EMPLOYMENT TRIBUNALS

Heard at: London South (by video) **On:** 11 May 2023

Claimant: Mr Bartek Tomaszewski

Respondent: Mr Richard Howard

Before: Employment Judge Ramsden

Representation:

Claimant In person

Respondent Did not appear in person or by representative

JUDGMENT

The complaint of unlawful deduction from wages is upheld. The Respondent is Ordered to pay to the Claimant the sum of £906.53.

REASONS

Introduction

1. It is not disputed that the Claimant, Mr Tomaszewski, worked for a period beginning on 23 February until 31 August 2022, arranged through the Job Centre as part of a government scheme to create jobs for 16 to 24 year olds on Universal Credit known as “Kickstart”. Nor is it disputed that he was paid all that he was owed for his work in that period. I refer to this period of employment as the **Kickstart Period**.

2. Nor is it disputed that Mr Howard is the sole director and shareholder of Managed Mail Service Ltd.

3. What is in dispute is:

(a) the Claimant's claim that, between 1 September and the 23 or 24 September, he worked a further period of 79 hours following the end of that Kickstart Period (the **Additional Period**) for which he was not paid; and

(b) who, if anyone, was responsible for paying him for work performed during that Additional Period.

Procedural history

4. The Claimant's claim form was received by the Tribunal on 8 November 2022. That claim form identified the Respondent as "Richard Howard", and provided an address for that individual.

5. An ACAS Early Conciliation Certificate with reference number R243238/22/42 was referred to in the claim form. That certificate names the Claimant as the "Prospective Claimant", but the "Prospective Respondent" is identified as "Managed Mail Services Ltd".

6. A letter acknowledging the claim was sent by the Tribunal on 23 December 2022, which referred to the Respondent in the same way as the ACAS certificate, i.e., "Managed Mail Services Ltd". A copy was sent to that company at the address identified for Mr Howard in the claim form.

7. On the same date, the Tribunal sent a "Notice of claim" to Managed Mail Services Ltd at the same address, informing Managed Mail Services Ltd that the Claimant had made an Employment Tribunal claim against it, and indicating how Managed Mail Services Ltd could defend that claim if it wished.

8. The Tribunal sent the Claimant and Managed Mail Services Ltd a notice of hearing on 10 January 2023, again using the same address for Managed Mail Services Ltd as the Claimant had identified for Mr Howard in the claim form.

9. On 12 January 2023, Mr Howard wrote to the Tribunal requesting an extension of time to respond to the Claimant's claim to 10 February 2023, on the basis that the Tribunal's letter of 23 December 2022 had only been received by him that day. That extension was granted in the interest of justice on 26 January 2023.

10. On 9 February 2023, a Response Form was received by the Tribunal from Mr Howard, defending the claim. The Response Form names the Respondent as "Richard Howard". That Response was acknowledged by the Tribunal, referring to the Respondent as Managed Mail Services Ltd, on 23 February 2023.

11. Further correspondence from the Tribunal followed, identifying the respondent to the proceedings as Managed Mail Services Ltd.

12. On the evening of 8 May 2023, three days before the hearing to determine the matter,

Mr Howard wrote to the Tribunal:

(a) Questioning the validity of the claim, as the ACAS certificate refers to Managed Mail Services Ltd (my emphasis), though no such company exists. Mr Howard stated that he is the sole director and shareholder of Managed Mail Service Ltd (again, my emphasis).

(b) Asserting that the Claimant was never an employee of any company owned by Mr Howard, but rather that the Claimant was employed by a different company, Connecting You Now Ltd, and that he and the Claimant were co-workers in the same office in Wimbledon. In support of that contention, Mr Howard supplied:

- payslips for each month of the Claimant's six-month Kickstarter placement, which are headed "Connecting You Now Ltd Payslip". In oral evidence at the hearing, the Claimant confirmed that those are the payslips he received for the work for which he was paid, until 31 August 2022; and

- what appears to be a bank statement for Connecting You Now Ltd, as at September 2022. That bank statement identifies a payment made to the Claimant on 1 September in an amount equal to the sum that the final payslip of 31 August 2022 indicates was paid to the Claimant.

Mr Howard's letter also purported to attach "*confirmation from the DWP that he [the Claimant] was joining a company called Connecting You Now Ltd*", but no such attachment was in fact provided. Mr Howard's letter made reference to "*previous correspondence with the court*" where he had pointed this out, but no such correspondence has been received by the Tribunal. Mr Howard's position, in his email of 8 May, was that he had replying to tribunal documents "*(which arrived at my office) out of courtesy*".

