



EMPLOYMENT TRIBUNALS

Claimant: Ms M Barrett

Respondent: 4 Recruitment Services Limited (R1)
Sapphire DNP Limited (R2)

Heard at: Midlands East Tribunal via Cloud Video Platform

On: 5 March 2023

Before: Employment Judge Brewer

Representation

Claimant: In person
Respondents: Mr M Olaseinde, Representative
Mr A Stevens, Company Secretary

JUDGMENT

The claimant's claim of unauthorised deductions from wages fails and is dismissed.

REASONS

Introduction

1. The claimant claims unauthorised deductions from wages. Her claim was brought against R1. R2 was later added as a respondent on the order of the Employment Tribunal.
2. I had a number of documents provided by R2. Although the claimant failed to provide a written witness statement, I allowed her to give oral evidence and treated her attachment to her claim form as her evidence in chief which she was content with. I also heard oral evidence from Mr Murphy, Head of Customer Experience for R2 and Mr Stevens, R2's Company Secretary. Mr Olaseinde relied on submissions.

3. Each party made submissions and /i have taken these along with the evidence into account in reaching my decision.
4. At the end of the evidence Mr Stevens indicated that R2 would like full written reasons and so I gave a brief judgment on the day of the hearing and the full reasons are set out below.

Issues

5. The sole issue is whether the claimant suffered unauthorised deductions from wages on each occasion she was paid.

Law

6. In relation to a claim for unlawful deductions from wages, the general prohibition on deductions is set out in section 13(1) Employment Rights Act 1996 (ERA), which states that:

'An employer shall not make a deduction from wages of a worker employed by him.'

7. However, it goes on to make it clear that this prohibition does not include deductions authorised by statute or contract, or where the worker has previously agreed in writing to the making of the deduction (section 13(1)(a) and (b)).
8. In order to bring an unlawful deductions claim the claimant must be, or have been at the relevant time, a worker. A 'worker' is defined by section 230(3) ERA as an individual who has entered into or works under (or, where the employment has ceased, has worked under):
 - 8.1. a contract of employment (defined as a 'contract of service or apprenticeship'), or
 - 8.2. 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.
9. Section 27(1) ERA defines 'wages' as:

'any sums payable to the worker in connection with his employment'
10. This includes *'any fee, bonus, commission, holiday pay or other emolument referable to the employment'* (section 27(1)(a) ERA). These may be payable under the contract 'or otherwise'.
11. According to the Court of Appeal in **New Century Cleaning Co Ltd v Church** 2000 IRLR 27, CA, the term '*or otherwise*' does not extend the

definition of wages beyond sums to which the worker has some legal, but not necessarily contractual, entitlement.

12. Finally, there is a need to determine what was 'properly payable' on any given occasion and this will involve the Tribunal in the resolution of disputes over what the worker is contractually entitled to receive by way of wages. The approach tribunals should take in resolving such disputes is that adopted by the civil courts in contractual actions — **Greg May (Carpet Fitters and Contractors) Ltd v Dring** 1990 ICR 188, EAT. In other words, tribunals must decide, on the ordinary principles of common law and contract, the total amount of wages that was properly payable to the worker on the relevant occasion.

Findings of fact

13. The claimant is an individual who has chosen to work on temporary contracts and in that context, and specifically in relation to this case, registered with an employment agency, the first respondent. The first respondent finds assignments for temporary workers.
14. On 21 November 2022 the claimant began work on a six-month assignment with Derby City Council as a debt recovery officer. She was introduced to Derby City Council by the first respondent. The first respondent had advertised the role and the claimant confirmed that she was told the rate would be £13.00 per hour.
15. The second respondent is an outsourced payroll, employment, and accountancy business commonly referred to as an umbrella company. Essentially, they employ temporary workers and deal with payroll and other matters for them. Those temporary workers may work on more than one assignment. The temporary workers are introduced to the second respondent by employment or recruitment agencies and in this case the claimant was introduced to the second respondent by the first respondent.
16. What follows the introduction of a temporary worker to the second respondent is a process under which information is provided to the temporary worker, who is then a potential employee of the second respondent, and if the potential employee agrees, a contract of employment is entered into.
17. At no point in this case was the first respondent responsible for employing the claimant, nor did she have with them a contract personally to provide work or services. The sole purpose of the first respondent is to find temporary work assignments for individuals seeking work.
18. A temporary worker may of course undertake work in a number of ways for an end user. They may be self-employed, they may choose to employ themselves through their own service company or, as in this case, they may be employed by a third party.
19. On 25 November 2022 the claimant spoke to the second respondent over the telephone. She was taken through the details of the proposed

