Case No: 3304221/2022

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr A Guler	**v**	**Newman Law LLP**

Heard at: Watford **On:** 22-23 May 2023
Before: Employment Judge French

Appearances:
For the Claimant: In person
For the Respondent: Mr Mekki, Managing Partner

JUDGMENT having been sent to the parties on 22 June 2023 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013, the following reasons are provided:

REASONS

Introduction

1. This is a claim for unauthorised deduction from wages and breach of contract relating to unpaid pay. The respondent denies any liability, they state that the claimant was a consultant and as such he was neither a worker or employee and they also bring an employer's contact claim in relation to a payment that was made to the claimant in the sum of £1,000.

The issues

2. The issues to be resolved are set out in the case management order of Employment Judge Maxwell dated 25 November 2022 at paragraphs 40.1 to 40.4 and I do not repeat the same here.

Preliminary issues

3. By way of preliminary issues there have been a number of issues that have arisen throughout the course of these proceedings. The first is that the respondent served evidence of text message screen shots the day before the hearing began on 22 May 2023 and sought to rely on the same. The claimant opposed reliance on the basis of the disclosure having been made very late, it effectively being the day before the hearing which was also a non-working day. I weighed both arguments carefully and ultimately allowed the evidence in, having provided full oral reasons at the time. I effectively took the view that the text messages were between the claimant and the respondent and as such they did not come as a complete surprise to the claimant. The texts or a form of the texts also appeared in the bundle which were provided by the

claimant, but this was not a full version. The respondent's screen shots sought to provide the full exchange which is of course of assistance to the tribunal to understand the context as a whole and to see the full exchange between the parties.

4. As a result of that decision, I did allow the claimant some additional preparation time.

5. The claimant also took issue with items C70 to 79 in the bundle. He stated that was not originally disclosed and also not agreed as part of the original bundle. However, he later conceded on that point and took no issue with them being relied upon and as a result I did not determine this issue. In any event, during the hearing itself those documents were not relied upon to any extent by the respondent and, indeed, it was the claimant that took me to extracts of that evidence.

6. During the course of cross examination of the claimant, the respondent did seek to adduce further evidence, namely an updated invoice to the one which appears at C86 of the bundle which they say the claimant later provided to them.

7. The respondent said that the reason they had not provided that before was because they trusted the claimant to give the correct account. I did not accept that explanation. They knew that the amount of commission payable was in issue and was entirely relevant and, indeed, sought to paint the claimant as an uncredible witness from the very outset, namely on the basis that he had concealed the screenshots of text messages that they subsequently provided and was the subject of the late disclosure application that morning.

8. At the outset, having dealt with reliance on the text message screenshots, I asked if there were any other preliminary issues, and I was told by both parties that there were not. I did not allow that evidence to be adduced in light of the background of the earlier late disclosure. I had already given the respondent leeway in relation to the text messages and was not willing to afford more. That would have required further time in the timetable for the claimant to consider the same and, of course, at that point the case had already started and been presented by both parties based on the evidence before the tribunal.

9. I will also say that, at various points throughout the proceedings, the claimant has stated that the respondent has not disclosed evidence which may have assisted. He did raise this in an email to the tribunal in November 2022 and was sent a reply that that was not considered to be a formal application for disclosure. At no point has he made such an application.

10. It also became apparent that during the course of proceedings, Ms Sohrabi had given an earlier witness statement which I had not had sight of. The claimant wished to rely on this statement because it was inconsistent with the subsequent statement, and I allowed this and was provided with a copy of the same. The first witness statement I understand was prepared in advance of the hearing that took place on 25 November which I understand was originally listed for a final hearing but converted on that occasion to case management hearing.

Evidence

11. As such, by way of evidence, the tribunal had before it a bundle that ran to page C93, the respondent's skeleton argument dated 17 May 2023, the claimant's skeleton argument dated 21 May 2023 which had attached to it a Pay as You Earn history, screen shots of text messages from a conversation on 10 January, and in addition to the witness statements that were within the bundle, a witness statement of Ms Sohrabi that was dated 22 August 2022. I also had 4 images being screenshots of the text message exchange recovered from Ms Sohrabi's telephone device.

