Case No: 2403154/2023

EMPLOYMENT TRIBUNALS

Claimant: Mr M Hussain

Respondent: Raina Ltd

Heard at: Manchester Hearing Centre (by CVP) **On:** 26 April 2023

Before: Employment Judge Feeny

Representation
Claimant: In person
Respondent: Mr Hashim, business administrator

JUDGMENT having been sent to the parties on 28 April 2023 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013.

REASONS

Introduction

1. By an ET1 presented on 7 March 2023 the Claimant brought a complaint for an unlawful deduction of wages pursuant to sections 13 and 23 of the Employment Rights Act 1996 ("ERA"). Early conciliation with ACAS had taken place from 21 December 2022 to 1 February 2023.

2. The Respondent filed its ET3 response defending the claim on two grounds: (1) the Claimant was self-employed and not therefore a worker or employee and, in the alternative, (2) the Respondent was entitled to make the deduction to his wages due to damage the Claimant had caused to the Respondent's van.

3. This has been a full merits hearing listed for 1 day on 26 April 2023. The Claimant has represented himself. The Respondent was represented by Mr Hashim, a business administrator. The hearing took place by CVP and I was satisfied that both parties were able to participate fully in it.

4. The Claimant had submitted a 45 page PDF bundle of documents for use at the hearing. The Respondent had sent in some documents in advance of the hearing, with some additional documents submitted by email during the hearing itself.

5. As this was a "fast track" case, the Tribunal did not order the parties to provide written witness statements in advance of the hearing and neither party had done so. I therefore swore in both the Claimant and Mr Hashim and took evidence through my own questioning of them. I then gave each party the opportunity to ask any questions of the other. Both parties asked a handful of their own questions. Both then made short closing submissions.

6. At the outset it was agreed that the two issues that I have to determine are:

    a. Whether the Tribunal has jurisdiction to consider the complaint, i.e. whether the Claimant was a worker or employee of the Respondent.

    b. Whether the Respondent was lawfully permitted to deduct his wages due to damage to the van.

7. The parties are agreed that if the two issues are resolved in the Claimant's favour the total due to him, as set out in three invoices issued by the Respondent, is £1,188.51 gross.

Findings of Fact

8. The Respondent operates a courier business based in Greater Manchester. At the relevant time, it had four sites – Manchester, Leyland, Bolton, and Rochdale. Its main contract is with Amazon, providing delivery services.

9. The Respondent has around 80-90 drivers on its books at any one time. All are notionally engaged as self-employed contractors. I was told by Mr Hashim that this was a term of the Respondent's contract with Amazon, i.e. that the drivers provided by the Respondent be classed as self-employed individuals rather than workers or employees of the Respondent.

10. The Claimant was engaged by the Respondent in October 2022. He had an initial discussion with the Respondent's recruitment manager, during which he was told that the work was paid on a fixed daily rate. Following provisional acceptance of the role, the Claimant was sent what is described on its face as a "Service Level of Agreement (SLA)/Contract for Services". I will refer to it as the "SLA". The Claimant signed the SLA on 2 October 2022.

11. There are a number of clauses in the SLA which are material to this claim. They are as follows (all emphasis is the original).

> **PURPOSE** (pg 1)
>
> The purpose of this contract is **not to establish an employment relationship**, but to define the extent under which the relationship between the **SUPPLIER** (RAINA LTD) and the **INDEPENDENT CONTRACTOR.** The INDEPENDENT CONTRACTOR is in business on their own account as a Self-Employed Courier Driver, who agrees to provide the following services to the Supplier:
> 1. Multi drop courier work
> 2. Same day delivery courier work
> 3. Long distance delivery courier work

4. Collection Services

AVAILABLILITY *[sic]* FOR WORK (pg 2)

When offered work by the SUPPLIER (RAINA LTD) to the Independent Contractor, the Independent Contractor may accept it or refuse it. Any refusal to accept work will not disqualify the Independent Contractor being offered further work when another opportunity arises.

DRUGS AND ALCOHOL TESTING CLAUSE (pg 3)

The nature of your job means that it is essential that you are not under the influence of drugs or alcohol at any time when you are providing services to Supplier (RAINA LTD). The Supplier (RAINA LTD) or its client reserves the right to carry out random testing of Independent Contractors of Supplier (RAINA LTD) to ensure that this requirement is complied with. Testing is carried out by a qualified tester from Supplier (RAINA LTD) Client's trusted partners Eurofins.

