



EMPLOYMENT TRIBUNALS

Claimant: MR VIOREL NAKU

Respondent: K9 STATA SECURITY LIMITED

REASONS (RESERVED DECISION)

Heard at: Birmingham (Hybrid CVP)
On: 7 August 2024

Before: Employment Judge N. Clarke

Appearances

For the Claimant: Mr Viorel Naku, on his own behalf
For the Respondent: Mr Miah, Solicitor's agent

Introduction

1. I heard the evidence in this case on 7 August 2024 and reserved judgment, indicating that I would give a decision by way of these written reasons.
2. Although the Claimant had ticked the box "I am claiming a redundancy payment" on the ET1, it was clear from discussions that he was claiming to have been underpaid. This was a claim for unlawful deductions under section 13 of the Employment Rights Act 1996 (the "Act").
3. The Respondent's case was that:
 - 3.1 The Claimant was not a "worker" under section 230 of the Act and therefore the Tribunal had no jurisdiction. (Although the ET3 and Grounds of Resistance said "employee", Mr Miah accepted that "worker" was the correct test) and that,
 - 3.2 In any event, there had been no underpayment.

Procedure

4. The Respondent had produced a file of 102 pages that the Claimant had seen in advance of the hearing.
5. The Claimant had filed 63 pages of documents at the Tribunal on 18 March 2024 and a copy was sent to the Respondent's representative during the hearing and the representative had sufficient time to consider it.
6. The Claimant had the benefit of an interpreter and appeared in person.
7. The Respondent's witness, the sole director Mr Ficioru, appeared remotely with his representative.
8. I also attended remotely.
9. Nicoara Vasile also appeared remotely. Although he was listed as the Claimant's representative on the ET1, he said he was a witness.
10. Neither the Claimant nor Mr Vasile had produced witness statements, contrary to the Case Management order of 18 January 2024.
 - 10.1 I allowed the Claimant to give oral evidence and asked him questions first. I decided that this was in accordance with the overriding objective because (i) he was a litigant in person (unrepresented) (ii) his claim was set out to some extent in the ET1 and the documents he had provided and (iii) it was fair and just to allow him to give evidence in his own claim.
 - 10.2 I did not allow Mr Vasile to give evidence: (i) there was no explanation as to why he had not prepared a statement, (ii) I did not know what he was going to say, and neither did the Respondent. (iii). The Respondent was prejudiced by the absence of a witness statement from him because it could not take instructions on it or prepare cross-examination.
11. I did, however, allow Mr Vasile and the Claimant to both make oral submissions at the conclusion of the evidence.
12. The Claimant had not produced a Schedule of Loss, again contrary to the Case Management Order. I said, a number of times during the hearing, that I would have expected the Claimant to produce a schedule showing invoices raised in one column and payments received in another. As the hearing progressed, the need for this became even clearer. Therefore, and during the course of his evidence, I gave the Claimant a break and an opportunity in which he could calculate his claimed losses, which he confidently said he would be able to do.

Findings of Fact

13. I made the following findings of facts on the balance of probabilities.
14. Where a fact was in dispute, I explain why I made the particular finding. I did not make findings on every fact in dispute, but only those relevant to the issues in the claim.
15. The Claimant started work for the Respondent in about 2021. The ET1 says 18 April 2021. In my questions to Mr Ficioru, he initially suggested it was around October 2022 but then said he did not remember. The bank statements he produced show a payment to the Claimant in April 2022, so his reference to October 2022 must be wrong. I prefer the Claimant's evidence for that reason.
16. It was not disputed that the Claimant worked as a security guard and the Respondent assigned him security jobs. The Claimant invoiced the Respondent for work done and he told me he was paid in arrears, which I accept, and which is reflected in the documents.
17. The Claimant provided his own uniform and equipment. He denied that he was entitled to send a substitute to work if he did not want to work himself.
18. The Respondent relied on contracts dated November 2022 that included a provision that the Claimant could send a substitute. In oral evidence Mr Ficioru said that any substitute would need to have SIA registration, NASDU Level 2, appropriate training records and a UTI number. He agreed that the Claimant had never sent a substitute for himself.
19. The Claimant said that he had signed the contract on trust, that he had been unable to read it because his English was not good enough and that it had not been translated to him.
20. The Respondent had produced some bank statements (or more properly a list of payments made to the Claimant resulting from, it seemed to me, a search against the Claimant's name on a banking application), some invoices and some text/WhatsApp messages. The Claimant had produced some invoices and some of his bank statements. Both sets of documents were unsatisfactory in that they were incomplete (in both cases), in the Respondent's case contained duplication and in the Claimant's case were poorly copied such that many dates were cut off.
21. In the absence of either party having done it, I created a schedule as follows (the "number" column is just numbers I have assigned for ease of reference):