Findings of fact

12. In November 2021 the respondent placed an advert on Indeed for a Turkish speaking paralegal and that can be seen at page C92 of the bundle. The claimant made an application for that position and, as a result, was invited for interview at the end of November.

13. The claimant's account is that following that interview he was offered a position as a paralegal although he said in describing his position it was a hybrid, a mix of paralegal and legal consultant and on further explanation said that was in relation to his title. He stated that there was an oral contract between the parties whereby he would be employed; he would receive a salary of £2,000 per month plus commission of 40% of the fees for clients which he introduced to the firm.

14. The respondent's evidence is that during the interview they did not consider that the claimant's skills were adequate enough for the position of paralegal. It was Mr Mekki and Ms Sohrabi who interviewed him, and both gave clear evidence that the claimant had explained that he had contacts in the Turkish community and could introduce clients to the firm He was also carrying out his Foreign Lawyer Transfer Course and required experience in a law firm which would assist with his learning but also his language skills. The claimant did not challenge any part of that evidence. As a result, the respondent's evidence was that whilst they did not offer him a paralegal position, they did offer him a consultancy position with the offer for him to take 40% of the fees generated from clients that he introduced to the firm. Again, the respondent agrees that that offer was made orally in the interview.

15. Both the claimant and the respondent agreed that during the interview there was no discussion about annual leave, sick pay, pension, tax or national insurance deduction or who would be responsible for the same.

16. The claimant's evidence is that during the interview he was offered a salary. The respondent denies this and says that he was offered an advance on his commission in recognition that it would take some time for him to generate fees. Their evidence was that the claimant, at that stage, did ask for £2,000 as an advance on the commission but that was not agreed. Effectively, what was agreed in that interview was the principle that there would be an advance, but the amount of that advance was not agreed.

17. The respondent says this was later dealt with by way of an email that I can see at page C67 of the bundle, dated 10 January from Mr Mekki to the claimant in which it was agreed that he would be paid an advance of £1,000.

18. Ms Sohrabi also gave evidence that other paralegals in the firm were on salaries of approximately £20,000 per annum; they did not earn commission on top of that. She also gave evidence that one of the consultants of the firm receives 40% of the fees that they generate, and others receive 50% and they did not receive a salary on top of that commission. It is a small firm as with a total of five or six people. That includes employees and consultants. No one in the firm is paid both a salary and commission.

19. In resolving the issue as to the agreement, I find that the agreement between the parties was that the claimant would be paid 40% of the fees for clients which he introduced to the firm. I am not persuaded that there was an additional agreement for a salary of £2,000 per month for a number of reasons.

20. The first is that the claimant started work in December; if there was an agreement for a salary he should have therefore been paid this at the end of December. He takes me to text message exchanges at C81 and C82. At C81 there is a text sent on 27 December in which he asks Ms Sohrabi what day he will be sent 'monthly fee wage'. There is then a text at C82 from 5 January again texting Ms Sohrabi asking when Osman, which is Mr Mekki, will send him the £2,000.

21. The claimant invites me to find that this was sent before the exchange on 10 January at page C67 and is him asking for his salary. I do not accept that. Those text messages have to be looked at alongside the other evidence. When looking at the full exchange, as provided by the respondent, on 10 January there was a text message where he refers to £2,000 'as a booster or like a loan'. Both of those texts read in light of that further text message leads me to the conclusion that he was effectively chasing the agreement of the advancement of the commission.

22. I also note that that evidence was not in the claimant's disclosure of text messages. He says that that was as a result of an Injunction Order made by Barnet County Court in which he was not to disclose confidential client information and, as a result, proceeded to delete that information. The text messages that have been deleted from the claimant's version of the texts do not contain any client confidential information. The order from Barnet was made following the issuing of the employment tribunal claim and the claimant would have been aware of the importance of keeping evidence relevant to his claim. I do therefore consider that those particular text messages were deliberately deleted or concealed because he knew that that was a true reflection of the agreement.

23. Secondly, the text message exchange from 10 January alone refers to it being a 'booster or like a loan'. He does not refer to it as being his salary which supports what the respondent says that they had agreed an advancement on his commission.

