Case Number: 3202049/2023

EMPLOYMENT TRIBUNALS

Claimant: **Mr Joseph Johnson**

Respondents: **(1) MMA LDN LIMITED**
(2) Mr Frederick Martin Sykes
(3) Mr Marco Grandi

Heard at: **East London Hearing Centre (by CVP)**

On: **16 April 2024**

Before: **Employment Judge Bradford**

Representation
Claimant: **In Person**
Respondents: **In Person**

JUDGMENT

1. The Claimant was a Worker of the First Respondent within the meaning of section 230 Employment Rights Act 1996.

2. Claims for unauthorised deductions from wages dating back to May 2023 are brought in time as there were a series of deductions, ending in November 2023.

3. The Claimant's claim for unauthorised deductions from wages in accordance with section 13 Employment Rights Act 1996 is well-founded.

4. The First Respondent is to pay the Claimant the sum of £5,500 gross.

REASONS

1. By a claim form presented on 6 November 2023 the Claimant brought claims for unpaid wages/arrears of pay. His claim is based on the premise that he was an employee of the Respondent company, of which the sole director is Mr Sykes, and which is run by Mr Sykes and Mr Grandi together.

2. The Respondents' position, as set out in the ET3 is that Mr Johnson was not an employee, and as such the Tribunal does not have jurisdiction. They

assert that Mr Johnson was an independent contractor and was self-employed.

3. A preliminary hearing was held on 22 January 2024, where Employment Judge Lewis established the issues for the Tribunal to determine. Those were:

1. Employment status

1.1 Was the Claimant an employee of the Respondent within the meaning of section 230 Employment Rights Act 1996?

1.2 Was the Claimant a Worker of the respondent within the meaning of section 230 Employment Rights Act 1996?

2 Time Limits

2.1 Given the date the claim form was presented and the dates of early conciliation, any complaint about something that happened before 7 August 2023 may not have been brought in time.

2.2 Was the unauthorised deduction made within the time limit in section 23 Employment Rights Act 1996?

2.2.1 Was the claim made to the Tribunal within three months (plus early conciliation extension) of the date of payment of the wages from which the deduction was made?

2.2.2 If not, was there a series of deductions and was the claim made to the Tribunal within three months (plus early conciliation of the last one?

3 Unauthorised deductions

3.1 Did the Respondent make unauthorised deductions from the Claimant's wages and if so how much was deducted?

3.2 Were the wages due to the Claimant between 21 April 2203 to 5 December 2023 unpaid, or was he paid less than the wages he should have been each month?

3.3 Was any deduction required or authorised by statute?

3.4 Was any deduction required or authorized by a written term of the contract?

3.5 Did the Claimant have a copy of the contract or written notice of the contract term befo9re the deduction was made?

3.6 Did the Claimant agree in writing to the deduction before it was made?

3.7 How much is the Claimant owed?

4. The Claimant had provided a bundle to the Tribunal which included his witness statement. The bundle also included evidence of his attempts to liaise with the Respondent about the content of the bundle, and about exchange of witnesses statements. The Respondent had not complied with the directions issued on 22 January 2023 and had not served any witness statements or other evidence.

Adjournment application of the Respondents

5. At the commencement of the hearing the Respondents made an application to adjourn the hearing on the ground that they wished to seek legal advice and/or representation.

6. The Claimant opposed this application on the grounds that the Respondents were aware of the hearing, had been informed of the directions and had not complied. He submitted that their failure to seek legal advice was not a reason to delay the hearing and he would be prejudiced by a delay in resolution if the application were granted.

7. The Respondents' application was refused. The Respondents had been aware of this claim since November 2023 and had served a response. The had, by their own admission, received the Case Management Order following the preliminary hearing on 22 January 2024. That set out the issues. They had had ample time to seek legal advice. They had been sent notice of today's hearing by email of 16 February 2024, and they had been contacted by the Claimant in February and March about the directions and in particular the need to serve witness statements. There was no good reason for the Respondent's having failed to prepare for the hearing or seek legal advice. It would run counter to the interests of justice if a party were able to effectively frustrate the process by ignoring the Tribunal's correspondence, and then get the matter adjourned because they were unprepared.

<u>Employment status</u>

8. The Claimant and both Respondents gave evidence under affirmation. The Claimant had provided the Tribunal with a 'Partnership Agreement' which whilst unsigned, had a commencement date of 3 January 2023. It was not disputed by the Respondents that this was the first agreement between the parties. Party 1 was the Claimant/Jomaj Studios and Party 2 was the Second Respondent/MMA MDN LTD. This agreement was that the Claimant would deliver certain classes and a community project. He would provide funding in the sum of £3,000 to cover costs of sponsorship, provide equipment and a contribution to the cost of opening the gym for 8 hours over the weekend. Party 2 would provide the premises to accommodate these activities and the marketing of them.

