EMPLOYMENT TRIBUNALS

Claimant: Mr D Wilson

Respondent: Carbon60 Limited

Heard at: Watford
On: 5 July 2023

Before: Employment Judge Caiden

Representation
Claimant: Not in attendance
Respondent: Ms E Greening

JUDGMENT

1. The Claimant's complaint that there was an unauthorised deduction from his wages, namely not being paid his accrued but untaken annual leave upon termination, is well founded and succeeds.

2. The Claimant is not entitled to any compensation for the authorised deduction from his wages, namely not being paid his accrued but untaken annual leave upon termination, as all the sums outstanding have since been made.

3. The Claimant's complaints of breach of contract, namely failure to pay notice pay and loss of wages following termination of the contract, are not well founded and are dismissed.

REASONS

A) Introduction and issues

1. The claim was made by an ET1 presented on 2 February 2023 following the Claimant's termination of what he asserted was a fixed term contract entered he entered on 9 January 2022. The date of the termination was 20 September 2022.

2. The ET1 ticked the boxes for unfair dismissal, notice pay, holiday pay and other payments. The Claimant did not have sufficient continuity of service for an unfair dismissal claim and that was rejected by the Tribunal. The only claims that were accepted were a holiday pay claim for failure to pay unused holiday upon termination, a notice pay claim for failure to pay 1 weeks' notice, and a breach of contract claim for losses that flowed from the termination of the contract (namely loss of earnings until the end date of the fixed term contract).

3. The Respondent in its ET3 denied the claims and alleged the Claimant was not an employee.

4. The issues were discussed with Ms Greening upon the Tribunal deciding to proceed with the hearing following the Claimant's non-attendance (see further below). She conceded that the Claimant was a worker and therefore entitled to holiday pay. This meant that the only live issues were

    4.1. what sum of accrued but untaken annual leave upon termination was properly payable? Do any such sums remain outstanding as at the date of the trial? ["**Holiday pay in lieu claim**"]

5. In terms of the breach of contract, the Tribunal only has jurisdiction to deal with such claims on behalf of employees (not workers): Article 3 Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994. Moreover, whilst the Respondent was relying upon a right to terminate immediately provided for in the contract, it was accepted by Ms Greening that an employee has a right to minimum notice periods, in this case one week, under s.86 Employment Rights Act 1996 ("ERA"). Therefore, the issue in terms of the notice pay and right to claim the 'future' loss of earnings from the termination all turned on:

    5.1. was the Claimant and employee of the Respondent under s.230(1) ERA? ["**Employee for breach of contract claim**"]

B) Preliminary and procedural matters: non-attendance of Claimant

6. By email of 5 July 2023 at 08:17, in other words 1 hour and 43 minutes before the hearing was due to commence, the Claimant emailed the Tribunal service stating amongst other things

> *I regret to inform the Tribunal and the Respondent that my connecting train to London is cancelled due to disruption on the railways. I am unable to attend the hearing listed today at 10:00am today in person. I am available on-line or by telephone if required.*

7. This email also complained of the Respondent defying orders. The Tribunal went through the orders with Ms Greening and she confirmed the Respondent had indeed complied with the orders. She further confirmed the bundle and the witness statement of Mrs Lawrence that was handed up on the morning had been supplied the Claimant previously. Ms Greening summarised that the Claimant had never provided any witness statement and that the crux of the issue was the parties could not agree the content of the bundle and thus the bundle the Tribunal had was a Respondent bundle.

8. The Tribunal was only provided with the Claimant's email shortly before 10.00 and upon reading its contents made enquiries internally which confirmed that it was not possible to arrange for telephone hearing or CVP facility given the short notice. Accordingly, the Tribunal made further enquiries of the Claimant via an email sent on its behalf from the Tribunal service, at 10:21 stating:

> *The Tribunal has received your email of 8.17am of this morning. The Tribunal does not have a telephone number to reach you on file and its only means to contact you is via email at present. The Tribunal wishes to confirm whether it is the case that you are still not going to be able to attend in person today at all between the time the case was allocated 10.00-13.00? Unfortunately, given the shortness of time it is not possible to conduct this hearing over the telephone or via computer. At present neither party has made any applications for the hearing to be conducted remotely prior to your email this morning and if you wish for any potential future hearings to be conducted in that manner please make an application copying in the Respondent*.

