EMPLOYMENT TRIBUNALS

Claimants: **Mr K Collins**
Mrs W Collins

Respondent: **Hermes Parcelnet Limited**

Heard at: **East London Hearing Centre (via Cloud Video Platform)**

On: **2 and 3 February 2023**

Before: **Employment Judge Brewer**

Representation
Claimant: Mr K Collins
Respondent: Mr R Lassey (Counsel)

JUDGMENT

The Tribunal's judgment is:

1. The claim of Mr K Collins for unauthorised deductions from wages fails and is dismissed.

2. The claim of Mrs W Collins for unauthorised deductions from wages fails and is dismissed.

REASONS

Introduction

1. This case was due to be heard over the course of one day on 2 February 2023. When I received the papers from the tribunal there were no responses. I chased those up and was told that the Respondent had failed to respond to the claims. I was then told that the Respondent had filed responses but that they had not been accepted because they were out of time and there had been no application to extend time.

2. When the hearing commenced, I was joined not only by the Claimants but also by the Respondent. The Respondent had attended prepared to argue why they should be allowed to participate in the hearing and indeed to argue that the responses had indeed been filed in time. Having considered the documentation and discussed the matter with the Respondent my view was that even if the responses were not provided in time, and at least one of them was certainly in time, the default was such that it would not be just to exclude the Respondent from the proceedings and therefore I gave leave to them to participate fully in the hearing.

3. Of course, at that stage the Respondent had not prepared full witness evidence to deal with the particular issues raised by the Claimants and wanted to produce further documentation. We again discussed the matter, and it was agreed that we would adjourn the hearing until the following day, 3 February 2023 and I ordered the Respondent to provide a witness statement and relevant documents to be sent to the Claimants and the tribunal by 4:00 PM on 2 February 2023. That was done.

4. In the event the evidence was heard on the morning of 3 February 2023. I had witness statements from both Claimants and Mr. Allan, Head of Legal, on behalf of the Respondent. Each witness was cross examined and then I heard submissions from Mr Lassey on behalf of the Respondent and Mr. Collins on behalf of the Claimants.

5. At the end of the hearing I reserved my judgement given the amount at stake which is in excess of £250,000 and cause my judgement may have implications beyond the particular Claimants in this case and I felt that the case deserved a fully reasoned judgment.

6. In reaching my decision I have taken account of all of the evidence both oral and documentary and I think both Mr. Collins and Mr. Allen for their assistance during the course of the hearing.

Issues

7. The Claimants claim unpaid wages and the issues are therefore as follows:

    a. did the Respondent make unauthorised deductions from the Claimant's wages and

    b. if so when and how much was deducted?

Law

8. In relation to a claim for unauthorised 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.'*

9. 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)).

10. In order to bring an unauthorised deductions claim the Claimant must be, or have been at the relevant time, a worker. A 'worker' is defined by section 230(3) ERA as an individual who has entered into or works under (or, where the employment has ceased, has worked under):

    a. a contract of employment (defined as a 'contract of service or apprenticeship'), 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 (so-called limb b employees).

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'.

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. Given the arguments pursued at the hearing it is necessary to consider the law relating to implied contractual terms.

16. In **Ali v Petroleum Co of Trinidad and Tobago** 2017 ICR 531, PC, Lord Hughes explained that: "A term is to be implied only if it is necessary to make the contract work, and this it may be if (i) it is so obvious that it goes without saying (and the parties, although they did not, ex hypothesi, apply their minds to the point, would have rounded on the notional officious bystander to say, and with one voice, 'Oh, of course') and/or (ii) it is necessary to give the contract business efficacy". The

connecting theme is that (at least as a starting point) an implied term is something which the parties must be taken to have agreed.

Conduct of the parties

17. Another way in which employment tribunals and courts may imply a term into employment contracts is to look at how the parties have operated the contract in practice, including all the surrounding facts and circumstances.

Business efficacy

18. In relation specifically to business efficacy, it is possible to imply a term which is necessary if the contract is to work properly. Such a clause is implied simply giving effect to the parties' unexpressed intentions: they must have intended their contract to work; therefore, they must have intended any term necessary to make it work.

19. The term:

    a. must be *'founded on presumed intention and upon reason'*: **The Moorcock** (1889) 14 PD 64*,* per Bowen LJ,

    b. must be *'necessary in the business sense to give efficacy to the contract'*: **Reigate v Union Manufacturing Co (Ramsbottom) Ltd** [1918] 1 KB 592*,* per Scrutton LJ.

