I claiming on top of my Schedule of Loss, back wages, overtime payment rate, worker compensation and holiday pay.

And, as, I should have protection against discrimination and compensated for unpaid wages, misrepresentation and bad treatment, where I was performing very good and I was rewarded and offered to be hired directly by the client. The respondent did not pay my employment, did not pay my employment taxes, they even sub contracted my wages to a payroll company that deducted every week £20 from my wages.”

40. While noting the terms of that email the Employment Judge advised the claimant that insofar as its content fell into the potential category of evidence such elements could be accorded no weight by the Tribunal in terms of Judge Macleod's Determination of 12th January 2022.

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41. For the respondent, Mr Miliar invited the Tribunal to accept the evidence of Mr Poli as both reliable and accurate in its detail and credible and, in reliance upon that evidence together with the documentary evidence produced by the respondent, he submitted:-

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(a) That the claimant had failed to place before the Tribunal any evidence that went to establish that he was an employee of the respondent which failing a worker of the respondent for the purposes of the Employment Rights Act 1996; and

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(b) That the preponderance of the evidence including the unchallenged documentary evidence went to show, on the balance of probabilities; that the claimant was a self employed sub contractor who operated under the CIS Scheme with a Unique Tax Reference, that the rates at which the claimant had agreed to be paid for the two projects undertaken by him were firstly £11.90 per hour and secondly £14.50 per hour, and, that there had never been any agreement between the parties that the claimant would be paid at £12 per hour;

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(c) That the claimant had been paid all sums due to him;

(d) That the deductions of CIS tax were made in compliance with the obligations arising under the CIS Scheme as advanced payments of tax by and on behalf of the claimant who was registered under the Scheme;

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(e) That in relation to the deduction made, the terms of Clause 3 of the agreed terms at pages 23 and 24 of the bundle constituted,

in any event, prior written consent on the part of the claimant to the making of the deduction.

- 5 (f) He invited the Tribunal to dismiss the claim and reserved the respondents position, until after Judgment, in relation to the question of making an application for an Expenses Order on the grounds of unreasonable conduct of proceedings.

Discussion and Disposal

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42. The onus sits squarely with the claimant in a case such as this to establish that he was an employee which failing a worker. Separately in relation to a claim for specific performance of the payment of wages withheld or in relation to claim for damages for breach of contract, the onus sits with the claimant to first establish the legal obligation from which he derives an entitlement in law to have received the sums and then the occurrence of a relevant breach of that obligation.

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43. The claim given notice of by the claimant is one in which he offers to prove that he should have been paid at an agreed contractual rate of £12 per hour. The Tribunal considered that the claimant had failed to adduce any evidence which went to establish such an agreement as to a £12 per hour contractual rate. On the contrary, the Tribunal considered the preponderance of the evidence established on the balance of probabilities and to the satisfaction of the Tribunal that the contracted for rates were respectively £11.90 per hour and £14.50 per hour and further, that the claimant had been paid all sums due to him at those rates subject only to the deductions of CIS tax at the Scheme mandated rate of 20% and the 20% "administrative payroll charge" which is the subject of paragraph 3 of the terms agreed.

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44. Separately and in any event had the Tribunal determined that the claimant was an employee or a worker of the respondent, it would have also found that the protection against unauthorised deduction from wages which arises under section 13 of the Employment Rights Act 1996 would, in terms of those

provisions, have not applied to the deduction of the CIS tax, nor to the deduction of the -payroll charge to which the claimant had given prior written consent in the terms agreed.

- 5 45. The claimant having failed to discharge his onus of proof in respect of establishing any entitlement in law to the payments which he sought, the claims fall to be dismissed.

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Employment Judge: J d'Inverno
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