PAYMENT – see schedule 2 (pg 4)

The day rate price will be agreed Between Supplier (RAINA LTD) & Independent Contractor **(see Schedule 2)** Written tenders are not required. RAINA LTD (Supplier) and Independent Contractor are obliged to honour any agreed price. (The current Service Rate Card and Remuneration can be found at **Schedule 2** to this SLA for Independent Contractors with Supplier providing Vehicle or Owner Vehicle Independent Contractor.
If/where applicable, the Independent Contractor agrees that the Supplier (RAINA LTD) may deduct from any sums payable any sums that the Independent Contractor may owe the Company, in respect of, and where applicable. The Independent Contractor agrees that they will be liable for any costs to repair damage to the vehicle up to the actual costs provided by the supplier/vehicle rental company, and in respect of traffic violations including, but not restricted to, parking tickets and/or speeding fines. The Independent Contractor will also be liable for any additional administrative costs, levied by any local authority or vehicle rental company, in addition to the cost for traffic violations, parking tickets and/or speeding fines.

Independent Contractor Agrees to the above statement and to the following **Excess Charges:**

- Goods In Transit & Public Liability = £500 per claim
- Vehicle Excess = £1250.00 per claim. Please note, Excess will only be applicable if involved with Third Party and full details of the incident, photos + police reference can be provided. Failure to provide information to the supplier (Raina Ltd), the Independent Contractor agrees to be liable for the damages caused to the vehicle up to the actual costs provided by the supplier/vehicle rental company.

[The Claimant had then signed to specifically agree to the Excess Charge Clause]

2. Deductions (pg 5)
The deductions for Independent Contractors engaged with RAINA LTD (supplier) are:
a. Vehicle Security deposits to cover (if only).
i. there is a separate van rental agreement with the Independent Contractor that allows the Supplier (Raina Ltd) to do so; and
ii. the van rental agreement states the amount and maximum retention period of the security deposit; and
iii. the security deposit for the VAN does not exceed £500.00 and will be taken off based on the total value of the self-billed invoice considering not to affect the personal financial condition and stability of the Independent Contractor, until reaching up to the amount of £500.00
80% of the security deposit will be returned after any applicable deductions no later than 14 days after the Independent Contractor ceases to provide services or returns the van. We will keep up to 20% of the security deposit to cover any traffic fines that the Independent Contractor may receive after the ceases to provide services, and this must be returned to the DA after any applicable deductions no later than 30 days after Independent Contractor ceases to provide services or returns the van.
b. Vehicle damages (actual costs only). Please note the Insurance Excess is £1250 per claim. **Please see Payment section above**.
c. Fines: speeding, parking or other driving fines incurred by the Independent Contractor (up to the amount of those fines) + Admin fees owed to our van suppliers in line with their T & Cs for any fines occurred.

3. Driving and duty time requirements (pg 5)
RAINA LTD always adhere to all applicable regulations on driving time, duty time, breaks and working hours in relation to their independent contractors and any other personnel, including but not limited to the GB Domestic Driving Rules.
a. At all times no **independent contractors to not drive more than 10 hours or be on duty for more than 11 hours on any day.**
b. Weekly delivery services limit**: Independent contractor must not provide delivery services for more than 60hrs/week**.
c. Minimum break time per day: As independent contractors, you are free to take breaks when and for
how long you want (provided this is reasonable given the services they have agreed to provide).
However, RAINA LTD always expect all our independent contractors to take at least a 30-minute break after they have been on the road for 5hrs30mins and a total of at least 45 minutes if they have been on the road for 8hrs30mins and this can be monitored via our app, flex portal or driving tracking facilities.
d. Independent Contractor is required to take minimum rest time between consecutive working days: 10 hours.
e. Record Keeping: All records will be kept on weekly record sheet regarding driving and duty time worked by Independent Contractor.

f. Maximum consecutive working days allowed per week for all independent contractors: 6 days/week.

12. Schedule 2, referred to in the PAYMENT section, is headed "Service Rate Card Payments" and sets out fixed daily rates depending on the types of deliveries being made. It is therefore immediately inconsistent with the suggestion in the PAYMENT section that the daily rate "will be agreed Between Supplier (RAINA LTD) & Independent Contractor". In his evidence the Claimant confirmed that he was not given the opportunity to negotiate his daily rate; he was simply told what the rates would be, as set out in Schedule 2. Mr Hashim confirmed that this is the case for all drivers.

13. The Respondent can provide rental vans for its drivers, which is what the Claimant did, but I was told by Mr Hashim that the majority of drivers use their own vans.