NUMBER	DATE	INVOICE	PAYMENT
1	29/04/2022		-300
2	04/05/2022		-1746
3	10/06/2022		-1466
4	06/07/2022		-1780
5	04/08/2022		-450
6	30/08/2022		-100

7	2022 ?	2788	
8	07/09/2022		-1000
9	12/09/2022		-2788
10	11/10/2022		-2000
11	24/10/2022		-2293
12	25/10/2022		-2293
13	08/11/2022		-4104
14	01/12/2022		-350
15	09/12/2022		-3750
16	03/01/2023		-4104
17	31/01/2023	4482	
18	10/02/2023		-4752
19	07/03/2023		-4482
20	31/03/2023	4212	
21	11/04/2023		-4212
22	02/05/2023		-100
23	05/05/2023		-3312
24	05/06/2023		-100
25	09/06/2023		-5800
26	06/07/2023		-200
27	11/07/2023		-5413
28	11/08/2023		-4452
29	24/08/2023		-300
30	31/08/2023		-500
31	08/09/2023		-4568
32	20/09/2023		-175
33	10/10/2023		-4161
34	30/10/2023		-42
35	31/10/2023	6992	
36	09/11/2023		-5992
37	17/11/2023		-500
38	24/11/2023		-150
39	25/11/2023	3876	
40	04/12/2023		-1500
41	18/12/2023		-3000
42	05/01/2024		-1000
43	10/01/2024		-2500

22. The Claimant said that he would send an invoice by no later than the 10th of the month for the preceding month and Mr Ficioru would then pay by bank transfer. He denied the suggestion that sometimes he was paid cash. Mr Ficioru also said in evidence that the Claimant sometimes asked for money in advance.

23. I do not consider it necessary to make any finding about payment of cash.
24. I have, however, concluded that the Respondent did pay some money in advance because:
- 24.1 Amongst the messages is one from Mr Ficioru saying (at page 41), “..*can you please confirm what the amount is less the deductions that you owe me to the loan of money that I gave you the loan of money I gave you was £4450 pounds*”. The Claimant’s reply is “*I only know about 1500 plus 500 from Turkey plus 150 from the UK. I don’t know anything about the rest*”. This appears to be an acceptance from the Claimant about the fact of a loan, or loans, even if there is a dispute about the amounts.
- 24.2 The schedule above shows a number of smaller payments, which appear to be less than the average invoice amount, many of which appear in months when other larger sums are also made. For example, payments of £100 and then £3312 in May 2023, £200 and then £5413 in July 2023, etc. These are consistent with advance payments.
25. The Claimant’s case in the ET1 is that,
- “during most of the months I worked I realised that the payment was not complete, example: the total payment was 7000£ and I only received 6000 in my account. This happened several times. ... the person who transferred money to me every month stole 1000 pounds from me at the end of each month and so it went on for a period of 12 months during which I had a deficit of 12,000 pounds after which other amounts are added on which the respective Denis-Emanuel-Ficioru is adding more debts to me that I did not owe to HIM THE AMOUNT HE CLAIMED THAT I OWE HIM TO WAS £7000.”*
26. In oral evidence the Claimant said:
- 26.1 That the Respondent retained £1000 from his salary **every** month so his total claim was “around £30,000”, and
- 26.2 That when Mr Vasile won an Employment Tribunal claim against the Respondent, Mr Ficioru said that the Claimant should pay for it, because the Claimant had introduced him to the Respondent and so the Claimant should pay “more than £5,000”
27. The Claimant alleged that he had been assaulted by Mr Ficioru and his car had been damaged by him. Mr Ficioru said that the Claimant had been cruel to his work dog such that the RSPCA had been involved. I did not consider it necessary to decide the facts of these allegations as they did not bear directly on the issues.

