EMPLOYMENT TRIBUNALS

Claimant: Mr T Irons

Respondent: 3Tone Music Ltd

Heard at: Southampton **On: 28 June 2024**

Before: Employment Judge Dawson

Appearances
For the claimant: Mr Irons
For the respondent: Mr Roberts, director

JUDGMENT

1. The respondent has made an unauthorised deduction from the claimant's wages and is ordered to pay the claimant the gross sum of **£13,691.78.**

2. The respondent has failed to pay the claimant's holiday entitlement and is ordered to pay the claimant the gross sum of **£2,692.71.**

3. The claimant's claim of breach of contract is well-founded and the respondent is ordered to pay the sum of **£4331.81.**

REASONS

Introduction and Issues

1. By a claim form presented on 19 October 2023, the claimant brought various claims against Mr Roberts. Subsequently the claim was amended to proceed against the current respondent and the issues were identified at a Case Management hearing by employment Judge Livesey on 8 March 2024.

2. In the very brief summary (and subject to the findings of fact set out below), the claimant is a musician who agreed with the respondent, which is a music company, to come to the UK in order to work with it. The claimant says that it was agreed that he would be paid a salary but when he came to the UK the respondent failed to pay his wages and also failed to promote him or give him work. The respondent denies that the claimant was its employee or worker and says that it has paid the claimant the sums due to him.

3. I record that on 21 January 2024, the tribunal wrote to the claimant stating that "the respondent's name has been changed to 3Tone Music Ltd. If the Claimant has any objections to the name change then they must inform the Tribunal by return." The claimant did not make any objection. The reason that I record that order is that in the claimant's witness statement he states "Dean Roberts is the Director of each of 3Tone's group companies, which is why I brought my claim against him initially and still wish for him to be a Respondent." The claimant did not apply for any order at this hearing. Having failed to challenge the order in January 2024 changing the name of the respondent to 3Tone Music Ltd (either by contacting the tribunal or by appealing the decision), it is too late for the claimant to attempt to do so at this hearing. I do not have the power to overturn that decision in the absence of any change of circumstances.

4. It was clarified at the case management hearing on 8 March 2024, that the claimant was bringing a claim in respect of unauthorised deductions from wages, for holiday pay and for breach of contract. It was also recorded that there is issue about whether the claimant was an employee or not and what, if any, wages he was entitled to be paid.

5. At this hearing the claimant altered the amount of wages that he was claiming by way of unauthorised deduction from the amount that he stated in the case management hearing (£17,500), to the amount in his witness statement (£25,000). I did not consider that he needed formal permission to do so since the claim, as pleaded, is one of unauthorised deduction from wages. The way in which such claims are calculated often changes over time and in the light of evidence as disclosed.

Conduct of the Hearing

6. I received a bundle which should have been 165 pages long but had some pages of the case management order and claim form missing. Full copies of those documents were available to me via the tribunal file.

7. Both Mr Irons and Mr Roberts attended for most of the hearing and the hearing adjourned at lunchtime for me to make a decision. Mr Irons attended from

California. Neither party sought any adjustments to the hearing. When the hearing resumed after lunch for me to give judgement, Mr Irons was not present. The tribunal had not had any message from him as to why he was not present. Given the stage which the proceedings were at and subject to what I record in the next paragraph, I decided that the appropriate way forward was for me to reserve judgment and send my decision in writing to the parties. Mr Roberts agreed with that approach.

8. Mr Irons and Mr Roberts both gave evidence. Mr Irons took the oath and confirmed that the contents of his statement was true and that the amended particulars of claim were also true. Due to my oversight, Mr Roberts did not take an oath or affirmation at the outset of his evidence or confirm that his statement was true or that the grounds of resistance were true. In order to remedy that oversight when the hearing resumed after lunch Mr Roberts took the affirmation and I asked him to confirm that the evidence that he had given, his witness statement and the grounds of resistance were true. He did so.

