



EMPLOYMENT TRIBUNALS

Claimant: Mrs Z Liu

Respondent: Meet You UK Limited

Heard at: Watford
On: 16 July 2024

Before: Employment Judge Caiden

Representation

Claimant: Mrs Z Lieu (Litigant in person), accompanied by her husband Mr Y Cai

Respondent: Mr J Chang (Director of Respondent)

JUDGMENT

1. The application by the Respondent to have the claimed postponed and/or stayed is refused.
2. The Claimant's complaint that there was an unauthorised deduction from her wages is well-founded. This means the Respondent unlawfully deducted the sum of £1,385 gross and is ordered to pay the Claimant this sum gross. The Claimant is responsible for any income tax or employee national insurance contributions which may become due for this gross sum.
3. The Respondent's breach of contract counterclaim is a matter for which the Tribunal has no jurisdiction to determine, and it is accordingly dismissed.

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REASONS

A) Introduction

1. By an ET1 presented on 10 December 2023, the Claimant, having taking part in ACAS Early Conciliation on 26 September 2023 – 13 October 2023 made a claim against the Respondent that she was owed wages for the work she undertook in August 2023 that she had not been paid as expected during September 2023. Notably, her ET1 ticked the box “*I am owed...arrears of pay*”.
2. The Respondent defended the claim in an ET3 received on 23 February 2024 and additionally brought a breach of contract counterclaim stating it was owed sums owing to the Claimant herself allegedly being in breach of contract (including allegedly working for a competitor).
3. At the hearing the Claimant represented herself with the help of her husband (Mr Cai) and the Respondent had one of its directors (Mr Chung) represent them. Prior to the hearing both parties had provided documents electronically by virtue of emails sent to the Tribunal Service on 24 May 2024 (from the Claimant providing a cover email and four attachments), on 4 July 2024 (from the Claimant providing a cover email and ten attachments), on 10 July 2024 (from the Respondent providing a cover email and five attachments). Both parties agreed that they had received the emails and attachments of the other. The Tribunal confirmed that it had considered the documents supplied, save for one by the Respondent which it appeared to be a ‘draft’ that had been erroneously provided (it was the document entitled Defence and Counterclaim which had been enclosed earlier to the ET3 but which a draft with various comments being made as attached to the 10 July 2024). Mr Chung confirmed at the hearing that this document was not the correct one and confirmed that the version provided with the ET3 was the only one the Tribunal needed to consider.
4. The Claimant and Mr Chung both gave evidence after taking the relevant oath and affirmation, and both were offered the opportunity to make any closing submissions but declined (the Claimant read out a statement that was not in fact closing submissions but criticised the Respondent for breaching the dates for providing documents, that is the Tribunal orders, and asserting that the evidence should in effect be ignored).

B) Preliminary and procedural matters

5. The hearing was due to commence at 10.00am on 16 July 2024, consistent with the Notice of Hearing that had been provided to the parties. However, only the Claimant and Mr Cai were in attendance at that time. The Tribunal directed the clerk to the Tribunal to wait 10 minutes before telephoning the Respondent to ascertain if it was intending on appearing. As no one from the Respondent appeared within that 10-minute interval, the clerk to the Tribunal called the Respondent and was informed that it had not expecting any such hearing to occur but that it could duly attend within 45 minutes. The Tribunal therefore decided to wait for the Respondent to attend and informed the parties.