24. The third reason as to why I find the agreement to have been 40% of fees and no additional salary is that the respondent sends an email on 10 January that is seen at C67 setting out the basis of the relationship between the parties and what they will pay the claimant. The claimant says that he challenged this orally when he next went into the office on 13 January and was told that the email was for compliance and that he trusted the partners.

He says that that took place on 13 January following which I note he was sent a payment of £1,000. He says that he trusted them to sort more. I do not accept that as credible. He says he was new to UK law, but he says he queried the email of 10 January on 13 January for which he was subsequently sent a payment of £1,000 and that would suggest an agreement on the claimant's behalf. He continued to work for the respondent despite the fact that on his account he was not being paid his salary as agreed. I do consider that the fact that he continued to work despite only having been paid £1,000 was because he knew that was the actual relationship status and agreement.

25. Fourthly, it was the respondent who terminated the relationship at the end of January when they felt his skills were not adequate. As I say, he continued to work despite having only received the payment of £1,000.

26. Further, looking at the claimant's bank statement, the payment that was made too him states that it was a 'consultancy fee'. He accepts that there was no wage slip attached, there was no tax or national insurance deducted from it which would have supported it being a salary.

27. Finally, I also accept the evidence of Ms Sohrabi that the firms practice, as indeed is known as general industry practice, was that you are either paid commission or a salary and not both. The claimant was a paralegal, he was not a trained lawyer, and I accept Ms Sohrabi's evidence that based on that he would never have been offered £2,000 plus 40% commission and that can also be compared to the monthly payments of the paralegals that were employed and the monthly commission of the consultants that were employed.

28. I also find that the payment of £1,000 was given as an advance payment on the commission. This is because I accept the evidence of Mr Mekki that there was a discussion between the parties about the same at the time that the offer was made. It is supported by his subsequent email dated 10 January, and it is further supported by the claimant's bank statements which refer to it as the consultancy fee and further by his own messages, namely the screenshots produced by the respondent in which he refers to it as "like a booster like a loan"

29. As to the working relationship between the parties the claimant says he was employed; the respondent says he was a sub-contractor on a consultancy basis. I have no written agreement to assist me in resolving it, albeit of course, there does not have to be a written agreement and case law makes clear that that need not be the only deciding factor.

30. I have heard evidence regarding the interview, the offer of employment, and made my finding regarding the agreement of pay. In light of those findings I do consider that there was no offer of employment and that the offer was one of legal consultant whereby the claimant would be paid a proportion of the fees that he generated based on client referrals.

31. This is again supported by the evidence of Mr Mekki and Ms Sohrabi as to what they offered. It is also supported, in my view, by the claimant's lack of questioning regarding sick pay, holiday pay, pension credits, tax and national insurance and benefits offered under the advert as can be seen at C92. It is supported further by the fact that all parties agree that there was no

discussion that took place around those aspects and that would of course usually be part of a job offer negotiation or subsequently as part of a written contract. Also of note is that the claimant had a period of sick leave in which he did not query any entitlement to sick pay. He stated that he had not taken any annual leave but also confirmed in evidence that he had never questioned his entitlement.

32. In looking at facts to assist me in determining whether or not the claimant was a worker, that being distinct from employee, I find that the claimant did have some limited flexibility; he was able to work from home and did so on occasion. Ms Sohrabi accepted however in her evidence that when he worked form home, he always advised her of this. She also accepted that when he was late on occasion he advised her of this although she did state subsequently that he began attending the office at 10am without advising her, when the working day would usually begin at 9.30. The overall impression from Ms Sohrabi's evidence, however, was that he was expected to attend the office on time.

33. The respondent's account is that an employee would be required to come in daily, whereas consultants effectively work their own hours and are generally not required to be in the office, although there are exceptions whereby consultants are asked to come in. I do note in the claimant's ET1 at paragraph 5.2 he says that his job is a legal consultant/paralegal.