Law

28. I set out the Law in an Appendix below.

Conclusions

“Worker”

29. I have concluded that the Claimant was a “worker” within the meaning of section 230(3) ERA 1996 because:

29.1 There was a contract between the parties. Even if there was no written contract before November 2022 there was an oral contract under which the Claimant provided services to the Respondent in return for money. One of the Claimant’s invoices in his bundle, for £2788, is from 2022, although the rest of the date has been cut off. The Respondent’s bank documents show payment of that sum in September 2022.

29.2 I am not satisfied that there was any, or any but a minimal, power of delegation.

- i) There was no evidence of a written contract before the November 2022 contracts.
- ii) In my judgement, the various clauses concerning delegation in the contracts of November 2022 were not incorporated into the contract between the parties. I accept the Claimant’s evidence that he signed the contracts on trust. His ability to read English, in my judgement, was not sufficient to understand the complicated terms about delegation. I asked him to read some of the contracts to me in evidence and it was obvious that he struggled. I can see that he was able to communicate in English in some text messages, but the contractual documentation contains complicated English.
- iii) The fact that the Claimant never sought to exercise his apparent right to delegate, including when he was (according to the ET1) too ill to work, is evidence that he was not aware of the power.
- iv) Mr Ficioru’s list of pre-conditions to the appointment of a delegate, in his oral evidence, indicate that, even on the Respondent’s case, the right was severely limited.
- v) That is to be expected in what is an inherently regulated and sensitive role involving security and dog-handling. The number of people to whom the role could be delegated is necessarily very small.
- vi) This is a limited power of delegation as described in *Ready Mixed Concrete*, in my judgement.

29.3 The Claimant was not providing a service to the Respondent, or the end user as a client. I accept that he was accounting for his own tax and providing his own uniform and equipment, but he was otherwise, I accept, working for the Respondent very much like an employee would.

Deductions

30. I do not, however, conclude that there have been any unauthorised deductions. Indeed, I consider that I am unable, on the evidence, to find that there have been any such deductions.
31. I remind myself that the Claimant brings the claim and must prove it.
32. The Claimant should have produced a schedule in the form (or similar) to that I have suggested above, as well as supporting documentation. He did not explain why he failed to comply with the direction to produce a Schedule of Loss or all the supporting documentation.
33. He said in evidence that he had £1000 deducted from every monthly invoice, which is why he claimed £30,000, being the 30 or so months he had been employed. I am not satisfied that he has proved this assertion because:
 - 33.1 In his ET1 he claims 12 months “deficit” being £12,000. There is no explanation for this discrepancy.
 - 33.2 He has only produced five invoices for the whole period.
 - 33.3 The first three of those invoices (lines 7, 17 and 20 in my schedule) all have subsequent matching payments (lines 9, 19 and 21). They have been paid in full, in my judgment.
 - 33.4 The October 2023 invoice (line 25) does seem to have been paid short by £1000 (line 26), but there are two subsequent payments (albeit only a total of £650).
 - 33.5 In any event, and for the reasons already outlined, there were loans or advances of wages paid by the Respondent to the Claimant. It follows that some of the invoices may not have been paid in full with a single sum but nevertheless paid.
 - 33.6 The payment pattern is complicated with a variety of both large and smaller sums paid by the Respondent. I am satisfied that these smaller sums were paid because (a) the Claimant did not challenge the Respondent’s documents and (b) many of those smaller payments appear in the bank statements the Claimant himself produced (lines 26, 38 and 40).
34. I am unable to conclude, on the balance of probabilities, that the Claimant has been paid less than he was due, to any extent, because:
 - a) The Claimant did not produce comprehensive set of documents
 - b) From the limited documents available, it is clear that there were more payments (in number) than invoices. Invoices were monthly, but many (if not most) months, show multiple payments.
 - c) From the limited documents there is no clear or discernible pattern.
 - d) For three of the five invoices produced by the Claimant he would seem to have been paid the full amount.
 - e) I have found that there were advance payments or loans.
 - f) It is impossible from the evidence to know exactly what was invoiced and when.

35. It follows that the claim fails and is dismissed.

Employment Judge Clarke
9 August 2024

APPENDIX

LAW1

1. Section 13 of the ERA 1996 provides:

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.

2. A “worker: is defined as:

230.— Employees, workers etc.