13. Mr Howard's cover email of 8 May 2023 stated that "*due to this not being a valid claim and even if it were as it is not a claim against a company I own* ***I shall not be attending the remote hearing this Thursday***" (his emphasis).

The hearing

14. A hearing of this matter took place on 11 May 2023. As expected, Mr Howard did not attend, and nor did anyone else on behalf of the Respondent. The Claimant was in attendance.

15. No bundle had been prepared for the hearing, nor any witness statement. The evidence available to me in advance of the hearing was:

(a) an email (forwarded to the Tribunal by the Claimant on 31 March 2023), which appears to show Mr Howard emailing the Claimant on 15 November 2022 about

some corrective work which Mr Howard considered the Claimant should perform;

(b) various screenshots of text messages exchanged between the Claimant and Mr Howard after the Additional Period concluded;

(c) various screenshots which the Claimant indicates shows him logging in to a platform when undertaking work in September 2022; and

(d) the letter from Mr Howard, attaching various documents, as described in paragraph 12 above;

together with evidence provided during the course of the hearing, being:

(e) oral evidence from the Claimant;

(f) an email of 15 February 2022 sent to the Claimant from "Richard" entitled "Formal Kickstart Job Offer"; and

(g) a further email of 23 August 2022 also addressed to the Claimant from "Richard" entitled "Work Hours".

Findings of fact

16. My factual enquiries have been hindered by the non-appearance of Mr Howard at the hearing, although I was, of course, able to hear from the Claimant and consider the documentary evidence supplied by him and by Mr Howard.

17. On the basis of that evidence, I make the following findings of fact:

(a) The Claimant was employed by Managed Mail Service Ltd (**MMSL**) for the Kickstart Period.

The "Formal Kickstart Job Offer", from "Richard" at enquiries@managedmailservice.co.uk, states in clear terms that the Claimant's duties would be "*related to Managed Mails print and post services*", his work was to be under the instruction of Mr Howard, Mr Howard determined his hours of work and dress, and his performance in role would be assessed and developed by Mr Howard.

This is consistent with the Claimant's clear oral evidence that he worked for, and under the direction of, Mr Howard. When asked about the passage in Mr Howard's letter of 8 May 2023 that says "*Mr Tomaszewski was never an employee of ANY company of mine. We both worked in the same office in Wimbledon as co-workers, but his employer was Connecting You Now Ltd which was made abundantly clear when he joined via the government's*

Kickstart jobs scheme", the Claimant said that that was simply not true, that "*He was the boss the whole time*", and "*When we met at the Job Centre through the Kickstarter scheme, he referred to himself as my employer*". The Claimant's account is consistent with the offer letter he provided to the Tribunal.

This is also consistent with the fact that the Response Form of 9 February 2023 makes no mention of Mr Howard's later assertion that the Claimant was employed by someone else. Instead, in resisting the claim, Mr Howard, identified in that form as the respondent, wrote:

"*This is not a valid claim, the hours, amount due to the supposed work carried out and other elements of this claim are not valid. Abundant evidence will be provided in due course to prove these points.*"

I find it inherently improbable, if Mr Howard or MMSL had never employed the Claimant, that Mr Howard would fail to mention that fact when filing his response to the Claimant's claim.

(b) MMSL used Connecting You Now Ltd as its payroll agent for the Kickstart Period.

The information in the offer letter from MMSL explains why:

"*There is a slight change since we last met in that the DWP credit given to Managed Mail Service Ltd was taken by a chap named Ben (who I met before you) however I can confirm that you can come on board with using the Kickstart job credit of a colleague who has his business in the same office building so we can proceed with the exact same role that we've been chatting about via email for the last week.*"

(c) Mr Howard personally employed the Claimant during the Additional Period.

The email of 23 August 2022 from "Richard" using enquiries@managedmailservice.co.uk entitled "Work Hours" amounted to an offer of employment, which I find the Claimant accepted by working in the Additional Period. That offer letter included the following:

"*Hi Bartek,*

So as discussed recently I am happy to extend your placement here by an extra month out of my own pocket…"

The words "*out of my own pocket*" indicate to me that Mr Howard was personally offering to engage the Claimant, and to be responsible for paying his wages for

this period. This I find he in fact did when the Claimant accepted that offer and undertook the relevant work.

The email continues, setting out the terms and conditions on which that employment was offered. There is no question that the Claimant was employed for this period, and in my view, his employer was Mr Howard personally.

"*The role, hours, payslip will be the same with the final day now 22nd September.*

…

This is 25hrs of work although as you know each week you receive 3x 1hr breaks and so your payslip for these 2 weeks will show 28hrs of work per week.

