EMPLOYMENT TRIBUNALS

Claimant: Mr A Parker

Respondent: Alpha Fire and Air Solutions Limited

Heard at: Midlands East Tribunal via Cloud Video Platform

On: 20 January 2023

Before: Employment Judge Brewer

Representation

Claimant: In person
Respondent: Mr M Liversidge, Director

JUDGMENT

The claimant's claim for unauthorised deductions from wages fails and is dismissed.

REASONS

Introduction

1. This case concerns an allegation by the claimant of unauthorised deductions from wages. The case was listed for a 2-hour hearing and it should have been possible to deliver judgment orally in that time, but unfortunately at the end of the evidence the respondent lost signal and having waited for some time for Mr Liversidge to log back in I decided that it would be a more efficient use of time to send a written judgment.

2. I had a number of documents sent in by the parties and I heard evidence both from the claimant and on behalf of the respondent from Mr Liversidge.

Issues

3. There are two issues in this case. The first is whether the claimant was a worker within the meaning of section 230, Employment Rights Act 1996 (ERA). If he is, then he is able to bring a claim for unauthorised deductions. If, on the other hand he falls under exception in s.230(1)(b), he is not able to bring such a claim. The second issue, assuming the Tribunal has jurisdiction to hear the claim, is whether he suffered unauthorised deductions from his wages.

Law

4. A brief summary of the law follows.

Worker status

5. Section 230 ERA is as follows.

> ***"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."*

6. Section 230(3)(b) ERA makes it clear that if a person renders services or performs work on the basis that the person to or for whom he or she does so is a customer or client of his or her business, that person is not a 'worker' for the purposes of the ERA. The EAT has held that the intention behind the definition of worker in s.230(3)(b) was clearly to create an 'intermediate class of protected worker' made up of individuals who were not employees but equally could not be regarded as carrying on a business (such workers are often referred to as 'limb (b) workers'), According to the EAT, the essence of the intended distinction must be between, on the one hand, workers whose degree of

dependence is essentially the same as that of employees and, on the other, contractors who have a sufficiently arm's-length and independent position to be treated as being able to look after themselves.

7. Lord Leggatt in **Uber BV and ors v Aslam and ors** 2021 ICR 657, SC, considered that, in applying the statutory language, it is necessary both to view the facts realistically and to keep in mind the purpose of the legislation. The vulnerabilities of workers which create the need for statutory protection are subordination to and dependence on another person in relation to the work done. A touchstone of such subordination and dependence is (as has long been recognised in employment law) the degree of control exercised by the putative employer over the work or services performed by the individual concerned. The greater the extent of such control, the stronger the case for classifying the individual as a 'worker' who is employed under a 'worker's contract'.

8. Drawing the distinction between a worker and a person in business for themselves in any particular case will involve all or most of the same considerations as are relevant in distinguishing between a contract of employment and a contract for services, but with the boundary pushed further in the individual's favour. Factors to consider could include the degree of control exercised by the 'employer', the exclusivity of the engagement and its typical duration, the extent to which the individual is integrated into the 'employer's' organisation, the method of payment, what equipment the 'worker' supplied and the level of risk undertaken. Factors such as the individual having business accounts prepared and submitted to the Inland Revenue, being free to work for others, being paid at a rate that includes an overheads allowance and not being paid when not working, can all be relied on as supporting the view that the individual is running a business and that the person for whom the work is performed is a customer of that business.

Unauthorised deductions from wages

9. In relation to a claim for unlawful deductions from wages, the general prohibition on deductions is set out in section 13(1) Employment Rights Act 1996 (ERA), which states that:

> *'An employer shall not make a deduction from wages of a worker employed by him.'*

10. However, it goes on to make it clear that this prohibition does not include deductions authorised by statute or contract, or where the worker has previously agreed in writing to the making of the deduction (section 13(1)(a) and (b)).

11. Section 27(1) ERA defines 'wages' as:

> *'any sums payable to the worker in connection with his employment'*

12. This includes *'any fee, bonus, commission, holiday pay or other emolument referable to the employment'* (section 27(1)(a) ERA). These may be payable under the contract 'or otherwise'. The definition excludes expenses.