- (1) In this Act “employee” means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.
- (2) In this Act “contract of employment” means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing.
- (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.

3. In this case the Claimant alleges that he was paid less than his invoices. The deductions were denied and the Respondent did not suggest that any deductions were lawful. The legal test in these circumstances is, therefore, simply a question of whether the deductions were made or not.
4. Whether the Claimant is entitled to bring the claim, because he was a worked, is, however, in issue.
5. The definition of worker includes, but is not restricted to, employees. The

definition potentially covers a wide range of individuals who provide personal services under a contract, including many casual and freelance workers who are not paid by PAYE. However, it is not intended to cover self-employed people who are genuinely pursuing a business activity on their own account.

6. The question of whether work is performed by an individual as a worker or as an independent contractor is to be regarded as a question of fact to be determined by the employment tribunal, Uber BV and ors v Aslam and ors [2021] ICR 657, SC. It said that status is a matter of statutory, rather than contractual, interpretation. The purpose of the legislation is to give protection to vulnerable individuals who have little or no say over their pay and working conditions because they are in a subordinate and dependent position in relation to a person or organisation that exercises control over their work. It would be inconsistent with that purpose to treat the terms of a written contract as the starting point in determining whether an individual falls within the definition of worker. Tribunals should consider the language of the correspondence between the parties, the way in which the relationship has operated, and any evidence of the parties' intentions to determine whether the relationship gives rise to 'worker' status under the legislation. While written terms may, depending on the other evidence, be understood to be an accurate record of the parties' rights and obligations, there is no legal presumption that a contractual document contains the true agreement just because an individual has signed it.
7. The definition requires the existence of a contract of employment or a contract for personal work or services, but a worker's contract need not be in writing.
8. In W and ors v Essex County Council and anor [1998] 3 WLR 534, CA, the Court considered that a contract is essentially an agreement that is freely entered into on terms that are freely negotiated. Since those offering work are frequently able to dictate written terms, there is a risk that they will insert clauses into contracts solely to evade the scope of the protections under the Act. In Autoclenz Ltd v Belcher and ors [2011] ICR 1157, SC, Lord Clarke held that, in cases with an employment context, 'the relative bargaining power of the parties must be taken into account in deciding whether the terms of any written agreement in truth represent what was agreed and the true agreement will often have to be gleaned from all the circumstances of the case, of which the written agreement is only a part'.
9. One of the criteria set out in S.230(3) ERA is that a worker must undertake 'to do or perform personally any work or services for another party to the contract'. In Byrne Brothers (Formwork) Ltd v Baird and ors [2002] ICR 667, EAT, the EAT held that cases on what constitutes personal service in relation to a contract of employment are relevant here. So, while a 'freedom to do a job either by one's own hands or by another's is inconsistent with a contract of service... a limited or occasional power of delegation may not be' (per Mr Justice McKenna in Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance [1968] 1 All ER 433, QBD). The distinction will depend on the facts of the case.

10. The Court of Appeal in (1) Redrow Homes (Yorkshire) Ltd v Wright; (2) Redrow Homes (North West) Ltd v Roberts and ors [2004] ICR 1126, CA, held that whether a contract included an obligation to do the work personally was a matter of construction, taking account of the circumstances in which it was made. The Court observed that it did not necessarily follow from the fact that the work was done personally that the worker undertook to work personally.

11. The final clause in S.230(3) ERA makes it clear that if a person renders services or performs work on the basis that the person to or for whom he or she does so is a customer or client of his or her business, that person is not a 'worker' for the purposes of the ERA. In *Byrne Brothers (Formwork) Ltd v Baird and ors* (above) the EAT explained that drawing this distinction in any particular case will involve all or most of the same considerations as are relevant in distinguishing between a contract of employment and a contract for services, but with the boundary pushed further in the individual's favour. Factors to consider could include the degree of control exercised by the 'employer', the exclusivity of the engagement and its typical duration, the extent to which the individual is integrated into the 'employer's' organisation, the method of payment, what equipment the 'worker' supplied and the level of risk undertaken. Factors such as the individual having business accounts prepared and submitted to the Inland Revenue, being free to work for others, being paid at a rate that includes an overheads allowance and not being paid when not working, can all be relied on as supporting the view that the individual is running a business and that the person for whom the work is performed is a customer of that business.