9. The Claimant responded to this email at 10:40 as follows:

> *Good morning,*
> *Thank you for your email.*
> *I regret to confirm that I am still not going to be able to attend in person today at all between the time the case was allocated 10.00-13.00.*
> *I have noted Judge Caiden's comments. I respectfully invite the Tribunal to proceed with the hearing in my absence.*
> *I await notification of the outcome of the hearing from the Tribunal.*
> *Thank you and regards,*
> *Dean Wilson*

10. The Tribunal relayed this information to the Respondent who was in attendance, and represented by Ms E Greening of Counsel, and invited it to make any observations on the course to adopt as appropriate. Ms Greening, initially stated that the Respondent had previously been minded to make a strike out application prior to the hearing and given the situation would make it orally. The basis of the application was under rule 37 in Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 ("ET Rules") namely that the claim had no reasonable prospects of success, the manner in which it was being conducted was unreasonable and scandalous, there had been non-compliance with orders (rules 37(1)(a), (b), (c)

ET Rules). The Tribunal pointed out that rule 37(2) ET Rules required the other party, in this case, the Claimant to have a reasonable opportunity to make representations on this issue and that given there was nothing in writing even giving him notice of it, and he was now not attending, that may preclude the matter being dealt with today. It also pointed out that rule 47 ET Rules applies for non-attendance which gives the Tribunal the power to dismiss the claim or continue hearing it in the absence of the party. Upon consideration, Ms Greening confirmed that her instructions were not to pursue the strike out under rule 37, but she submitted that the claim should be dismissed in the Claimant's absence, or the matter proceed in his absence. She pointed out that her client had spent considerable time and cost and wanted the matter concluded.

11. The Tribunal, after a period of deliberation, decided that the best course of action was for the hearing to continue in the absence of the Claimant under rule 47 ET Rules. It had regard to the overriding objective and the interest of justice and reached this conclusion for the following reasons:
    11.1. one option available was to treat the Claimant's email as an application to postpone, however neither he nor the Respondent wished for that course to be adopted;
    11.2. both parties in fact wanted the matter to be concluded on the day, importantly the absent party, the Claimant, asked for this very course to be adopted;
    11.3. the Tribunal had documents supplied by the Claimant from his emails and his position was clear in his ET1. The focus of the issues did not appear to turn on oral evidence that was being challenged; the Claimant's claim seems to describe working under the contract with his main point being he was "*PAYE*" employee;
    11.4. simply dismissing the claim for the non-attendance did not seem appropriate as the Claimant had explained his absence at least to a point and there was no further information that was obtainable;
    11.5. the absent party could apply for reconsideration if necessary.

12. Accordingly, the Tribunal considered the bundle provided by the Respondent, the papers on the Tribunal file and the witness statement of Mrs Lawrence (she took an affirmation and confirmed the truth of its contents). Reference to page numbers below are to the Respondent's bundle.

C) Findings of fact

13. The Tribunal makes the following findings of fact on the balance of probabilities of those areas that were material to the decision it had to make.

14. The Respondent is an employment business within the meaning of Employment Agencies Act 1973. One of its clients is British Airways and it provides temporary workers to it.

15. The Claimant entered into a "*Temporary Workers*" engagement entitled "*Contract of Services*" on 21 December 2021 (pp.32-36). This document:
    15.1. made clear that it did not amount to a contract of employment (clauses 2.1-2.2, p.32);

15.2. stated the Claimant was not obliged to accept any assignment offered by it to him (clause 3.1, p.32);

15.3. made clear the pay would be worked out by the Claimant giving the Respondent a timesheet, and it would pay for those hours even if the client did not pay the Respondent for it (clauses 7.1-7.2, p.34);

15.4. indicated that in effect it was the client who would be in control of him day to day on assignment (clause 8.1, p.34);

15.5. stated that the Respondent or its client could terminate the assignment or the temporary worker engagement contract at any time for any reason without prior notice of liability (clause 9.1, p.35).

16. The Claimant was supplied to British Airways initially on 10 January 2022 until 8 July 2022. He signed an assignment schedule (p.37). This set out his pay rate and noted also that the "*Termination Notice Period*" was "*1 Week, save for where terminated in accordance with Clause 9.1*" (p.37). This was extended to end on 31 October 2022. The day-to-day work was done in accordance with the assignment schedule and contract, the Claimant was therefore being supplied to British Airways by the Respondent and British Airways had day to day control as it were of the Claimant.