Once I return we will go back to the usual days and 25hrs of work until 22nd September. If things remain quite I may ask you to do some video editing work.

Each day you are in the office go for the post at 1pm/1:30pm so you have 30 minutes to forward things to Mariz or send the client feedback etc.

If you have any questions regarding the above please let me know via email or when we see each other tomorrow.

Kind Regards

Richard"

There is no signature block beneath Mr Howard's sign-off to indicate that the "*out of my own pocket*" language meant out of MMSL's pocket, and therefore I take that language at face value.

"*As stated in my email to you on Wednesday, I am not willing to inherit a mess that was not of my making and could have been avoided had the daily task of checking HS and following my specific instructions sent on Friday 23d when I was out of the office had been followed.*

I suggest you get cracking with it in the morning."

And later in the exchange, when complaining about the Claimant's performance, Mr Howard wrote:

"*I needed an army of employees and not just 1.*"

(d) The Claimant worked 79 hours for Mr Howard in the period 1 September 2022 to 23 or 24 September 2022, for which he was not paid.

This conclusion is supported by the terms of the offer made by Mr Howard to the Claimant to work in the Additional Period. While Mr Howard's email indicated that the Claimant was required to work 84 hours in that period, the Claimant's oral evidence is that he actually finished the work in slightly fewer hours, and so he only expects to be compensated for the 79 hours he worked.

Again, the text messages bear out the Claimant's assertions that he in fact worked for Mr Howard during this period.

(e) The reason Mr Howard did not pay the Claimant is because Mr Howard considered that the Claimant had done a poor job in that time.

The text exchange includes the following from Mr Howard to the Claimant, when the Claimant chased Mr Howard for payment shortly after the Additional Period ended:

"*I'm sorry you see it as unfair that you man up and take responsibility for your [*curseword*] up.*
I'm getting zero additional benefit from the above except u correcting your costly error and putting things back to how they should have been.
None of these HS would have been lost had they been moved as instructed.
If you ever choose to be a responsible adult regarding this at any time do let me know."

The Claimant's response included:

" *"responsible adult" pays his employees*"

Later on, the Claimant to Mr Howard:

"*You gonna pay me or not.*"

Mr Howard's reply:

"*Absolutely.*
As soon as u correct your mistake and get affairs back into the state they should have been in when you left…
Its up to you how long this goes on for. Keep scheming revengeful deeds, feeling victimised, report me and the company to whoever + +
Or correct the mistake made on your watch and bring this to an end."

The email identified at paragraph 15(a) above also supports this finding. On 15 November 2022, Mr Howard emailed the Claimant in the following terms:

"*Dear Bartek*

I am about to delegate the task of unlocking the 11 holding slots to someone else and so this is your last chance to resolve this matter before Christmas and perhaps even Easter. I'd rather put this matter to bed by the end of this week but its up to you.

Kind regards

Richard".

The law and its application here

Can this tribunal determine this complaint? The mismatch between the "prospective respondent" identified on the ACAS Early Conciliation Certificate and the Respondent to these proceedings

18. While his non-attendance at the hearing meant I could not hear directly from him on the point, the Respondent noted in his Response "*The Claimant has not included a valid certificate number in their claim or provided a copy of a valid certificate separately.*"

19. The Claimant did include the certificate number matching an early conciliation certificate bearing the Claimant's name as the prospective claimant, and that of "Managed Mail Services Ltd" as the prospective respondent, i.e., not Mr Howard's name, nor the name of his company, Managed Mail Service Ltd.

20. Section 18A of the Employment Tribunals Act 1996 provides:

"*(1) Before a person ("the prospective claimant") presents an application to institute relevant proceedings relating to any matter, the prospective claimant must provide to ACAS prescribed information, in the prescribed manner, about that matter…*

(2) On receiving the prescribed information in the prescribed manner, ACAS shall send a copy of it to a conciliation officer.

(3) The conciliation officer shall, during the prescribed period, endeavour to promote a settlement between the persons who would be parties to the proceedings.

(4) If—

(a) during the prescribed period the conciliation officer concludes that a settlement is not possible, or

(b) the prescribed period expires without a settlement having been reached,

the conciliation officer shall issue a certificate to that effect, in the prescribed manner, to the prospective claimant…

(8) A person who is subject to the requirement in subsection (1) may not present an application to institute relevant proceedings without a certificate under subsection (4)…

(11) The Secretary of State may by employment tribunal procedure regulations make such further provision as appears to the Secretary of State to be necessary or expedient with respect to the conciliation process provided for by subsections (1) to (8).