9. The Claimant, in his statement, explained that this partnership was formed to deliver free martial arts to young people "*in exchange for me to serve as an employee of MMA LDN and deliver martial arts classes for customers of*

MMA LDN".

10. In his evidence the Claimant confirmed that he did not receive any remuneration under this agreement.

11. The Claimant went on to explain that in May 2023 the Second Respondent promoted him to Director of Youth, and a wage of £1,000/month was agreed. The Claimant stated, and it was not challenged, that he created and delivered a summer programme that ran for a month from the end of July, as well as a programme with a neighbouring school.

12. I was provided by the parties with two versions of the agreement from May 2023, with slight differences in wording. The agreed evidence was that the Third Respondent had prepared a template letter to formalise the agreement reached between the Claimant and the Second Respondent, in the form of a letter from the Claimant to the Second Respondent. The Claimant's evidence was that this was given to him to amend as appropriate and sign, which he duly did. He then gave it to the Second Respondent who also signed it. The issue in dispute related to the way in which the Claimant had amended the template document, in that he had removed reference to 'self-employment' and changed the word 'collaboration' to 'employment' in one paragraph. It was disputed by the Respondent that the Claimant's version was the agreed version. Certainly, there was no evidence that any discussion took place about those changes.

13. The letter was headed 'Collaboration Contract' and read:

Dear Frederick Sykes,

I am writing to confirm our agreement to collaborate. I will engage in community services related to the promotion of martial arts, as well as teaching, and coaching. As per our discussion, I commit to dedicating 20 hours per week to these tasks. The primary responsibilities will include promoting classes to schools and youth organizations, teaching classes, and searching for and engaging local community sponsors.

Please note that this engagement is self-employment, and the retribution for my services will be 1000£ per month (v1) / Payment for this will be £1,000/month (v2)

The terms of our engagement will be reviewed and updated on an ongoing basis to ensure that we are meeting our objectives effectively.

As agreed, two months' notice will be required by either party to end our collaboration (v1) / employment (v2). However, I understand that MMALDN reserves the right to terminate the agreement immediately without any compensation in case of gross misconduct by me or individuals associated with me. This includes but is not limited to fraud, unethical or violent behavior, gross negligence, theft, and vandalism.

I am thrilled to embark on this journey with you and MMA LDN and contribute to the betterment of our community. Thank you for your trust in

me.

14. I have indicated in the above the two different versions. Version 2 had been signed by the Claimant and the Second Respondent. The address of the First Respondent was included in the top left of the first page. It was the Claimant's case that this letter represented an agreement that he was an employee of MMA LDN. The Respondents' evidence was that this had never been the intention of the parties, and that all their coaches worked on a self-employed basis.

15. There was evidence that the Claimant invoiced the First Respondent, via the Third Respondent each month. Although it was agreed that only his first invoice for the period 21 April to 21 May 2023 had been paid. The Respondents' evidence was that this was because thereafter they had concerns that he was not working for the agreed number of hours/week. However, there was no evidence that the Claimant was asked or challenged about this until late October 2023. On the other hand, there was evidence that the Claimant submitted regular monthly invoices and that each month he reminded the Third Respondent that he had invoice(s) outstanding. The Claimant's evidence was that he put in additional hours over the period he ran the summer programme.

16. On 21 October 2023 the Claimant emailed the Third Respondent with an invoice for the period 21.09.23 – 21.10.23. The same document set out that invoices for the period 21.05.23 – 21.09.23 remained unpaid and stated "*cleared by JOMAJ Studios fee due in December 2023*". The Claimant's evidence was that he had waved the £4,000 outstanding at that date to cover his financial contributions under the partnership agreement. However, on reflection, he had waived too much, as only £2,000 was owed.

17. The Respondents' evidence was that the sums were not due as the Claimant had not been working the hours agreed. This was evidenced by the email conversation which took place in late October, where the Claimant was asked to account for 20 hours/week or 80 hours/month. The Claimant's reply gave a breakdown of sessions and admin and 60 hours were "Liaising/Chasing/Planning with schools'.

18. The Third Respondent's reply was:

"*First and foremost, I want to express my sincere appreciation for your dedication and the energy you bring to our martial arts gym business.*
However, there are some crucial points we need to address, particularly in response to feedback we've received from our internal investors. The primary goal is to align your time allocation and financial charges / cost with our commercial objectives, which revolve around building a sustainable martial arts gym business and exploring opportunities to generate revenue.

Let's break down the key points we've discussed:
October - Approved Time:
• Your allocation of 4-hour for Friday sessions is approved.
• We also confirm the allocation of 3 hours for outreach and 3 hours for interclub activities.