17. On 20 September 2022, an incident occurred on the British Airways premises. The exact nature and details of it are not relevant for present purposes. What is relevant is that British Airways wanted a replacement and on 21 September 2022, the Claimant was sent a termination notice confirming his assignment had been brought to an immediate end pursuant to Clause 9.1.

18. On 6 October 2022, the Claimant stated he had yet to be paid in lieu of untaken holiday upon termination. He asserted that payment should be £6,454.77. This was in addition to saying he was owed 1 weeks' notice pay. The following day a payment of £3,838.22 gross was made (p.43). Given the discrepancy an investigation or review was launched which revealed an underpayment had been made. The result was that a further payment was made on 20 January 2023 of £2,598.30 (p.44). The Claimant acknowledged receipt of this payment the following day (p.45).

19. On 5 June 2023, the Claimant was provided with an email that stated the Respondent had made a payment in lieu of notice of £1,500 gross (p.46). The payslip was at p.47 and included in the email as an attachment.

D) Relevant legal principles for claims

Deduction of wages and holiday pay claims

20. The right not to suffer unauthorised deductions is set out in s.13 Employment Rights Act 1996. A deduction can be made if it is authorised by statutory provisions, or relevant provision of the worker's contract, or if the worker has previously signified in writing agreement/consent to the deduction (s.13(1)).

21. In an unlawful deduction of wages context it is the worker who bears the burden of establishing on the balance of probabilities that there has been a 'deduction' (see *Timbulas v Construction Workers Guild Ltd* EAT/0325/13 [17], a case where the Claimant was unsuccessful in claiming lack of holiday pay as a deduction of wages as he failed to provide evidence to indicate which days

holiday was taken and merely pointing to payslips showing some days were not paid was not enough).

22. As the Claimant has sought to do in this case, in his ET1, whilst Regulation 14 Working Time Regulations 1998 provides for payment in lieu of untaken leave following termination, it is clear that such claims for outstanding holiday payments in lieu of untaken leave at termination may be brought before a Tribunal by virtue of an unlawful deduction of wages claim also (*Revenue and Customs Commissioners v Stringer* [2009] UKHL 31; [2009] ICR 985 at [29]-[33]).

23. Complaints of unlawful deductions under s.13 ERA may be brought to a Tribunal pursuant to s.23 ERA. Where a complaint is under s.23(1)(a) ERA is "*well founded*" the Tribunal "*shall make a declaration to that effect and shall order the employer…to pay the worker the amount of any deduction made in contravention of section 13*". However, s.25(3) ERA makes clear that under s.24 ERA an employer should not be required to pay or repay sums in so far as it appears to the Tribunal that the employer has already paid or repaid any such amount to the worker.

Employment status

24. Pertinent to the present case is that in a classic tripartite agency context, that is where the 'worker' (party one) is supplied by the 'agency business' (party two) to its client (party three) to work for it (the client), the worker is not an employee of the agency business. This has been the position since *Dacas v Brook Street Bureau (UK) Ltd* [2004] EWCA Civ 217; [2004] ICR 1437. This is because ordinarily:
    24.1. the 'agency business' is under no obligation to provide work to the 'worker';
    24.2. the 'worker' is under no obligation to accept work provided by the 'agency business';
    24.3. the 'agency worker' does not exercise any control over the 'worker', that being something that the client, frequently referred to as the end user, does.

Breach of contract claims and statutory minimum notice

25. Article 3 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 confers breach of contract jurisdiction on employment tribunals in certain limited events. Material to the present case it applies to a "*claim of an employee….*[that] *arises or is outstanding on the termination of the employee's employment*".

26. Where a contract provides for less than statutory minimum notice, after a period of one month's continuous employment but less than two years an employee is entitled to a notice period of at least one week (s.86 Employment Rights Act 1996).

27. Least burdensome principle means that the party in breach is assumed to perform the contract in the manner least burdensome to itself. Therefore, if there are clauses that provide for payments in lieu of notice or other means of terminating lawfully the contract, one will not be able to recover for greater periods of losses (see *Mackenzie v AA Ltd* [2022] EWCA Civ 901; [2022] I.C.R. 1362 for a recent examination of this).