(12) Employment tribunal procedure regulations may (in particular) make provision—

(a) authorising the Secretary of State to prescribe, or prescribe requirements in relation to, any form which is required by such regulations to be used for the purpose of providing information to ACAS under subsection (1) or issuing a certificate under subsection (4)…"

21. The regulations setting out the "*prescribed manner*" in which the early conciliation certificate should be issued (for the purposes of section 18A(4) above) are the Employment Tribunals (Early Conciliation: Exemptions and Rules Procedure) Regulations 2014, and that detail is set out in Regulation 8:

"*An early conciliation certificate must contain—*

(a) the name and address of the prospective claimant;

(b) the name and address of the prospective respondent;

(c) the date of receipt by ACAS of the early conciliation form presented in accordance with rule 2 or the date that the prospective claimant telephoned ACAS in accordance with rule 3;

(d) the unique reference number given by ACAS to the early conciliation certificate; and

(e) the date of issue of the certificate, which will be the date that the certificate is sent by ACAS, and a statement indicating the method by which the certificate is to be sent."

22. The Employment Tribunals Rules of Procedure (the **ET Rules**) were amended, as anticipated by section 18A(12)(a), to reflect the early conciliation requirements. Rule 12(1) lists the circumstances in which the staff of the tribunal office "*shall*" refer a claim form to an Employment Judge if they consider that the claim, or part of it, may be:

"*(f) one which institutes relevant proceedings and the name of the respondent on the claim form is not the same as the name of the prospective respondent on the early conciliation certificate to which the early conciliation number relates.*"

23. Rule 12(2A) then provides:

"*The claim, or part of it, shall be rejected if the Judge considers that the claim, or part of it, is of a kind described in sub-paragraph (e) or (f) of paragraph (1) unless the Judge considers that the claimant made error in relation to a name or address and it would not be in the interests of justice to reject the claim*" (my emphasis).

24. In this case, the name of the prospective respondent on the ACAS early conciliation certificate referred to in the Claimant's claim form is "Managed Mail Services Ltd", which does not match the name of the respondent identified on the Claimant's claim form, which is "Richard Howard". Furthermore, as the Respondent has pointed out, there is no such company by the name of Managed Mail Services Ltd – the company which the Respondent is the sole shareholder and director of is Managed Mail Service Ltd.

25. The staff of the tribunal office did not, in this instance, refer the claim form to an Employment Judge (and had they done so, Rule 12(2A) would not have been available to the Employment Judge, because the Claimant did not make an error in in relation to a name or address on the claim form).

26. I have treated the Respondent's point, made in the response form, about the discrepancy between the name of the prospective respondent and his company name, as an application for the claim to be struck-out under Rule 37.

27. The grounds for strike-out in that rule are any of:

"*(a) that it [the claim] is scandalous or vexatious or has no reasonable prospect of success;*

(b) that the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious;

(c) for non-compliance with any of these Rules or with an order of the Tribunal;

(d) that it has not been actively pursued;

(e) that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out)."

28. The Respondent's complaint could fall under Rule 37(c), that there has been non-compliance with Rule 12(1)(f), or under Rule 37(a), that the claim "*has no reasonable prospect of success*" because of the mismatch issue.

(a) On the former, the fact that the Rule 12(1) is phrased in definitive ("*The staff of the tribunal office **shall** refer a claim form to an Employment Judge…*", my emphasis), rather than discretionary, language means that this should have occurred. However, Rule 6 provides that:

"*A failure to comply with any provision of these Rules (except rule 8(1), 16(1), 23 or 25) or any order of the Tribunal (except for an order under rules 38 or 39) does not of itself render void the proceedings or any step taken in the proceedings. In the case of such non-compliance, the Tribunal may take such action as it considers just, which may include all or any of the following—*

(a) waiving or varying the requirement;

(b) striking out the claim or the response, in whole or in part, in accordance with rule 37;

(c) barring or restricting a party's participation in the proceedings;

(d) awarding costs in accordance with rules 74 to 84."

In this case, it is plainly just for this matter to proceed. By the Respondent's own evidence, he is the sole director and shareholder of Managed Mail Service Ltd. The Respondent undoubtedly received the claim, as he responded to it in his own name (albeit that he raised the point about the inconsistency between the names of the "prospective respondent" on the early conciliation certificate and the name of the respondent identified in the claim form). Given there is no such company as Managed Mail Services Ltd, and the address identified for Managed Mail Services Ltd on the ACAS early conciliation certificate is the address for Managed Mail Service Ltd, it is reasonably to be presumed that the ACAS conciliation officer in fact conducted the early conciliation process with Managed Mail Service Ltd, of which Mr Howard is the sole director and shareholder.