14. The Claimant was a university student at the time. He was not always available for work. He told the Respondent when he was available and would be given shifts on those days. Sometimes the Respondent would offer him shifts when he was not available and the Claimant would refuse them. There was never any issue raised with him refusing a shift.

15. After a period of training and shadowing the Claimant commenced delivery driving on 23 October 2022. He only worked six shifts in total. He soon realised that the work was impacting on a medical condition which affects his knees and gave notice to terminate the contract with immediate effect on 6 November 2022.

16. During this period the Claimant rented a total of four different vans from the Respondent. Two of the vans he kept at his home overnight and returned to the Respondent a day or so later. The other two were just hired for the day and returned at the end of his shift.

17. The van in question for this claim was a white Ford Transit Custom, registration MW22 X0K ("the Van"). The Claimant hired the Van on 26 October 2022. He collected it at the start of his shift and inspected it for damage with the Respondent's fleet manager. Pre-existing damage was noted to the wing mirror and side panel. Nothing was noted, in terms of damage, to the rear doors.

18. The Claimant dropped off the Van at the end of the day. By that stage, the fleet manager had left for the day so the Claimant just dropped the keys with a manager. He did not take photographs of the Van before leaving. The Claimant is adamant that no damage was caused to the Van during that day and his period of rental. He was not at that time, or in the days thereafter, notified that any new damage had been seen on the Van.

19. The Van was hired by another driver a few days later, possibly on 31 October 2022. Mr Hashim claimed in evidence that the damage to the rear door was noticed at this point but no documentary evidence to this effect has been provided to the Tribunal. Mr Hashim relies on a photograph showing damage to the door, which he says was taken on 31 October 2022 (see pg 35 of the Claimant's bundle), but he has not produced any proof (or even indication) that this was the date the photograph was taken. The

Claimant was only sent this photograph when the claim for repairs was sent to him in April 2023. As a minimum, I would have expected to see the paperwork for the subsequent rental on 31 October 2022 with this "new" damage being noted on it.

20. It appears that the Van was assessed for repairs on 23 December 2022, as there is an invoice to that effect. The quote was for £1,465 so for more than the money by that point owed to the Claimant. Somewhat surprisingly, this estimate provided by "Manchester Auto Services" does not include VAT or a VAT registration number. When I asked Mr Hashim about this he speculated that the company may not be VAT registered.

21. The Claimant was not notified that it was being alleged that he had caused the damage to the Van until he received an email on 6 April 2023. This was after he had presented his claim to the Tribunal.

22. In the meantime, on 1 November 2022, the Claimant received an invoice for his work detailing the payment amounts. This invoice did not indicate that there would be a deduction made for vehicle damage. As a result, the Claimant did not query it. The pay slip stated that he would be paid (a total of £718.58) on 14 November 2022.

23. The Claimant was not paid on 14 November 2022. He chased the Respondent on 15 November 2022 and was asked to confirm his bank details. He did so immediately. Despite further chasing, no further communication was received from the Respondent until after he had started his claim.

24. Mr Hashim said that the fleet manager would have contacted the Claimant to discuss the damage to the Van, in part because the Respondent may have been able to recover the cost of repairs as a third party claim. However, no such contact was made with the Claimant.

25. Due to not receiving his pay, the Claimant was forced to borrow money from his sister to pay for an air ticket (£860). He has since paid her back and she did not charge him interest. He has not incurred any bank charges or other consequential loss following the non-payment of wages.

The Law

26. S 13 ERA sets out the right not to suffer an unauthorised deduction in wages.

> **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.
> (2) In this section "relevant provision", in relation to a worker's contract, means a provision of the contract comprised—
> (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

(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.

(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.

(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.

(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.

(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.

(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.

27. S 23 ERA gives a "worker" the right to present a complaint to the Tribunal that there has been an unauthorised deduction. A claim can therefore be brought by an employee or worker, but not someone who is genuinely self-employed.

28. As is clear from s 13(1)(a) ERA, a deduction is not unauthorised if there is a contractual provision that permits it. It follows that, where an employer seeks to rely on such a provision, the reason for making the deduction in those particular circumstances must be permissible under the contract.

29. As for the question of "worker status", the starting point in a claim brought under the ERA is s 230:

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.
> (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.
> […]

30. The test in s 230 ERA is hierarchical: an "employee" enjoys greater rights and protections than a "worker". Therefore, the more stringent test for establishing "employee" status should be applied first, before one falls back on the less strict test for "worker" status. If the "worker" test is also not met then the conclusion will be that the individual is genuinely self-employed.