13. According to the Court of Appeal in **New Century Cleaning Co Ltd v Church** 2000 IRLR 27, CA, the term *'or otherwise'* does not extend the definition of wages beyond sums to which the worker has some legal, but not necessarily contractual, entitlement.

14. Finally, there is a need to determine what was 'properly payable' on any given occasion and this will involve the Tribunal in the resolution of disputes over what the worker is contractually entitled to receive by way of wages. The approach tribunals should take in resolving such disputes is that adopted by the civil courts in contractual actions — **Greg May (Carpet Fitters and Contractors) Ltd v Dring** 1990 ICR 188, EAT. In other words, tribunals must decide, on the ordinary principles of common law and contract, the total amount of wages that was properly payable to the worker on the relevant occasion.

15. The burden of proof is on the claimant.

Findings of fact

16. The claimant is registered as self-employed. He is a level 2 NVQ qualified Passive Fire Protection operative.

17. The claimant was engaged by the respondent, itself a sub-contractor, as a sub-contractor for work being done on a cinema.

18. The claimant was free to work elsewhere when not working at the cinema site for the respondent.

19. The claimant was to be paid an hourly rate for work done on site. The system operated as follows: the claimant got a sheet signed off by the site manager which showed the number of hours he was on site. This formed the invoice he sent to the respondent against which he says he was or ought to have been paid. The claimant also input data into the respondent's system known as Bolster. This shows the number of pieces of work done and the time of the work.

20. For the period 6 to 19 August the claimant says that in the second week he worked 82 hours but was paid only for 30 hours and he is therefore owed 52 hours pay at £20.00 per hour (gross).

21. The respondent says that it does not pay sub-contractors against the hours sheet but instead relies on the Bolster system as this is an accurate reflection of the work done and not merely presence on site.

22. The respondent deducts CIS4 tax at 20% from what it pays to its sub-contractors as required by law.

23. In undertaking the work, the site is not supervised by the respondent but by their client and it appears that the claimant was free to work in the way he chose.

Discussion and conclusions

24. In relation to the claimant's status, I find that on balance the respondent was a client of the claimant's profession. The claimant accepted in his oral evidence that he was self-employed and all of the matters I have referred to above are strongly suggestive of an arms length relationship such as does not exist between an employer and an employee or a worker. the claimant was not closely supervised by the respondent, He was paid for the work done rather than receiving a wage irrespective of the amount of work, he was free to work elsewhere whenever he was not working for the respondent and overall, the relationship has a few of those you would expect to find in an employment or worker relationship.

25. it follows from this that the claimant is not a worker for the purposes of section 13 ERA and the Tribunal does not have jurisdiction to hear his claim which therefore fails.

26. I shall go on to consider what the position would have been had I found the Tribunal did have jurisdiction to hear the claim.

27. As I have set out above the burden of proof is on the claimant to show that he was paid less than he ought to have been paid. The claimant accepted that they were two different systems for recording what I shall refer to as time spent by the claimant on the respondent's business.

28. the first is clearly a measure of the number of hours spent on site. This is clear from the relevant invoice sheet which simply includes dates and number of hours spent on site The section headed description all location of works completed for the relevant period simply says "As Bolster Installs". The reference to Bolster is to the system referred to in the findings of fact above.

29. it follows from this that the respondent it is bound to look at its Bolster system in order to see what the work was. I accept the evidence of Mr Liversidge that the contractors are paid against what is on the Bolster system, not against the invoice sheet simply showing total hours spent on site. Mr Liversidge says that the claimant was paid correctly against what was on the Bolster system

30. Given that there is no other evidence from the Bolster system before me, and given that the burden of proof rests on the claimant, I am bound to find that the claimant has failed to show that he has suffered unauthorised deductions And his claim would fail for that reason in any event.

31. Therefore, the claim for unauthorised deductions from wages fails and is dismissed.

Employment Judge Brewer

Date: 20 January 2023

JUDGMENT SENT TO THE PARTIES ON

2 February 2023

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