relationship between the second respondent and the claimant. She was told that the second respondent retained £25.00 as the company margin and “then pay you with all statutory deductions including tax and then declare it to HMRC and then pay the balance to you...”. The claimant was given a breakdown of likely take-home pay based on information she provided. The result was her likely take-home pay would be £363.00 per week after all deductions.

20. In this case the claimant chose to be employed by the second respondent and on 28 November 2022 the claimant was sent information documentation and a contract of employment.

21. This documentation comprised a welcome letter which included the following:

“we have an established relationship with your recruitment agency and will liaise with them in respect of any assignments and invoices for work carried out, to ensure you can be paid accurately and on time each period.

*The agreed rate of pay for each assignment comprises of more than just your pay. It includes employment costs such as employers National Insurance and pensions, the apprenticeship levy and your holiday pay. **The agency includes these costs in the assignment rate paid to us which we retain before calculating your payment.** Any holiday pay entitlement will be paid to you each period as part of your payment unless you choose otherwise.”*

22. The claimant completed a document headed “employee personal details form”, she also confirmed that she had a P45 and a student loan as well as a postgraduate loan. The claimant signed that form on 28 November 2022.

23. The claimant was also provided with an “initial assignment schedule” which confirmed that she would be working for six months as a debt recovery officer.

24. The claimant was provided with a single sheet of A4 headed “key information summary”. That document included the following:

“You will become an employee of Sapphire DNP Limited. The recruitment agency and/or the end client are not your employer. You will not receive a contract from any other party...”

The rate of pay agreed with the recruitment agency... is Sapphire’s Company Income generated by your work on the assignment.

From this company income, sapphire will retain statutory employment costs associated with employing you. These include:

- a employers National Insurance...*
- b apprenticeship levy...*

c *employer's pension contributions...*"

25. The key information summary confirmed that in relation to holiday pay, the second respondent runs rolled up holiday pay which means that 12.07% of the individual's basic pay is added to their basic pay so that when they go on holiday they have already received holiday pay. In this case the respondent operated an alternative system which enabled the individual to ask for that percentage to be set aside and used to pay them during periods when they were on holiday, and indeed that is the option chosen by the claimant in this case.

26. The key information summary also includes the following:

"Sapphire retain a small margin from the income it receives...which would have been discussed during our initial call with you. This margin is subject to change without prior notice.

You were offered a financial illustration based on a scenario you gave us, and the assumptions noted, to give you an approximate idea of your take home pay each month..."

27. The claimant signed this document on 28 November 2022.

28. The claimant was also presented with an employment contract which she signed on 28 November 2022.

29. The key parts of the employment contract are as follows (reference to the 'company' is to the second respondent):

"5.1 the rate of remuneration will vary according to the rates agreed by the company with the clients for whom you provide services. Your rate of pay will at all times be at least at rate at least equivalent to the then current national minimum wage (or if applicable the national living wage) currently in force and this will be termed your "basic pay". The company will pay you the basic pay for the hours you work..."

*6 The employee warrants that he
6.1 Has read and understood this Agreement..."*

Discussion and conclusion

30. In this case there is a very unfortunate chain of events which seem to me to work against the claimant.

31. The claimant's case is that she decided to take the assignment at the council on the basis that she would be paid £13.00 per hour subject only to deductions for tax and National Insurance contributions.

32. The claimant did not expect to be paid by the first respondent and indeed the first respondent has never been responsible for employing the claimant nor did they have a contract with her personally to perform work or services

and therefore they cannot be the respondent to a claim for unauthorised deductions from wages.