• Furthermore, we agree that you have dedicated 3 hours to planning and 20 hours to planning, specifically for this project outreach
• In total 30 hours which equates to a charge of £375. Which will pay you

However

Social Media:
• It's essential to note that we did not agree on social media involvement. We value your insights, but we have a professional social media team in place. This implies that we do not require your social media efforts as part of our agreement.

Planning:
• The allocation of 15 hours per week for planning is not agreed upon, and we need to revisit this allocation.
• The suggestion of dedicating 1 hour to plan a 1-hour class is also not approved.

Looking ahead,
In the future, we aim to only direct your involvement towards classes that are revenue-generating. No social media involvement / no planning for outside projects unless specifically requested to you on ad hoc basis
Therefore
In addition to the Friday class / + hours for the outreach
We want get you involved w teaching for a new project we have a project on the horizon, offering tailored off-peak classes to local schools and universities, including a basic MMA curriculum. These classes will be scheduled solely from 16:30 to 17:30., and have a separate reduced membership for people to attend.

I suggest we revisit your contract and reassess it in light of these changes."

19. On 2 November the Claimant replied. He disputed the assertion that he had not been putting the agreed time in, and emphasised the value of what he was providing to the Respondents. On 4 November he sent a further email about the pay dispute, which concluded "*I will be ceasing all work at MMA LDN effective immediately*."

The Law

20. The Employment Rights Act 1996, s230, defines an employee as a person who works under a contract of employment. Caselaw has elaborated on this. What is now generally termed a contract of employment was historically a contract of service.

21. In *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* 1968 1 All ER 433, QBD Mr Justice MacKenna stated:

"*A contract of service exists if these three conditions are fulfilled. (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."

22. The continuing relevance of this passage was confirmed by the Supreme Court in *Autoclenz Ltd v Belcher and ors* 2011 ICR 1157, SC. It is generally accepted that there is a three part test to establish whether a person is an employee:

- Personal performance;
- Mutuality of obligation, meaning the employer must provide work and the employee must do it;
- A sufficient degree of control exercised by the employer.

23. A Worker is defined in s230(3) of the Employment Rights Act as a person who has entered into or works under:

a contract of employment, or

any other contract, whether express or implied and (if 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

24. Following *Hospital Medical Group Ltd v Westwood* 2013 ICR 415, CA, three elements are necessary for a person to fall within the definition:

- there must be a contract, whether express or implied, and, if express, whether written or oral

- that contract must provide for the individual to carry out personal services, and

- those services must be for the benefit of another party to the contract who must not be a client or customer of the individual's profession or business undertaking

25. *Uber BV and ors v Aslam and* ors 2021 ICR 657, SC, is authority for the proposition that the key question in such cases should now be whether the relationship is one of subordination and dependence, having regard to the legislative purpose of protecting those who have little or no influence on the terms under which they work.

Application of law to facts

<u>Was the Claimant an employee?</u>

26. The starting point is the letter headed Collaboration Contract. Whilst there is one reference in this, in the version produced by Mr Johnson, to employment, this cannot be said to be a contract of employment. I have set it out in full above, and beyond the agreed payment, it makes no mention of

the key rights an employee has such as paid annual leave. It does not set out the obligations of each party. There was no evidence of a further verbal contract which dealt with these matters. Nor does it purport on its face to be a contract of employment. For completeness, the 'Partnership Agreement' was not a contract of employment either, it set out the contribution of each party to a common aim, and Mr Johnson was not being renumerated under that contract, he gave his time voluntarily.

27. That said, the written contract is not to be taken as a definitive statement of the relationship, so I will go through the principles established by caselaw.

28. Work personally - It is clear that Mr Johnson was expected to work personally. Indeed his evidence was that it was due to his performance under the 'Partnership Agreement' that he had been 'promoted' to this role.

29. Mutuality of obligation - It is less clear that MMA LDN would provide work that Mr Johnson was expected to carry out, particularly as he was to search for and engage sponsors. Whilst there is an agreement to 20 hours/week, there is no specificity as to what proportion of this would be spent in which activities or how the time would be spent. That said, there was an expectation that the Mr Johnson would dedicate 20 hours/week to furthering the interests of MMA LDN through seeking to build external relationships and provide some martial arts classes.

30. Control - I find that MMA LDN was, up to the end of October 2023, exercising no control over Mr Johnson. He was responsible for deciding how to spend his time and where to focus his efforts. I find that Mr Johnson decided which schools or organisations he aimed to develop ties with how to go about his role. The Respondent attempted to exercise control by seeking to redefine some of the terms of the agreement, and in setting out what it would and would not pay for in October 2023 based on the work Mr Johnson said he had carried out. It sought to provide some level of structure. In response to a combination of this and the lack of payment, the Claimant ceased his engagement with MMA LDN. The degree of control required for an employment relationship was not present.