(b) On the latter, given my conclusion about the non-compliance with Rule 12(1), and the merits of the Claimant's claim, I do not consider that the claim "*has no reasonable prospect of success*".

29. In my view it is clear that the Tribunal is able to determine the Claimant's claim.

30. This conclusion is consistent with the approach of the EAT in both *Treska v The Master and Fellows of University College Oxford and another* UKEAT/0298/16/BA and *Chard v Trowbridge Office Cleaning Services Ltd* UKEAT/0254/16/DM (both cases about similar mismatches between the name of the respondent on the claim form and the name of the prospective respondent on the early conciliation certificate), together with that of the Court of Appeal in the *Maria Clark* case. Although that latter case concerned a different kind of mismatch between the contents of the early

conciliation certificate numbered in the claim form and the contents of the claim form itself, the approach of the Court of Appeal is relevant to the correct approach to take to the mismatch issue raised by the Respondent in this case. Lord Justice Bean, giving the judgment of the Court, said:

(a) at [47]: "*Parliament has not stated that a claimant who has in fact complied with the requirement to go to ACAS, and has obtained a certificate to prove it, should nevertheless be excluded from claiming because of the provision of a wrong number.*" In my view, this principle is equally applicable to the provision of the wrong prospective respondent name on the early conciliation certificate; and

(b) at [3]: "*employment tribunals should do their best not to place artificial barriers in the way of genuine claims.*"

31. Consistent with Rule 2 of the ET Rules, which requires me to seek to give effect to the overriding objective in interpreting or exercising any power given to the Tribunal by those Rules, I see no barrier to the Tribunal determining the complaint here presented by the mismatch between the name of the Respondent and the name of the "prospective respondent" identified in the early conciliation certificate, for the reasons set out above.

Was the claim form validly served on the Respondent?

32. Although not raised by the Respondent, I have considered whether the claim form was validly served on him, given that the Tribunal's correspondence with the respondent in this matter has been addressed to "Managed Mail Services Ltd", at the same address as the registered office address for Managed Mail Service Ltd.

33. Rule 15 of the ET Rules is the applicable provision.

"*Unless the claim is rejected, the Tribunal shall send a copy of the claim form, together with a prescribed response form, to each respondent with a notice which includes information on—*

(a) whether any part of the claim has been rejected; and

(b) how to submit a response to the claim, the time limit for doing so and what will happen if a response is not received by the Tribunal within that time limit."

34. That notice was sent, albeit addressed to Managed Mail Services Ltd.

35. What is clear is that the Respondent did receive that correspondence (for example, he sought and was granted an extension of time to respond), which is unsurprising given he is, by his own evidence, the sole director and shareholder of Managed Mail Service Ltd. Furthermore, the Respondent filed a response to the claim in his own name.

36. Consequently, I consider that the claim form was validly served on the Respondent.

Was Mr Howard's failure to pay the Claimant an unauthorised deduction from wages?

37. Section 13 of the Employment Rights Act 1996 provides:

> "*(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.*
>
> …
>
> *(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.*"

38. It has been settled law since the decision of the Court of Appeal in *Delaney v Staples (t/a De Montford Recruitment)* 1991 ICR 331 that subsection (3) applies to wages which are properly payable but not paid, i.e., unpaid wages are to be treated as a deduction.

39. The terms of the email from the Respondent to the Claimant of 23 August 2022 entitled "Work Hours", together with the oral evidence from the Claimant and the text messages exchanged between the Claimant and the Respondent after the Additional Period concluded, make it clear that the work that the Respondent asked the Claimant to perform was in fact performed (even if the Respondent would question its quality), and therefore payment for that work is "*wages properly payable*". The Claimant is not seeking to be paid for the total number of hours that the Respondent offered him by way of work, but a slightly lower number of hours that he says he in fact worked, being 79 hours at £9.18 per hour.

Conclusion

40. The Respondent has made an unauthorised deduction from the Claimant's wages.

41. The value of the unauthorised deduction is £725.22.

42. An unauthorised deduction from wages under section 13 of the Employment Rights Act 1996 is a matter to which the ACAS Code of Practice for Disciplinary and Grievance Procedures applies. There has been a total failure on the part of the

Respondent to engage with the Claimant's complaint (amounting to a grievance) about his unpaid wages, as evidenced by the text exchanges between the parties. That failure was unreasonable, not least because the Claimant was entitled to be paid. I therefore consider it appropriate to increase that amount by the full 25% permitted by section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992, bringing the amount to £906.53.

43. The Respondent is therefore ordered to pay to the Claimant the amount of **£906.53**.

Employment Judge Ramsden

Date 16 May 2023