9. Mr Roberts objected to the introduction of transcripts of recorded conversations into the evidence but he did not dispute the accuracy of the transcripts; it was simply the case that he did not know he was being recorded at the time. I consider that the evidence is admissible. It is relevant evidence and the fact that it was covertly recorded does not mean that it is inadmissible. He also objected to the admissibility of a magazine type article which asserted that that the respondent is on a “knife edge” as employment tribunal judgements “stack up” and artists demand unpaid royalties. I agree with Mr Roberts that that article is irrelevant to anything which I must decide and have given it no weight.

Findings of Fact

10. Mr Irons is a musician who writes and produces and also works as a technician. He has been an independent artist since 2018. Prior to the events to which this claim relates, he resided in California, United States of America. The claimant moved to the United Kingdom on 15 January 2023 pursuant to discussions with Mr Roberts of the respondent in order to do work with the respondent. The claimant told me, and it was not disputed, that in October 2022 Mr Roberts said to him that they should work with a handshake instead of a contract and referred to the fact that Mr Irons appeared “stern”. It is a matter of concern that Mr Roberts should be seeking to persuade somebody in the position of Mr Irons to move country, to an insecure and possibly vulnerable position, on the basis of a handshake.

11. There is a significant dispute between Mr Irons and Mr Roberts about what was agreed between them and when any agreements were made.

12. Mr Roberts asserts that Mr Irons never did any work for the respondent when he was in the UK, that initially he was brought to the UK on a sponsorship visa and it was, at least initially, never the intention that he would be an employee (or worker) of the respondent. The intention was simply to pay his expenses. I found it difficult to understand why, on that basis, the respondent would seek to bring Mr Irons to the UK at all and did not find anything in Mr Roberts evidence

to assist me in this. He did say, however, that around April 2023 it was decided to seek an extension to Mr Irons' stay in the UK and change his visa to a work visa. The intention, then, was to utilise him in a number of areas, including engineering work at a salary of £30,000 per year. Mr Robert says that did not happen because no contractual terms were ever agreed and therefore there is no need for the respondent to pay the claimant anything.

13. The claimant's case is that it was always intended that he would have an agreement with the respondent for a 12 month period, that he would be in the UK for that period, the respondent would pay him £30,000 a year and he would be an employee of the respondent.

14. In order to resolve that dispute I have, primarily, had regard to the contemporaneous documents.

15. It is not in dispute that the claimant arrived in the UK on 15 January 2023 on a creative work visa.

16. At page 72 of the bundle is an email dated 1 February 2023. The email is written in a style whereby Mr Irons has asked questions and Mr Roberts has inserted the answers in a different colour. Mr Irons has written "*contract will be handled promptly*" and Mr Roberts has replied "correct". Mr Irons writes "monthly transfer on 8th will begin in 4 – 6 weeks once the long term visa kicks in." Mr Irons replies "correct, reliant on new visa completion date." (Emphasis added).

17. That email also has a discussion about the amount that the respondent would pay for expenses but does not make any express reference to salary. Mr Irons told me that the salary was worked out by reference to necessary expenses and came out to be £30,000 per annum. I see no reason to doubt that, particularly given late events, and accept it.

18. On 28 February 2023 Colette, an employee or agent of the respondent sent an email to the claimant where she stated "your current COS visa doesn't cover any NHS services but the one-year visa that we've applied for (Temporary Worker Creative) will, *we are some 3 weeks into this process*…" (Emphasis added).

19. I find, therefore, that Mr Roberts' evidence to the tribunal is incorrect. There was clearly a discussion about both a contract and a work visa well before April 2023. The contemporaneous evidence is much more consistent with the evidence of Mr Irons that, before he left California, the intention was that he would come to work in the UK on a year-long visa and that there would be a contractual agreement between him and the respondent. I find accordingly. I must then move on to determine what kind of contract existed between the claimant and the respondent.

20. Mr Roberts stressed in his evidence that I needed to understand that no employment work was done throughout the whole of Mr Irons' stay in the UK.

When I asked why, in those circumstances, he continued to pay him the expenses that he had paid him, he told me that he felt obligated to do so.