20. If the term really is necessary in order to make the contract work, then (since the contract is to be construed on the basis of what a reasonable man would take to be the consensus) the court can say that it must necessarily have been in the mind of both parties, so that it is possible to conclude that, if asked, the parties would have said: *'Of course! … we did not trouble to say that; it is too clear'*: see **Reigate v Union Manufacturing Co,** (above). If a term is to be implied on that basis it must be sufficiently precise: **Lake v Essex County Council** [1979] IRLR 241, *Cf* **Society of Licensed Victuallers v Chamberlain** [1989] IRLR 421, EAT.

Findings of fact

21. I make the following findings of fact.

22. The Claimants began working for the Respondent in November 2006.

23. From 2006 until 2018 the Claimants were self-employed. This status was challenged at the employment tribunal and in the case of **Leyland and ors v Hermes Parcelnet Limited** (ET 1800575/2017) it was determined that in fact those in the position of the Claimants were workers within the meaning of s.230(3)(b) Employment Rights Act 1996 (they were so-called limb b employees).

24. The Respondent runs a large parcel delivery company, and it engages for most parts of the year some 18,500 couriers (although this number may swell to 25,000 during the busy Christmas period).

25. Couriers are paid a set rate per item for the successful delivery of a parcel or are paid where the courier has attempted to deliver it three times, but the delivery has been unsuccessful.

26. Following the tribunal litigation referred to above, the Claimants entered into what is termed a "self-employed worker contract for services" with the Respondent. The contract is quite short and the only term relevant to this case is clause 2(a) which is in the following terms:

> *"The company shall pay to the Courier a fee calculated on a variable tariff as negotiated plus VAT (if the Courier is VAT-registered). details of the agreed fees shall be set out on Couriers Online"*

27. At this point, the Claimants were paid a model called "round rate". Under this model the Respondent determined rates on a round, which is essentially a group of postcodes to which the courier delivered the parcels. The round rate was based upon the size of the round and what the market in that round would bear.

28. During 2019, the Respondent unilaterally decided to change the way in which couriers were paid. It was decided that each courier would be given their own personal rate group (PRG). Previously if a courier operated on more than one round, they could receive a different round rate for each one of those. Under the new system the courier would receive the same rate across all rounds.

29. The Claimants were advised of this change on 3 July 2019 in a letter from Mr Ormsby the 'Head of Courier'.

30. I accept the unchallenged evidence of Mr. Allan that for some couriers the move to the PRG model meant that their overall earnings reduced.

31. Under the PRG model, different rates are payable depending on the type of parcel being delivered. There are currently 8 categories of parcel as follows:

    a. postable,
    b. packet,
    c. standard parcel,
    d. hanging,
    e. heavy,
    f. heavy/large
    g. small catalogue,
    h. medium catalogue,
    i. collection.

32. There is a different rate of pay for each of the above and the rate differs depending essentially on the weight of the parcel.

33. In the case of Mr. Collins the rates are set out in the 3 July letter, and I note that the rates for standard parcel, heavy, and heavy/large were reduced. However, because some rates increased, looking at his then last set of invoices, he would have been no worse off had the new rates applied. The same position applied to Mrs Collins who again, despite the reductions, would have been no worse off.

34. The letter introducing the PRG states that if the courier believes that they would be adversely affected by the introduction of the new system they could discuss the matter with the Respondent. Neither Claimant raised any concerns about what was a unilateral reduction in some of the rates that applied to them.

35. The letter ends as follows:

> *"As is the case currently, you will be free to negotiate the Courier payment rates set out in this letter using the existing rate negotiation process".*

36. There was a good deal of discussion at the hearing about what this meant, and I will deal with that expressly below.

37. The Claimants were written to during 2019 and advised that there would be a reduction in the rates they were in receipt of. The Respondent said that it would listen to representations made by the Claimants about the proposal, but the Claimant failed to engage, and the new rates were imposed. There is some question as to whether the Claimants received the correspondence about making representations (or negotiating) but given that they did ultimately respond to object to the changes I conclude that they did receive notification of the changes.

38. The Claimants allege that this reduction was not agreed to by them and that this therefore led to a series of unauthorised deductions from their wages thereafter.

Discussion and conclusion

39. The key argument put forward by Mr. Collins was that the Respondent was not able to reduce the rate because there was no express contractual term to that effect. Of course, it is also true that there is no express contractual term which states that the Respondent can increase rates and therefore this argument does not really get us very much further.

40. The Respondent accepts that there is no express term in the contract dealing with this matter.

41. The Respondent argues that there is an implied term in the contract between themselves and the couriers, to the effect that the Respondent can unilaterally alter rates, both by increasing or reducing them. Although in his submissions Mr Lassey focused on business efficacy as the route to imply such a term, I note that much of the evidence of Mr. Allan deals with the issue of the conduct of the parties.