6. Mr Chung, on behalf of the Respondent, duly attended the Tribunal by 11.00am on 16 July 2024. However, he informed the clerk that he would be grateful if there could be a translator. The hearing commenced at 11.20am, at which points, after introductions, Mr Chung apologised for his lateness and explained that he had understood the matter had been transferred to another court in Balham (the County Court).
7. The Tribunal first explained to the parties that it was used to non-professional or legal representatives attending, and it would adjust its procedure accordingly. However, the Tribunal emphasised that it was very important that all parties understood the process that would have to be conducted in English and that at this late stage it was not possible to arrange a translator, that had not previously been requested for, at such short notice. It also explained to the parties that the audio recording equipment was not working and so the Tribunal would have to take a note of the hearing for it to be the official record. With respect to the need for an interpreter, it was agreed that by the parties and the Tribunal to commence the proceedings as it appeared that all had a reasonable command of English. The Tribunal was satisfied that the hearing had been fairly conducted and that it could be understood by the parties and the parties understood the Tribunal. Indeed, Mr Cai was able to assist the Claimant by repeating questions to her in Chinese and Mr Chung was able to understand that too so was satisfied that there had been no improper interference.
8. The Tribunal then explored the issue of the 'transfer' of the case. It appeared that there had been a claim that had also been made in the civil court, what appeared to be the small claims that had then been transferred to the County Court. The Tribunal understood that this was because the Respondent had counterclaimed and that, although it did not have the claim form, there was significant overlap between the Tribunal proceedings and these. Mr Cai explained that ACAS had told the Claimant to pursue a small claims. Both parties confirmed however that there had been no determination by the County Court or indeed any other court. Following the Tribunal explaining to the parties that the same matter could not be dealt with twice, it asked the parties how it wished to proceed. The Claimant wished for the matter to be dealt with by the Employment Tribunal, she was here, and it was going to be dealt with first here anyway. The Respondent stated it wanted the matter to be dealt with by the County Court and so that should be awaited. The Tribunal treated this as an application by the Respondent to postpone or stay the proceedings under rules 29-30 Employment Tribunal Rules of Procedure (found in Schedule 1, Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013. The application was refused as it was not within the overriding objective under rule 2 of the Employment Tribunal Rules of Procedure nor in all the circumstances was it appropriate for the Tribunal to exercise its discretion. This was because, the parties were all present and prepared to deal with the matter and postponing or staying things would lead to a (considerable) delay for a relatively modest sum. Furthermore, even if the matters were identical the matter was not proceeding on a point of law in a higher court. The matters that the Tribunal was concerned with were factual and which it was competent to deal with. Indeed, any decision it reached would not embarrass the County Court, as explained in more detail for the consequences below, the Claimant would not be able to recover twice for the same loss and in respect of other matters (it not being clear exactly the overlap as it had not got a copy of the

claim form), including any counter claims, those could still be dealt with by the County Court as appropriate (whether in the outstanding litigation or any fresh litigation if necessary).

9. Having determined the matter would proceed, the Tribunal asked the parties to comment on an excel table that had been produced by the Respondent which appeared to show, if her claim were to succeed, what sums were at issue. The Claimant when making the claim did not have access to all the material as she was no longer working for the Respondent and did not have access to the 'Google Sheets' that would have the data. She however provided an estimate, namely £1,600 which was not far off the sum the Respondent had in its excel sheet of £1,325. The parties were allowed 10 minutes to consider the document and upon returning to the hearing confirmed that it was agreed that the sums outstanding, if the Tribunal found in favour of the Claimant, was £1,385.
10. Before hearing the evidence, the Tribunal clarified the parties their respective positions:
 - 10.1. The Claimant's position was she did £1,385 of work in August 2023 for which she was expected to be paid at the beginning of September;
 - 10.2. The Respondent's position was that the Claimant was not owed the £1,385 as (a) she was not an employee of it, (b) she breached the contract in any event, including by not giving sufficient notice, (c) since terminating any relationship with the Respondent is now competing with it and using its materials and resources contrary to any agreed confidentiality and/or restrictions. In fact, the Respondent is counter claiming for the damages for losses cause by (b) and (c).
11. It appeared to the Tribunal that the Claimant had not been asked formally to provide a response to the breach of contract counterclaim, it being it appeared not realised by the Tribunal service, but she had dealt with the substance in her documentation.