34. Ms Sohrabi's evidence was that he would refer clients to her, and she would have conduct of the files. The claimant would work under her on those files and was under supervision. The claimant points out that under the Solicitor's Regulation Authority Rules as an unqualified person he would have to be under supervision, and I accept that. That does demonstrate that he is not able to work entirely independently. I find that the claimant did have fixed hours where he was expected to work, namely between the hours of 9.30 and 5.30 and was required to come into the office save for what was otherwise agreed. That is supported by the email from Mr Mekki at C67 which says that they expect him to be om the office daily at 9.30. I do consider that the claimant had a personal service obligation to the respondent. He could not have substituted his services and was required to individually perform the tasks that were delegated to him. He was controlled by the respondent in terms of the tasks that he did and Mr Mekki's and Ms Sohrabi's evidence was that he was delegated tasks under them and effectively required supervision. I also find that he was integrated into the firm; he was delegated an email address and a work telephone number.

35. There was a dispute over a logo design by way of advertisement where apparently it was agreed by him without partners consent. I do not make any finding on that because it is not relevant to my decision today. What is relevant is that there is a document at C85 which I understand to be an invoice for the respondent paying for an advert targeted at the British Turkish community to generate work for the claimant which would support his integration and I am satisfied that the claimant was relying on the respondent for income and that was his primary source of work.

<u>The law</u>

36. They key issue in this case is employment status and I turn to s.230 of the

Employment Rights Act 1996 which states that:

> "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.

36. Effectively there are two distinct definitions in relation to employee and worker. That is important because the claims before me today are a breach of contract and unauthorised deductions from wages. A breach of contract claim can only be brought by an employee. The respondent can also only bring an employer contact claim if they are an employer. However, both employees and workers can bring claims for unauthorised deductions from wages.

37. Section 1 of the Employment Rights Act states that employees or workers must be provided with written particulars and sets out what those particulars should include.

38. S.38 of the Employment Act 2002 states that where an employer fails to provide written particulars the tribunal must made an award of two weeks' pay and, if just and equitable, the tribunal can consider awarding a higher amount of four weeks.

39. I am also assisted by case law which the claimant takes me to, namely Autoclenz Ltd v Belcher [2011] UKSC 41 and also Uber BV and others v Aslam [2021] UKSC 5. Those cases assist me in relation to the definition of a worker. I make that distinction because the claimant sought to rely on those cases to demonstrate that he was an employee. I am also assisted by the case of Pimlico Plumbers v Smith [2018] UKSC 29 which again concerned the definition of a 'worker' under s230 ERA 1996. In that case the Supreme Court considered whether a plumber engaged as an independent contractor was required to perform his work for a company personally, when he had a limited right to substitute another company operative in his place. It found that

the dominant feature of the contract remained personal performance, and he therefore fell within the definition of a "worker" in s230(3)(b) ERA 1996.

40. In relation to unauthorised deduction from wages, s.13 of the Employment Rights Act states:

> (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.

Section 13(3) of the Act states:

> (2) 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.

41. Wages are defined in s.27 of the Employment Rights Act. Section 27(2) sets out what is excluded but effectively commission would be included in the definition of wages.

Conclusions

42. I find that the claimant was not an employee within the meaning of s230(1) of the Employment Rights Act because I do not find that there was evidence of a contract of employment, whether orally or in writing.

43. I am persuaded by the evidence of Mr Mekki and Ms Sohrabi that the interview was such that they did not feel that the claimant had the appropriate skills to offer him an employed position. He had however advised that he was going through training and had good connections and, as a result, an offer of consultancy was made. This is made out in the subsequent agreement regarding fees, namely that he would receive 40% of fees for clients that he generated. That is in line with a consultancy agreement generally but also in line with the consultancy agreement of the firm. The respondent's position is that they would not pay a salary and commission and I accept that. I also accept that that is usual industry practice for such situations.

44. The breach of contract claim is therefore dismissed because the claimant was not an employee. As such, the respondent cannot proceed with the employer contract claim because there was no such relationship.

45. I do, however, find the claimant to be a worker within the meaning of

s230(3)(b) ERA 1996. There was clearly a contract of service here rather than a contract for services. The claimant was not contracted to carry out just one task or work one file; he undertook work personally for the respondent. There was no way that he could have substituted that work. He had a personal service obligation and that is supported by the evidence of the respondent that he was supervised by them. They delegated work to him and whilst he introduced clients to the firm as per their agreement, he was not carrying out his own work separately. Those clients would be referred to Ms Sohrabi who would delegate tasks to the claimant.