31. This test is a vexed one that has attracted a substantial and ever-growing body of case law. Based on the facts of this claim, I consider that the following authorities are the most apposite.

32. Firstly, the Supreme Court in the landmark case of **Uber v Aslam & Ors** [2021] UKSC 5 cautioned against giving primacy to the written documents purporting to document the legal status between the parties over the day-to-day reality, i.e. what happens "on the ground". This guidance was a continuation of a previous decision of the Supreme Court: **Autoclenz Ltd v Belcher** [2011] UKSC 41. The key passage in **Uber** is from para. 85 of Lord Leggatt's judgment:

> "[There] is no legal presumption that a contractual document contains the whole of the parties' agreement and no absolute rule that terms set out in a contractual document represent the parties' true agreement just because an individual has signed it. Furthermore, as discussed, any terms which purport to classify the parties' legal relationship or to exclude or limit statutory protections by preventing the contract from being interpreted as a contract of employment or other worker's contract are of no effect and must be disregarded."

33. Secondly, in assessing the first limb of the s 230 ERA test (employee status), I have considered the useful discussion of the principles to be applied by the Court of Appeal in **Stringfellow Restaurants Ltd v Quashie** [2012] EWCA Civ 1735, paras. 4-14. In **Stringfellow** (para. 7) the Court emphasised that the summary of McKenna J in **Ready Mixed Concrete (South East Limited) v Minister of Pensions and National Insurance** [1968] 1 QB 497 remains the applicable test for a contract of service (s 230(2)). This is as follows.

> "(i) The servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master.
> (ii) He agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient degree to make that other master.
> (iii) The other provisions of the contract are consistent with its being a contract of service."

34. The Court also made clear that the other key factor in determining employment status is whether there is "mutuality of obligation" (see **Stephenson v Delphi Diesel Systems** [2003] ICR 471, cited at **Stringfellow** para. 13).

35. A key authority on the test for a worker (s 230(3)(b) ERA) is **Pimlico Plumbers Ltd & anor v Smith** [2018] UKSC 19; also a Supreme Court judgment. That judgment confirmed that the two key features of the test for worker status are whether: (1) personal service by the individual is required under the contract (i.e. there is not a genuine right to send a substitute) and (2) the alleged employer is a customer or client of the purported worker (so that the latter is in business on his own account). The latter test engages with the principles of control and subordination. The alleged employer will only be a genuine client or customer if the individual has independence in respect of the terms by which he contracts and the way he performs his obligations under the contract.

Conclusions

36. I start my analysis by considering the first part of the s 230 ERA test: was the relationship between the Claimant and Respondent one of employment? In other words, was the Claimant an employee of the Respondent's?

37. In my judgment, it is clear that it was not an employment relationship. There was, in short, no mutuality of obligation between the parties. The Respondent was under no obligation to offer shifts and the Claimant was under no obligation to accept any shifts offered to him. This was not just what the paperwork said, it is how the relationship operated in practice.

38. The next question is whether the Claimant was a worker for the Respondent, i.e. whether he met the test in s 230(3)(b) ERA. If he was a worker then the Tribunal will still have jurisdiction to determine his complaint in respect of unpaid wages.

39. In such cases, the key issue is normally personal service, that is whether the individual had a genuine right to send a substitute to perform the services under the contract (see, e.g., **Pimlico Plumbers**). Unusually, in this case, there is no dispute between the parties that the Claimant was not permitted to send a substitute to perform his courier duties on any given day. There is no such clause in the SLA and it would, in any event, be inconsistent with, for example, the requirement for drugs testing. I expressly asked Mr Hashim when adducing his evidence whether personal service was required under the SLA and he confirmed that it was.

40. The only real question, therefore, is whether the Claimant was genuinely in business on his own account. That is, whether the Respondent was a "client or customer" of his. As per **Uber**, the fact that the SLA states this to be the case is of little weight. In deciding this question, I must consider factors such as integration, subordination, and inequality of bargaining power (**Pimlico Plumbers**).

41. The main factors in the Respondent's favour are (a) the lack of obligation on the drivers to accept the shifts offered and (b) that some autonomy is afforded to the drivers as to how the work is done; for instance, drivers are able to use their own vans, providing that it is the right sort of van and with the correct type of insurance in place.

42. On the other hand, there is essentially no bargaining power in the hands of the drivers. Despite the suggestion in the SLA, in reality the work is only offered at the rates fixed by the Respondent.

43. Further, there are stringent conditions imposed on the drivers under the SLA, for example, a limit on the total number of hours that can be worked in any given week and drugs and alcohol testing carried out by the Respondent. Whilst I understand that these restrictions ultimately come from Amazon, under its contract for services with the Respondent, that does not affect or inform the (separate) relationship between the Respondent and its drivers.