21. The contemporaneous evidence shows a somewhat different picture.

22. At page 61 of the bundle is a WhatsApp exchange between the claimant and Julian Gill, who worked for the respondent. It took place on 4 April 2023. Mr Gill wrote "album mix is w/Mike 15k – those masters will not be released until he gets his money. I need to know we can pay, tomorrow ahead of Michael with him- Dean will say yes regardless of if we have money or not…". The album which is being talked about is an album of Mr Irons'. The WhatsApp message suggests that Mr Irons was doing work insofar as he was recording an album. I find, however, that this evidence is somewhat ambiguous because it might be argued that the respondent was doing no more than giving the claimant the opportunity to mix an album which would assist him in his career.

23. On page 83 of the bundle is a list of the sums of money which the respondent says it spent on the claimant while he was in the UK. 5 of the items are for equipment bought/rented by the respondent being a guitar, an amplifier, a bass and keyboard. If Mr Irons was not doing some work for the respondent it is difficult to understand why the respondent would be renting equipment for him. It would be an extremely charitable endeavour if the respondent was simply assisting the claimant to record an album to promote his career and was also hiring the musical instruments for him to do so. It is much more likely that the respondent was hiring the equipment because it was getting something out of the relationship with the claimant.

24. In the email of 1 February 2023, the claimant stated "meetings with agents and bands are a near focus" and Mr Roberts replied "ongoing and strengthening". Mr Irons has also written "Lick Speak meeting/session will be arranged during CoS period with Troi Irons as producer/engineer" Mr Roberts has replied "yes, but let's not rule out any colabs". In my judgment references to Mr Irons working as a producer/engineer are references to him doing work for the respondent. It may well be that once matters got underway the claimant did not do those things as had been envisaged but, if he did not, I find that was because the work was not provided to him by the respondent rather than because of any lack of willingness on his part.

25. When the respondent finally applied for a creative worker visa in April 2023, the sponsorship certificate stated that Mr Irons would be working as a musician/producer for an established UK label. The main work address was given as the respondent's and the gross salary was given as £30,000. I find that sponsorship certificate reflects the understanding which had always been present between the parties as to what the working relationship would be between them. The fact that the respondent inaccurately told the claimant that the application for the creative work visa was underway in February 2023 does not alter that.

26. In my judgment it had always been the intention of the parties that when Mr Irons came to the UK he would do work of an artist/musical/engineering nature for the respondent, at a salary of £30,000 per annum.

27. I further find that when he was in the UK the claimant was subject to the control of the respondent. The claimant told me, and I accept, that the amount of expenses he could reclaim was closely scrutinised by the respondent.

28. An example of the financial control that Mr Roberts had is a WhatsApp message dated June 2023. Mr Roberts was at Glastonbury and the claimant sent the message to remind him that money should be transferred to him. Mr Roberts replied that his signal was pretty non-existent and he would get something over to him that day and the rest on Tuesday. On Sunday, 25 June Mr Irons had to write to Mr Roberts stating “please I don’t have money for dinner”.

29. I have already recounted the fact that equipment was provided for the claimant at the respondent’s expense.

30. I find that the verbal agreement between Mr Irons and the respondent that existed before Mr Irons came to the UK gave rise to mutuality of obligation. The claimant was expected to be willing to provide the services of a musician/producer/engineer (even if, as a matter of fact, he was not called upon to do so very often). There was an obligation upon the respondent to provide payment (even on the respondent’s account it was going to provide sums in respect of personal expenses for the claimant). I find that the financial risk was all on the part of the respondent, (or would have been if the respondent had not failed to pay the claimant as it should have done).

31. It was agreed by both parties that the claimant was unaware that he could take holiday and that he did not take any. Mr Roberts’ evidence on this point is that if there had been an employment contract in existence, the holiday would have been taken but only if there was a contract in place. Mr Roberts went on to say that he was under the impression that because there was no contract the claimant could do as he wished, but that is not the same as explaining to the claimant that he was entitled to take paid annual leave. Nor is it the same as allowing the claimant to take paid annual leave. I find that the claimant took no annual leave during the time he was working in the UK.

32. On 12 April 2023, a further agreement was entered into between the respondent and Mr Irons, this time in writing. It was an agreement that the claimant would be provided with;

    a. £2500 parting fee

    b. moving invoice £1205.11

    c. moving costs £600

    d. storage costs £26.70 per week for up to 4 weeks

33. the agreement went on to state that all of the costs would be paid by 8 May 2023 if requested minus the moving invoice which would be paid on receipt of an interim payment.

