Case Number: 2302505/2022

THE EMPLOYMENT TRIBUNAL

Claimant: Mr McKie

Respondent: Hays Specialist Recruitment Limited

Heard at: London South Employment Tribunal (video hearing)

On: 11 January 2023

Before: Employment Judge Robinson

Representation
Claimant: In person
Respondent: Mr Garnett, Counsel

JUDGMENT

The judgment of the Tribunal is that the Claimant's claim for unauthorised deduction from wages is not well-founded and is dismissed.

WRITTEN REASONS

1. I gave the above judgment at the 11 January 2023 hearing, together with oral reasons. The Respondent has requested written reasons under Rule 62 of the Employment Tribunals Rules of Procedure. My reasons are as follows.

Introduction

2. The Claimant was engaged by the Respondent (a recruitment agency) as an IT teacher, to provide work to schools. The Claimant had worked for the Respondent since 2017 on various different assignments. However, this claim relates to an agreement that was made for an assignment that began on 6 May 2022.

3. ACAS early conciliation started on 26 June 2022 and ended on 22 July 2022. The claim form was presented on 26 July 2022. The response form was received on 6 October 2022.

Claims and Issues

4. At the outset of the hearing, the Claimant confirmed that he was claiming unauthorised deductions from wages because he believed that he had not been paid at the correct daily rate.

5. The parties agreed that the issue for me to consider was what was agreed in relation to the Claimant's daily rate for this assignment.

Procedure, documents and evidence heard

6. The Respondent's submitted the following documents as evidence:

    a. A bundle of 89 pages.

    b. A witness statement from Thomas Hayes, Senior Manager in the Respondent's Secondary Education team.

7. The Claimant had not engaged with the Tribunal since submitting his claim form and had not complied with its Orders. However, shortly before the hearing, he submitted evidence of email correspondence with the Respondent (which align with the Respondent's bundle) and a witness statement. The parties accepted the combination of all of the above as the agreed bundle of documents for the purposes of this hearing.

8. There was a preliminary point raised by Mr Garnett that Mr Hayes should not be named as a Second Respondent because he only ever acted in this matter as an employee of Hays Specialist Recruitment Limited. It was therefore that company that is the correct Respondent because it had the agreement with the Claimant. The Claimant was content with that change. I consequently amended the proceedings and issued the judgment in the name of Hays Specialist Recruitment Limited, solely, as the Respondent.

9. I heard oral evidence from the Claimant and from Mr Hayes for the Respondent.

10. I have carefully considered the documentary evidence provided, together with the parties' oral evidence and closing submissions.

Fact findings

11. I have made the following findings of fact on the balance of probabilities having heard the evidence and considered the documents. These findings of fact are limited to those that are relevant to the issues listed above, and necessary to explain the decision reached.

12. The Claimant and Mr Hayes had a number of email exchanges in early May 2022 in which the daily rate of pay was discussed. Mr Hayes was attempting to negotiate a higher daily rate with the school for this assignment, on behalf of the Claimant.

13. The Claimant originally requested £250 per day. The discussion then moved on to discuss other sums. In those email exchanges, Mr Hayes began using the term "paye" after the amounts. Eventually, a figure of "*£225 paye*" was agreed upon by the Claimant and Mr Hayes.

14. These email exchanges did not refer to the distinction between premium rate and working rate. Although the Claimant explained in his evidence that he was trying to establish the amount he would receive pre-tax, I accept Mr Hayes's evidence that his own emails were referring to a premium rate figure as that it the basis on which the Respondent always agrees its rates.

15. Both parties accepted that the two documents that formed the contract:

    a. the Terms of Assignment ("ToA") dated 6 May, and
    b. the Assignment Confirmation Letter ("ACL") dated 9 May

    when read together, make it clear that the £225 figure is the premium rate and that an amount would be deducted for holiday pay arrangements.

Relevant Law

Unauthorised deduction from wages

16. Section 13 of the Employment Rights Act 1996 ("ERA") sets out the right not to suffer an unauthorised deduction from wages:

    "*(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"

Conclusion

17. In relation to this claim, I make the following conclusions.

18. I believe that the Claimant and Mr Hayes were talking at cross purposes in their email exchanges in relation to whether £225 was the premium rate or the working rate.

19. However, the determinative factor in this case is the terms of the contract. Section 13(1)(a) of the ERA permits an employer to make deductions where they are authorised by the contract.

20. The written documents in this case make it clear that the correct payment for the Claimant is as set out in the ToA and ACL combined. Both of those

documents state that the premium rate has a holiday pay contribution deducted from it, such that what is actually paid is the lower working rate. The difference between the premium rate and the working rate is then used to account for the employee's statutory holiday entitlement by creating a "holiday fund" through which employees are able to take paid holiday.

21. The ToA was sent to, and signed by, the Claimant on 6 May – 3 days before he began working. I appreciate the Claimant's position that the minimum rate figure in that document of £160 is rather redundant because it just sets out the minimum amount payable and is, in essence, upgraded by the figure in the ACL. Nevertheless, the ToA document is clear in the rate of pay provisions at paragraph 4.1, and in the final paragraphs that say "*for the avoidance of doubt, after separate holiday pay arrangements, the Temporary Worker will be paid a working rate which shall be lower than the premium rate quoted*".

22. I also have some sympathy with the Claimant that he did not know the precise working rate he would receive until the morning of the first day of his assignment on 9 May (when he received the ACL). However, the fact the Respondent sent that rather late does not alter the fact that the Claimant had signed a contract agreeing that the premium rate would have a holiday pay deduction taken from it. There is also an entire agreement clause in para 14 of the ToA which means that the intention on the part of Mr Hayes and the Claimant is overtaken by the intention as set out in the ToA itself.

23. I do also consider it relevant that the Claimant had worked for the Respondent before, and had signed a very similar contract in 2019. He therefore must have been aware (and indeed he did confirm in his oral evidence today) of the distinction between the premium rate and working rate. I find that it was reasonable for Mr Hayes to refer to the shorthand of *"£225 paye*" as being a reference to the premium rate, given that he was corresponding with someone who was familiar with the Respondent's operating model.

24. It is for these reasons that I consider the Claimant's claim for unauthorised deduction from wages to not be well-founded and I therefore dismiss the claim.

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Employment Judge Robinson

Date__30 January 2023_____