42. Mr Allen's unchallenged evidence was that unilateral reductions have in fact occurred. By way of example, in winter 2021 the Respondent carried out a review of high earning couriers the outcome of which was that some had their rates unilaterally reduced.

43. Mr. Allan also pointed out that since it recognised the GMB union there have been three negotiations on pay and on each occasion the GMB have sought rate protection. For example, in 2020 the GMB recommended to members, including the Claimants, accepting the pay proposals they had negotiated with the

Respondent and the first reason given for accepting the proposal was “protection from rate cuts”. As Mr. Lassey pointed out, if the Respondent did not have the right to cut rates there would have been no need for the GMB to seek protection from that.

44. As I have referred to above, it is also the case that the rates received by the Claimants’ have in fact been unilaterally altered downwards without complaint from them, because that is exactly what happened when the PRG was introduced in July 2019 (see above).

45. Furthermore, in March 2021 the GMB confirmed to its members, including the Claimants, that one of the main headlines of the pay offer by the Respondent was “protection against rate reductions…”.

46. Mr. Collins’ response to this evidence was that in referring to this protection, the GMB were really referring not to the limb b workers like himself and Mrs Collins, but to what are called the ‘SE+ Couriers’. The difficulty he has with this argument is that that is not what the GMB had said. They have consistently said that the offers which they are putting to their members, and indeed recommending , applies to workers and SE+ Couriers.

47. In summary therefore the position would appear to be that rates have been unilaterally reduced and, furthermore, that those reductions have been accepted by the Claimants (see the July 2019 reductions). Rates have been reduced for other workers as set out in Mr Allan's evidence and the GMB have been seeking to negotiate protection against rate reductions strongly suggesting that the Respondent does indeed have the ability to reduce rates. if, as Mr. Collins submitted, rates could not be reduced unless there was negotiation, and by implication agreement, there would be no need for this protection, yet it features large in the union’s correspondence with its members.

48. Just turning to the question of negotiation, I am satisfied that when the PRG was first introduced that was a unilateral variation to the method of payment which included a unilateral reduction in some of the rates payable to the Claimants on three of the parcels they are required to deliver. Although there is reference to negotiation, it seems to me that the way the system has operated is that the Respondent reviews rates and makes a rate proposal, which may be to increase and/or to reduce rates, the courier then has an opportunity to negotiate over those changes and either there is agreement, in which case the rates are applied or there is not, in which case the Respondent has to take a decision about whether to impose those changes.

49. It seems to me therefore that by conduct of the parties the Respondent clearly has the right to unilaterally vary the rates payable for the items delivered by the couriers and that includes increasing and decreasing the rates.

50. I should turn to the question of business efficacy because Mr Lassey made specific reference to that in his submissions.

51. Given the very large number of couriers it is self-evident, and in any event was confirmed by Mr. Allan, that pay is the single Respondent’s biggest overhead. The actual amount of money received by the couriers is variable because it is

determined by what they deliver or, if they fail to deliver items. It follows that a courier can increase the amount of pay they receive by increasing the amount of work they do and can earn less by working less hard and delivering fewer parcels.

52. This is a matter which the Respondent clearly monitors because the unchallenged evidence of Mr. Allan was that in 2021 some couriers' earnings had grown, as he put it, exponentially, and therefore they were issued with a rate reduction. Although there was a negotiation, his evidence, which I accept, was that where there was no agreement the reduction was applied in any event.

53. Given that Courier costs are the biggest overhead which the Respondent has, where courier earnings are increasing but, for whatever reason, extra costs cannot be passed on to the Respondent's customers it will be necessary to consider and if appropriate reduced rates in order to maintain profit and competitiveness. But if it would be necessary to maintain the rates at any given time because there was no agreement to reduce the rates, as the Claimants contend, the only ways the Respondent could reduce costs would be reduce the amount of work done by any particular courier, but given that the couriers operate on given rounds, that would be logistically very difficult if not impossible without completely re organising the way the couriers work.

54. Simply put, if the Claimants are correct and rates could not be reduced unless it was agreed with each courier, the Respondent would be in the impossible position, in circumstances where it had to reduce costs and no agreement was forthcoming to reduce rates, to reduce the size of the workforce. But that would be self-defeating because reducing the size of the workforce would lead to a reduction in the Respondent's income because with fewer couriers, fewer parcels would be delivered.

55. I find therefore that because of the Respondent's business model it is necessary to imply a term enabling them to reduce rates even if there is no agreement to that effect.

56. For those reasons the claims fail and are dismissed.

Employment Judge Brewer

3 February 2023