34. Mr Irons told me, and it was not disputed by Mr Roberts, that he wanted that agreement be entered into before he would return back to Los Angeles in connection with the attempt to get the creative work visa. I was not given any real details about that trip to Los Angeles, but it appears that it happened in around April 2023 in order to pursue the application for the visa. In those circumstances I find that Mr Irons gave consideration for that contract because he did go to Los Angeles in connection with the Creative Work visa.

35. Mr Roberts has not suggested that the conditions for payment of the invoice had not arisen at the date the engagement between the claimant and the respondent came to an end.

36. At page 83 of the bundle is a list of payments which the respondent says it made to the claimant. The claimant accepts that expenses were paid over the course of the year amounting to £11,923.33 which he largely treated as part of his salary. Within that total amount, however, he disputes that the sum of £615.11 was paid to him personally. He says that amount of money referred to his visit Los Angeles as evidenced at pages 93 and 95 the bundle. I find that those sums were not paid to Mr Irons as part of his remuneration but were business expenses which he incurred on behalf of the the respondent.

37. In addition the respondent says that £11,280 was paid in respect of rent on Mr Irons behalf. The respondent provided a flat for the claimant when he came to the UK. However Mr Irons points out that he was evicted from the flat in November 2023 because the respondent had not paid the rent. Mr Roberts says that the rent has now been fully paid. The date given in the amended particulars of claim for moving out is 25 November 2023. I find that is when the claimant moved out and the relationship with the respondent came to an end.

38. The respondent also says that £6000 was paid in respect of studio costs on behalf of the claimant and £1748 was paid in respect of instrument hire.

39. The respondent says if one takes account of all of those sums the claimant has been paid £30,951.

The Law

40. The Employment Rights Act 1996 contains the following relevant sections

> **13.— Right not to suffer unauthorised deductions.**
>
> (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.

…

(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) ...

41. The following regulations are in the Working Time Regulations 1998

13 Entitlement to annual leave

…

(9) Leave to which a worker is entitled under this regulation may be taken in instalments, but—

(a) [subject to the exception in paragraphs (10) and (11),] it may only be taken in the leave year in respect of which it is due, and

(b) it may not be replaced by a payment in lieu except where the worker's employment is terminated

14 Compensation related to entitlement to leave

(1) Paragraphs (1) to (4) of this regulation apply where—

(a) a worker's employment is terminated during the course of his leave year, and

(b) on the date on which the termination takes effect ("the termination date"), the proportion he has taken of the leave to which he is entitled in the leave year under [regulation 13] [and regulation 13A] differs from the proportion of the leave year which has expired.

(2) Where the proportion of leave taken by the worker is less than the proportion of the leave year which has expired, his employer shall make him a payment in lieu of leave in accordance with paragraph (3).

16 Payment in respect of periods of leave

> (1) A worker is entitled to be paid in respect of any period of annual leave to which he is entitled under regulation 13 [and regulation 13A], at the rate of a week's pay in respect of each week of leave.

42. In respect of breach of contract claims, the Employment Tribunals Extension of Jurisdiction (England And Wales) Order 1994, Article 3, provides that "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 … if -

> (a) the claim is one to which [section 3(2) of the Employment Tribunals Act 1996] applies …
>
> (b) the claim is not one to which article 5 applies;
>
> (c) the claim arises or is outstanding on the termination of the employee's employment.

43. Section 3(2) Employment Tribunals Act 1996 provides

> (2) Subject to subsection (3), this section applies to—
>
> (a) a claim for damages for breach of a contract of employment or other contract connected with employment,
>
> (b) a claim for a sum due under such a contract, and
>
> (c) a claim for the recovery of a sum in pursuance of any enactment relating to the terms or performance of such a contract,
>
> if the claim is such that a court in England and Wales or Scotland would under the law for the time being in force have jurisdiction to hear and determine an action in respect of the claim.