46. He was required to attend the office and he was required to attend at 9.30 which is supported by the respondent's email at C67 setting this out. There was a degree of control over the hours, location and work done. He was integrated into the firm by way of email address and work phone number. The claimant was dependent on the income he generated from the respondent. He was not working for anyone else during this time and relied on them. I consider that in those circumstances I am entitled to find that he was a worker because there is an obligation for personal performance there. That is unless the status of the respondent by virtue of the contact was that of a client or customer of this.

47. The agreement here was that the claimant was a consultant; he had connections with the Turkish community and would refer work which would predominately be undertaken by a qualified partner and tasks delegated to him and supervised. Under the Solicitor's Regulation Authority Rules he is unable to conduct the work himself so it cannot be, in my view, that the respondent was a client or customer of the claimant.

48. I am assisted at paragraph 23 of the Judgement of Windle v The Secretary of State [2016] EWCA Civ 459 where Lord Justice Underhill states that:

> "A person's lack of contractual obligation between assignments might indicate a lack of subordination consistent with the other party being no more than his client or customer". Here there is subordination, there is a contractual obligation to attend the office at a required time".

49. On the basis that I find the claimant to be a worker he is entitled to bring a claim for unauthorised deduction from wages. His claim of course was for a salary of £2,000 per month plus 40% commission. In that regard I need to determine what was properly payable in order to determine whether there has been an unauthorised deduction. I have already given my finding in relation to the £2,000 salary and I find that there was no agreement that that effect. I am therefore dealing with commission only and commission would fall within the definition of wages. All parties agree that the commission agreed was 40% of the fees generated by clients referred.

50. At C86 there is a document prepared by the claimant as to such fees. Although the respondent sought to refer to an alternative document during cross examination of the claimant, I refused that reliance on that for the reasons given above. In any event, when the document at C86 was pit to both Mr Mekki and Ms Sohrabi both agreed that under the terms of the agreement that they had with the claimant he would be entitled to the figures set out in that document and therefore this document was not disputed by the

respondents. The total outlined in that document was £1092.48 representing 40% of the fees generated through clients referred.

51. The claimant accepts he was paid £1,000 and I find that that was an advance of the commission due whilst the claimant settled into the firm and effectively generated more work.

52. The agreement between the parties terminated on 31 January and the claimant should have been paid the balance of the commission due under that agreement which I calculate to be £92.48 (total commission of £1092.48 less the advancement of £1000.00). I find that there has been an unauthorised deduction in that sum, and I order that the respondent pays the claimant £92.48 as a result.

53. Finally, all parties agree that there were no written particulars in this case. That is a breach of s.1 of the Employment Rights Act. I must, under s.38 of the Employment Act 2002 make an award of two weeks' pay unless I consider it just and equitable to extend that to four weeks. In these circumstances I don't consider that it would be just and equitable to extend to four weeks; the claimant was contracted for a short period of time. There was an initial training period and was disengaged at the end of January. In this case in calculating the two weeks' pay I take the commission figure of £1,092.48, which was commission earned over the two-month period and which I take as the average of the claimant's normal rate of pay. I do not have anything else to compare it to and of course there was no salary. So, what I do is I divide that figure by two months, because it is what was earned over two months, and that gives a monthly figure of £546.24. I times that by 12 months to get my yearly figure which is £6,554.88 and I then divide that by 52 weeks to give me the weekly amount. The weekly amount I make to be £126.05. So, an award of two weeks would be £252.11. The total due the claimant is £344.59.

54. The claimant has asked me for a preparation time order under Rule 75 of The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 and that is to be read in conjunction with Rule 76. It is not the case that these orders are made on a regular basis, and it is a very high bar. Ultimately, in this case, the claimant has not been successful on all of his claims and has effectively been part successful. In that situation, I do not consider that it was unreasonable for the respondent to have contested these proceedings and when applying Rule 76 it is not unreasonable, it is not vexatious, it is not the case that the respondents had no reasonable prospect of success, and this is not a case where proceedings have been postponed or adjourned as a result of fault of any of the parties. By way of application of the rules the criteria for making a preparation time order is not met and as such I do not make one.

Employment Judge French

Date: 25 July 2023
Judgment sent to the parties on
27 July 2023
GDJ
For the Tribunal office