33. The claimant was advised that to be paid she would need to be employed and to facilitate that she was introduced to the second respondent.
34. There was no suggestion that the claimant had no choice other than to be employed by the second respondent. In other word she was free to reject the offer of employment should she wish. So that leaves the question what was the offer which was made to the claimant and accepted by her?
35. The claimant says that the unauthorised deductions from her wages were the deductions made by the second respondent in respect of the apprenticeship levy, employers National Insurance contributions and the company margin. In respect of her reference to holiday pay, the claimant's complaint is that her holiday pay was based on a percentage of the reduced rate of pay which was in fact £9.50 per hour and not the £13.00 per hour she was expecting.
36. What seems to have happened in this case is that the rate for the work being undertaken by the claimant for the council was presumed by her to be her hourly rate of pay. Whether or not that is correct, the second respondent in its offer of employment to the claimant confirmed that the £13.00 per hour was not her pay but was in fact the rate they were being paid for providing the claimant, their employee, to work on the assignment. In other words, the first respondent would pay to the second respondent a rate of £13.00 per hour worked by the claimant, and the second respondent would deduct certain costs from that payment before paying to the claimant the amount left following those deductions which was her basic pay. That basic pay was then subject to statutory deductions for tax and employee's national insurance contributions.
37. An alternative view of these facts is that the claimant was in receipt of £13.00 per hour but the deductions of the apprenticeship levy, employer's national insurance contributions and the company margin were authorised by the claimant.
38. No doubt to the second respondent would prefer the first analysis because if the claimant was in fact paid £13.00 per hour, then it would be illegal for them to deduct employers' national insurance contributions although it would still be possible for the claimant to have authorised the other deductions.
39. Having given the matter considerable thought it seems to me that the correct understanding of the position in which the claimant found herself was that the amount of £13.00 per hour, however it was presented to her by the first respondent, was never the amount which the second responded said it would pay to her. The second respondent was clear that the agreed rate of pay for each assignment (in this case £13.00 per hour) included more than just "*your pay*" (see welcome letter of 25 November). The second respondent was perfectly clear that the rate for the assignment included costs which it would incur and therefore this was not (or not any longer) the claimant's rate of pay but rather the rate which was being paid by the first

respondent to the second respondent and which no doubt the end user was being charged (plus any markup for the first respondent) for the work being done by the claimant.

40. In short, the claimant's hourly rate of pay was determined by taking the rate for the assignment, £13.00 per hour, and deducting from that certain costs to be incurred by the second respondent, specifically it's National Insurance costs, the company margin, pension contributions and the apprenticeship levy, which then gives the actual hourly rate of pay which in this case was £9.50. Holiday pay was then calculated as a percentage of that rate.
41. The claimant received in a full week of 37 hours around £340.00 net, which is not far off the illustration given to her on 25 November in her telephone conversation with the second respondent.
42. In summary, in a conversation with the respondent on 25 November the claimant was told that her net earnings in a week would be around £363.00 and if, at that stage, she was unhappy with that, she could have declined to become employed by the second respondent.
43. The claimant had another opportunity to consider the matter when she was given the documentation on 28 November in which it is clear at the rate of pay for the assignment included more than just her pay, it included an amount to cover the second respondent's costs. Nevertheless, the claimant decided to go ahead and sign the employment contract.
44. Having entered into the employment contract with the claimant, the second respondent paid her what they had agreed to pay her and although I can understand the reasons for it, the only criticism of the second respondent is that the claimant's actual pay per hour is not set out in the employment contract, although I concede it is possible looking at the key information summary for the claimant to work out the likely hourly rate given that she knew the rate for the assignment was £13.00 per hour and what the second respondent's deductions would be thus leaving the hourly rate of pay.
45. For those reasons I conclude that there have not been unauthorised deductions from wages in this case and the claim is dismissed.

Employment Judge Brewer

Date: 5 March 2024

JUDGMENT SENT TO THE PARTIES ON
28th March 2024

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