44. Taking a step back, I cannot say that the Respondent is a customer or client of the Claimant's. The Claimant does not offer himself to the world at large as a driver/courier offering courier services. He accepted an offer of work from the Respondent and then worked on the terms set by the Respondent, including the rate of pay.

45. My conclusion, therefore, is that the Claimant met the definition of "worker" in s 230(1)(b) ERA. As a result, the first issue is resolved in the Claimant's favour and the Tribunal has jurisdiction to consider his complaint brought pursuant to s 23 ERA.

46. As already noted earlier in this Judgment, there is no dispute that the amount "properly payable" to the Claimant was the total of the three invoices issued to him: £1,188.51. The second issue I have to determine is, accordingly, whether the Respondent was authorised to deduct from that amount the cost of repairs to the Van, thereby reducing the Claimant's pay to nil.

47. I accept that there was a written provision in the SLA which permitted a deduction to be made for vehicle damage. This is most clear in the Payment section on page 3 of the SLA (quoted above). However, the Respondent must prove that such damage was caused by the Claimant to be entitled to make the deduction under the contract. Based on the evidence before me, I am not able to make such a finding.

48. I accept that there is no evidence that the damage to the rear doors was already on the Van when the Claimant collected it on 26 October 2022. Accepting that the damage occurred at some point after the Claimant first

collected the Van, the Respondent still needs to prove that it occurred whilst the Claimant had the Van within his control and not after he had returned it later that evening. In other words, the Respondent must show that the Van could not have been damaged by a subsequent user of it after the Claimant's period of hire had ended.

49. It is not clear when the Respondent first realised that the Van had been damaged. Although Mr Hashim says that the photograph of the damage was taken on 31 October 2022, as I have already observed, there is no paperwork in support of this assertion. Furthermore, if fresh damage had been noted on 31 October 2022 I would have expected this to have been raised with the previous hirer of the Van, i.e. the Claimant, straightaway. But this did not happen.

50. I accept Mr Hashim's submission that the Claimant would have been better following the advice in the hire agreement and taking his own photographs of the Van at the time that he returned it. This would, of course, have established definitively that he was returning the Van without any fresh damage. However, the onus is still on the Respondent to prove that the damage was caused by him, rather than for the Claimant to disprove.

51. There is a further inconsistency in the Respondent's case. Although Mr Hashim's evidence is that the photograph of the damage was taken on 31 October 2022, he also maintained in evidence that the damage was not brought to the attention of the relevant person at the Respondent (presumably the fleet manager) until early December 2022. This begs the question as to why a photograph would be taken of the damage in October, but not brought to anyone's attention until over a month later.

52. More fundamentally, however, it means that there is no explanation as to why the Claimant did not receive his pay as due on 14 November 2022. If the damage had not been registered by the Respondent until early December there would have been no reason to have deducted the Claimant's pay in November. Mr Hashim could not explain this inconsistency.

53. I also place weight on the fact that no one contacted the Claimant to discuss the damage until after he had submitted his ET1. As Mr Hashim rightly pointed out, where damage to a vehicle has been found further details would be needed from the driver to, for example, ascertain whether a third party claim could be brought.

54. The above chronology is consistent with the issue of damage to the Van only being raised after the payment due to the Claimant on 14 November 2022 had been withheld. It suggests that the issue of vehicle damage was retrospectively used to try to justify a deduction already made for different reasons (of which I can only speculate).

55. Ultimately, I am not satisfied on the balance of probabilities that the Claimant did damage the Van on 26 October 2022. The Respondent has not provided sufficient evidence to support such a finding. The deduction made by the Respondent was not therefore authorised under the contract.

56. I therefore uphold the claim and will order the Respondent to pay the sum

of £1,188.51 to the Claimant. As I have indicated to the Claimant, given that the sum is due to him as a worker, it will be subject to income tax and national insurance contributions. I understand that the Respondent does not have a payroll system set up to make the deductions at source, given it does not recognise its drivers as workers, and so it will be a matter for the Claimant to account for HMRC for these sums.

57. Finally, I find that there was no consequential loss caused to the Claimant by the deduction. The Claimant had to borrow money from his sister but understandably she did not charge interest. I therefore make no further award of compensation.

Employment Judge Feeny

Date: 8 June 2023

JUDGMENT SENT TO THE PARTIES ON

13 June 2023

FOR THE TRIBUNAL OFFICE