C) Findings of fact

12. Although the Tribunal had and considered much evidence, it only sets out below the matters that it was required to make findings of fact on and such findings were made on the balance of probabilities.
13. The Respondent is a company that provides tour operator services. In October 2022, the Claimant commenced working for it. There was contract entered into in Chinese for which a translation had been provided (although there was some dispute as to the exact translation of documents) but that was not material to the task of the Tribunal given the evidence it received from the parties.
14. The Claimant's role, which the Respondent was at pains to state was simply on a self-employed contractor basis but for which the Tribunal does not make a definitive finding, was to provide museum tour guide services in the UK to Chinese speaking customers of the Respondent. The Claimant was trained by the Respondent and received materials to do the job effectively and did such tours for the Respondent's customers in the British Museum.
15. In terms of getting the work, respective clients would book tours with the Respondent who would then assign the tour to the relevant guide, in this case,

the Claimant. The Claimant would then be paid an agreed rate for the hours she had worked. However, on some occasions she was paid directly by the person who had booked the tour at the museum, and she was expected to pass along the relevant sums and these payments collected by her were deducted from those that the Respondent would ordinarily pay to her. It was common ground that the Claimant was in charge of her own tax affairs. The Respondent made clear, via Mr Chung's evidence which is accepted, that the Claimant was not expecting to offer touring services to other companies and even after any agreement was terminated it was alleging, she was barred from competing. Furthermore, it was also made clear that once work was assigned to the Claimant, she was expected to personally conduct the tour. It was only in situations of illness or other such emergency that the Respondent would organise another guide to cover the 'assignment'. Ordinarily, the Claimant was not allowed to get someone else to do the job for her (whether by subcontracting or otherwise)

16. In August 2023, as already set out above, the Claimant had done £1,325 worth of work that had not been paid for, as she had expected in September 2023. From the end of August 2023, the Claimant no longer did any work for the Respondent.

D) Relevant legal principles for the heads of claim

17. Section 13 of the Employment Rights Act 1996 provides

- (1) An employer shall not make a deduction from wages of a worker employed by him unless—*
- (a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or*
- (b) the worker has previously signified in writing his agreement or consent to the making of the deduction.*
- (2) In this section "relevant provision", in relation to a worker's contract, means a provision of the contract comprised—*
- (a) in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or*
- (b) in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.*
- (3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion.*
- (4) Subsection (3) does not apply in so far as the deficiency is attributable to an error of any description on the part of the employer affecting the*

computation by him of the gross amount of the wages properly payable by him to the worker on that occasion.

(5) For the purposes of this section a relevant provision of a worker's contract having effect by virtue of a variation of the contract does not operate to authorise the making of a deduction on account of any conduct of the worker, or any other event occurring, before the variation took effect.

(6) For the purposes of this section an agreement or consent signified by a worker does not operate to authorise the making of a deduction on account of any conduct of the worker, or any other event occurring, before the agreement or consent was signified.

(7) This section does not affect any other statutory provision by virtue of which a sum payable to a worker by his employer but not constituting "wages" within the meaning of this Part is not to be subject to a deduction at the instance of the employer.

18. Section 230(3) Employment Rights Act 1996 defines "worker" in the following terms:

(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.

19. The Tribunal has jurisdiction to hear breach of contract claims and employer breach of contract claims by virtue of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994. This Order at Arts.3-4 states:

Article 3

Proceedings may be brought before an employment tribunal in respect of a claim of an employee for the recovery of damages or any other sum (other than a claim for damages, or for a sum due, in respect of personal injuries) if-

(a) the claim is one to which section 131(2) of the 1978 Act applies and which a court in England and Wales would under the law for the time being in force have jurisdiction to hear and determine;

(b) the claim is not one to which article 5 applies; and

(c) the claim arises or is outstanding on the termination of the employee's employment.

Article 4

Proceedings may be brought before an employment tribunal in respect of a claim of an employer for the recovery of damages or any other sum (other than a claim for damages, or for a sum due, in respect of personal injuries) if-

- (a) the claim is one to which section 131(2) of the 1978 Act applies and which a court in England and Wales would under the law for the time being in force have jurisdiction to hear and determine;*
- (b) the claim is not one to which article 5 applies;*
- (c) the claim arises or is outstanding on the termination of the employment of the employee against whom it is made; and*
- (d) proceedings in respect of a claim of that employee have been brought before an employment tribunal by virtue of this Order.*

20. In *Read v Ryder Ltd* UKEAT/0144/18/BA at [8]-[10] it was established that in order for an employer breach of contract counterclaim to be maintainable pursuant to Article 4 Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994, the employee had to unequivocally bring a claim under the same Order and that was not the case where no such clear election had been made and the claim was equally maintainable as a deduction of wages claim under s.13 Employment Rights Act 1996.