31. It follows that the Claimant was not an employee of MMA LDN.

<u>Was the Claimant a Worker?</u>

32. It is not disputed that he worked under a contract, namely the collaboration agreement. It was agreed evidence that this was intended to create a legally binding relationship. The Third Respondent's email quoted above makes reference to revisiting the contract. Nor is it disputed that the Claimant was required to perform work personally. The dispute has been around the extent to which the services were for the benefit of MMA LDN, with the Respondent's asserting that via his social media posts, Mr Johnson also promoted his own business, Jomaj Studios, and hence his work was not exclusively for the benefit of MMA LDN. Mr Johnson disputed this. His evidence was that Jomaj Studios was entirely separate, and indeed the Respondents acknowledged this in a WhatsApp message sent to all their clients after the Claimant ceased to work for the Respondents. The

Claimant pointed out that MMA LDN charged customers for some of the sessions he provided, and he did not get any additional fee. He said his work as Director of Youth was entirely for the benefit of MMA LDN, and relied in the fact that he had given his time voluntarily, to further the aims of MMA LDN when there was only the Partnership Agreement in place.

33. In view of the Partnership Agreement, and the undisputed evidence that Mr Johnson worked outside of his Director of Youth role, through his business Jomaj Studios, I need to consider whether MMA LDN was a client or customer of Mr Johnson or Jomaj Studios. The fact Mr Johnson had his own business is insufficient. It does not automatically follow that MMA LDN was a customer. Mr Johnson himself strongly refuted this suggestion, and the Respondents described the business relationship as a collaboration, and not that they were a client.

34. The case of *Cotswold Developments Construction Ltd v Williams* 2006 IRLR 181, EAT, suggested that an 'integration test' was helpful in answering the question of whether the organisation to which services were provided was a client or customer. It was suggested that the focus should be on whether the individual actively markets their services to the world in general and as such had clients or customers, or alternatively whether they had been recruited to work for the principal as an integral part of its organisation. I find that the latter applies here, and the Claimant was given his role as Director of Youth due to the value he had proved to be to MMA LDN through the original Partnership Agreement.

35. It follows that the Claimant was a worker within the definition of s230 Employment Rights Act 1996, and as such can bring a claim for unlawful deduction from Wages in accordance with s13 Employment Rights Act 1996.

Time Limits

36. The last invoice sent by the Claimant included work carried out to 4 November 2023. Prior to that he had sent monthly invoices, which from 21 May 2023 onwards had not been paid.

37. The claim in respect of the final deduction is therefore brought within time. Prior deductions, for the August to October invoices were also in time. A pattern has been established, namely that each month from 21 May 2023 the Claimant submitted invoices, in accordance with the contractual term that he would be paid £1,000/month, and these were not paid. There has been a series of deductions. As such, the claim dating back to the first unpaid invoice for the period 21 May – 21 June 2023 is in time.

Unauthorised deductions

38. S13(3) Employment Rights Act 1996 states:

"*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 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".

39. It was confirmed in *Bruce and ors v Wiggins Teape (Stationary) Ltd* 1994 IRLR 536, EAT that a deduction is a complete or partial failure to pay what was properly payable.

40. It follows that monthly invoices from 21 May – 21 June 2023 to 21 September - 21 October 2023 amount to 5 months of deductions, and added to this is his final invoice for the period 21 October 2023 to 4 November 2023. These invoices total £5,500.

41. The Claimant, after his invoices were not paid, suggested offsetting some of the sums due against the sums he agreed to pay under the Partnership Agreement. He waived £4,000 in respect of invoices to 21 September 2023. His evidence was that he made a mistake in doing so, as he only in fact owed the partnership £2,000. There has then been further offsetting suggested by him, for gloves he bought in accordance with an obligation under the Partnership Agreement which cost £460. He said in his email of 4 November 2023 to the Third Respondent, that he was therefore owed £540 for his October-November invoice. There was also money he spent on refreshments at an event, that he would expect to be refunded.

42. There has been no evidence of any agreement in relation to refreshments. In the absence of evidence that this cost was authorised by MMA LDN, it falls outside the scope of money properly payable to the Claimant.

43. Applying s13 of the Employment Rights Act, deductions from wages are permitted only where authorised by statute or by a written contract term. Neither of these apply here. There is no duty to off-set or similar, and I find that this suggestion was made by the Claimant with a view to maintaining the working relationship. The Claimant has said, and I accept, that payment was not a primary motivation for him, evidenced by the initial period from January 2023 where he provided his services as a volunteer.

44. It follows that the Respondents made unauthorised deductions from the Claimant's wages for the period 21 May 2023 – 4 November 2023. The Claimant is owed 5.5 months wages/payment of invoices, at a rate of £1,000/month, totalling £5,500.

Employment Judge Bradford
Dated: 17 April 2024