44. For a contract of employment to be in existence there are a number of tests which the tribunal must consider.

45. In *Ready Mixed Concrete v Minister of Pensions* [1968] 1 All ER 433, it was held that for a contract of service to exist, three conditions must be fulfilled:

    a. the servant agrees that in consideration of a wage… he will provide his own work and skill in the performance of some service for his master,

    b. he agrees expressly or impliedly that in the performance of that service he will be subject to the others control in a sufficient degree to make that other master,

    c. the other provisions of the contract are consistent with it being a contract of service.

46. In *Stephenson v Delphi Diesel Systems Ltd* [2003] ICR 471, it was held that for a contract of any kind to exist there must be a mutuality of obligation and in

cases where putative employees provide their services on a casual as required basis that will generally be lacking and prevent a contract of employment coming into being (*Carmichael v National Power* [2000] IRLR 43).

47. In considering the other provisions of the contract and whether they are consistent with a contract of employment a wide range of factors may be considered including:

- Who provides and maintains the tools or equipment used.
- Whether the person hires their own help.
- The degree of financial risk adopted.
- The degree of investment in and management of the business.
- Whether the individual has the opportunity to profit from their own good performance.
- Whether the person is paid a fixed wage or salary.
- Whether the person is paid when absent due to holiday or sickness.

Conclusions

48. I find that the claimant was an employee of the respondent from the time that he came to the United Kingdom. The claimant had agreed that in consideration of a wage he would provide his work and skill in performance of some service for the respondent. There was a sufficient degree of control to make the respondent the master of the claimant. The other provisions of the contract, such as the provision of equipment, the fact that the claimant was not in business of his own account or taking on board any financial risk point to this being a contract of employment. The claimant was not doing any work for any other people while he was in the UK. There was a clear mutuality of obligation.

49. Further, for the reasons I have given, I find that it was agreed that the claimant would be paid a wage of £30,000 per annum while he was working for the respondent.

50. The claimant worked for the respondent from the time when he arrived in the United Kingdom on 15 January 2023 until was evicted from his accommodation on 25 November 2023. The claimant claims that is a period of 10 months. Although it is slightly longer, I am content to work on the claimant's figures. Thus the claimant should have been paid 10/12ths of £30,000 being £25,000.

51. The claim was also entitled to be paid in respect of his accrued but unused holiday for that 10 month period. He was entitled to 5.6 weeks holiday per year. At the date he stopped working for the respondent he was entitled to 10/12 of that entitlement amounting to 4.67 weeks. The claimant's weekly wage was £576.92. Thus his holiday entitlement amounted to £2692.31.

52. Finally the question arises as to what sums the claimant was entitled to under the agreement of 12 April 2023. I find that he was entitled to all of those sums for the reasons I have given above. The claimant calculates those sums to be £4331.81, presumably on the basis that he only claims one week of storage costs. The claimant was an employee of the respondent and I find that the sums were due by the date that his employment terminated and therefore they are recoverable.

53. I turn then to consider the sums which the respondent says should be set off against the amount that the claimant claims.

54. Those sums which were paid to the claimant in respect of personal expenses were, in my judgment, part payment of wages and the claimant should give credit for them. Those sums are the £11,923.33 less £615.11 amounting to £11,308.22.

55. The other sums should not be set off against the sums the claimant is claiming. There was no written agreement in this case. In the absence of a written contractual agreement, the respondent has no right to deduct sums from the claimant's wages in respect of the provision of accommodation. Likewise it has no right to deduct the sums it says it paid in respect of studio costs or for equipment.

56. In those circumstances the claimant is awarded

    a. £13,691.78 in respect of unpaid wages (£25,000- £11,308.22)

    b. £2692.31 in respect of accrued but untaken holiday

    c. £4331.81 in respect of the agreement of 12 April 2023

Employment Judge Dawson

Date 01 July 2024

JUDGMENT SENT TO THE PARTIES ON
13 August 2024 By Mr J McCormick

FOR THE TRIBUNAL OFFICE

Notes

Public access to employment tribunal decisions

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claimant(s) and respondent(s) in a case.

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https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/

Recoupment

The recoupment provisions do not apply to this judgment.