E) Analysis and conclusions

21. With respect to the Claimant's claim, it is not anywhere in the ET1 expressly set out that the claim is being made as a breach of contract claim under Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 (and Article 3 in particular). The claim form ticks "*arrears of pay*", and it is a natural reading of the claim form that the claim is being made pursuant to s.13 Employment Rights Act 1996.

22. As can be seen from paragraph 17-18 above, unlawful deduction of wages claims under s.13 Employment Rights Act 1996 can be brought by workers as well as employees (in contrast to breach of contract claims which can only be brought by employees, see paragraph 19 above). Therefore, the arguments that the Respondent had for not paying any sums, that the Claimant was not an employee (see paragraph 10.2(a) above), are not determinative and so the Tribunal does not express a conclusion on whether she was an employee or not. In this case it is apparent that the Claimant is at the very least a worker and so she can make a claim under s.13 Employment Rights Act 1996. The reason she is a worker is she meets the s.230 Employment Rights Act 1996 definition. There was an agreement, a contract, between her and the Respondent that she would provide work, in this case guided tours to Chinese speaking clients of the Respondent and for which she would be paid by the Respondent. Furthermore, the Claimant had to personally perform that work (see paragraph 15 above). Further still, the Respondent was not her client or customer. All of the constituent elements are therefore present for the Claimant to be a worker.

23. Having determined the Claimant is at the very least a worker, and so can bring a s.13 Employment Rights Act 1996, the next issue is whether she suffered any deduction, that is was she paid less than the amount of wages properly payable (s.13(3) Employment Rights Act 1996)? She was and this was not in fact in dispute, that is ordinarily but for the issue of any alleged breaches she committed she would have been entitled to receive the sum of £1,385 gross at

some point in September. This being the sum that the parties agreed was the amount of work she did in August 2023 for which payment remained.

24. In terms of the Respondent's defence to this sum that would ordinarily owe, it has not actually raised any of the matters 13 of the Employment Rights Act 1996 (or indeed in any of the other sections that are related such as overpayments). In particular even the document for which the English translation was disputed did not provide a right to deduct wages. The fact that the Respondent asserts that this or any other contractual document provides that the Claimant owes it damages (even to the extent that there is a specified sum) is separate to there being something in writing saying that any such damages can be paid by deducted wages owed. Indeed, there is nothing in any of the documents presented to the Tribunal that shows that any deductions were authorised by virtue of the Claimant's contract or for which there had been previously signified agreement in writing. Likewise, there is no statutory basis for the deduction. Accordingly, the fact that the Respondent is maintaining that the Claimant has breached any contract, whether by giving insufficient notice or otherwise, or that it is now competing with it (these being the Respondent's two other grounds for why no payment is outstanding, paragraph 10.2(b)-(c) above) is immaterial. The Claimant is owed the outstanding wages and if there are other matters that means that she owes the Respondent money or is liable to pay damages, which the Tribunal is making clear it is not determining or making factual findings on, that has to be dealt with separately.
25. Finally, the Tribunal addresses the breach of contract counterclaim. That can only be brought as against an employee (which is curious as the Respondent's own case is that the Claimant was not). More pertinently that can only be brought if the Claimant has presented her own breach of contract claim relying upon article 3 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 – this is required by virtue of Article 4(d) of the Order. As stated above she has not unequivocally made such a claim and the Tribunal is bound by the decision in *Read v Ryder Ltd* (see paragraph 20 above). The result is that the Tribunal has no jurisdiction to determine the Respondent's breach of contract counterclaim and that has to be dismissed.
26. Therefore the Claimant's claim of unlawful deduction of wages succeeds, and the Respondent the agreed amount of £1,385 gross (for which the Claimant is responsible for any income tax or employee national insurance contributions which may become due for this gross sum). The Respondent's breach of contract counterclaim is dismissed on the basis that the Tribunal has no jurisdiction to consider it.

Employment Judge Caiden
16 July 2024

RESERVED JUDGMENT AND REASONS
SENT TO PARTIES ON 17 July 2024.....

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FOR EMPLOYMENT TRIBUNALS