E) Submissions

28. Ms Greening made brief submissions and in the main answered some queries of the Tribunal. The material points were as follows:
    28.1. the Claimant was not an employee, this was a classic type of agency case, and so there could be no breach of contract claim brought;
    28.2. it accepted that the Claimant was a worker however and so the holiday pay claim could be brought;
    28.3. in relation to the holiday pay claim a mistake had been made but all the sums owing had now been paid. The Claimant had not set out his calculation but had set out the sum he believed he was owed in an email of 6 October 2022 as £6,454.77 gross total for payment in lieu of unused holiday. The Respondent had paid initially paid £3,838.22 on 7 October, but on further examination realised the pay was short and made a further payment of £2,598.30 on 20 January 2023. Therefore, it had paid a total of £6,436.52 which meant it was £18.25 apart from the initial requested amount for which no working had been provided (just the end figure). Its position was therefore that all had now been paid;
    28.4. notwithstanding its position on employment status and that the contract allowed for immediate termination in any circumstance, it made clear it was not arguing any 'gross misconduct' or some breach entitling in common law to immediate termination, the sought after payment of 1 week's payment in lieu was made (5 days' worth at his day rate).

29. The Tribunal asked Ms Greening what her position was on s.24 ERA as it appeared that as at the time of presenting the ET1 there had been a deduction, the Respondent having admitted the error. This seemingly required, or rather mandated a declaration, even if there could be no compensatory payment given s.25(3) ERA. After some reflection and taking instructions, Ms Greening accepted that this analysis and stated that the Respondent would not take issue to a declaration being made and that s.25(3) ERA meant that no further payment was necessary. She noted that whilst an error of computation would mean s.13(1) would not apply (s.13(4) ERA), she accepted that no evidence of this had been advanced or was before the Tribunal and therefore conceded that no such argument was now being made.

F) Analysis and conclusions

30. The Tribunal sets out its analysis and conclusion on the claims, having regard to the issues above.

Holiday pay in lieu claim

31. In term of the analysis of the holiday pay claim, as set out above the breach has been admitted. Given s.25(3) ERA the sums paid cannot be ordered. Therefore, at most there is a small £18.25 discrepancy. The Claimant however has not put forward any evidence to establish the breach in so far as there being £18.25 owing so in line with *Timbulas* the claim for this small amount fails on burden of proof grounds. The Tribunal is satisfied with the figures provided by the Respondent are correct when the two payslips are added together.

32. However, given s.24 ERA and following the discussion of the law and concessions by Ms Greening (see paragraph 29 above), the Claimant is entitled to a declaration.

Employee for breach of contract claim

33. Fundamentally, the Claimant needs to establish that he was an employee of the Respondent. Without this the Tribunal has no jurisdiction to consider any breach of contract claim given Article 3 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 limits its jurisdiction to that of "*employees*". Equally, if he is not an employee than the statutory minimum notice provisions in s.86 ERA do not apply and so a term in essence allowing termination at will which seemingly is found in clause 9.1 (p.35).

34. The Tribunal has concluded that the work was done in line with the contract, and this was a classic tripartite agency relationship. Therefore, like in the case of *Dacas* the Claimant would not be an employee of the Respondent. The Tribunal has in mind that a contract is not the starting point and that there have been developments since *Dacas*. However, none of these cases concerned genuine tripartite agency type scenarios. The Claimant was under control of the client, British Airways, was not obliged to accept assignments and the Respondent had no obligation to offer work. So material ingredients of an employment contract are missing, the contract is not therefore a 'contract of service' (it is a contract for services).

35. In any event, even if the Tribunal were wrong and it did have jurisdiction there is in fact no loss as the Claimant has been paid one week's payment in lieu as he has sought. Further still, the Tribunal notes that the Claimant has in some of the papers it has seen claimed that he should be entitled to loss until the end of the assignment or even many years into the future (totalling on one bit of correspondence just over £150,000). These all appear to be claims for financial loss that would be compensation claimable for say a discriminatory dismissal (a statutory tort). For a common law claim of breach of contract in contrast to a tortious assessment of compensation, the 'least burdensome principle' applies (see paragraph 27 above). This means that the loss has to be limited to the notice period. The contract and so pay could have lawfully stopped in accordance with that and so the Claimant would not be paid until the end of some assignment (given the clauses allowing for earlier termination), and nor would the Respondent be liable well after the assignment would have come to an end (after all there was no obligation to give him work). Therefore, these claims would legally have failed even if the Claimant was an employee of the Respondent which conferred on the Tribunal a jurisdiction to consider the claims.

Employment Judge Caiden
7 July 2023

JUDGMENT AND REASONS
SENT TO PARTIES ON 14 August 2023

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FOR EMPLOYMENT TRIBUNALS

Notes

Public access to employment tribunal decisions: Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.