EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 8000807/2024

Final Hearing heard at Edinburgh remotely by Cloud Video Platform on 11 October 2024

Employment Judge A Kemp

Mr Hisam Elboghdady	**Claimant** **In person**
RAA Couriers Ltd	**Respondent** **Represented by:** **Mr R Anderson,** **Director**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Tribunal grants a declaration that the respondent made unauthorised deductions from the wages of the claimant under section 13 of the Employment Rights Act 1996 and the claimant is awarded the sum of FIVE HUNDRED AND FIFTY EIGHT POUNDS SEVENTY FIVE PENCE (£558.75) payable by the respondent.

REASONS

Introduction

1. The claim is one for unlawful deductions from wages in respect of unpaid wages for work the claimant argues he carried out, which includes underpayment for one period of time and for one day of work. The respondent denies that the claimant was a worker, and argues that if he was he was due more to the respondent than was payable to him.

2. The claimant is a party litigant, and the respondent was represented by Mr Anderson one of its directors. Neither had experience of Tribunal proceedings in such a capacity, and I explained how the process would be undertaken, about the giving of evidence in chief, cross examination, and re-examination, about referring to documents in evidence, and as to making submissions. I explained that I could assist them to an extent but not so as to become the solicitor or adviser for either of them. I also addressed with the parties the issues in the case.

Issues

3. The first issue is whether or not the claimant was a worker, if so the second is whether or not he suffered unauthorised deductions from wages under Part II of the Employment Rights Act 1996, and the third is, if so, what remedy he is entitled to.

Evidence

4. Although case management orders had been made on 25 September 2024 neither party had directly and timeously complied with them. The claimant had not provided a Schedule of Loss. The respondent sent its documents by email on 8 October 2024. The claimant had sent documents on 10 October 2024 but had not copied the respondent in to that, and the Tribunal sent the email to the respondent a few minutes before the hearing commenced. I made allowances for the fact that neither party had professional representation and that this was a claim of moderate amount.

5. I raised with Mr Anderson whether he wished time to consider the documents, or to seek to postpone this hearing, but he was content to proceed with it to resolve the matter.

6. The claimant gave evidence himself, and for the respondent Mr Anderson was its only witness. I asked questions of both to elicit the facts under Rule 41. The claimant had sought to rely on correspondence to and from ACAS which he had produced, which I informed his was not admissible by statute and he agreed that it should not be considered. I did not do so.

Facts

7. The claimant is Mr Hisam Elboghdady.

8. The respondent is RAA Couriers Ltd. As its name implies it is a courier company delivering parcels for clients.

9. The respondent contracted with the claimant under what was titled a Contract for Services dated 28 November 2023, which the claimant signed. It had been presented to him by the respondent, and he had not sought to make any amendments to it. It was stated in a separate and unsigned document that the claimant was self-employed and accepted that he was not a worker. The Contract for Services included at clause 17 a provision entitling the respondent to deduct sums for vehicle rental at the rate of £5 per day.

10. The claimant's role was to deliver parcels for the respondent. The claimant provided details of when he could work each week. He did not require to work on particular days if he did not wish to. When he did work he came under a material level of control by the respondent. The respondent owned and provided a van for him to use. The claimant attended at the respondent's premises to pick up the parcels for delivery using the van. He was given a fuel card to use. He was told where to deliver the parcels, and which parcels were to be delivered that particular day. He was included in a WhatsApp group for messages to be sent and received in relation to the work to be performed.

11. He was paid a daily rate of £113 initially, together with a seasonal peak amount of £15.75. He was then informed by a manager of the respondent

that if he worked in the Inverness area, staying in an hotel overnight when doing so, the overall rates would be increased by £71.75 per day to lead to a daily rate of £200 (that increase being referred to hereafter as the Inverness supplement). The claimant did then work in Inverness on such a basis. The sums due to him were paid gross of tax or other statutory deductions.

12. The claimant worked in Inverness for five days in the week commencing 24 December 2023. He was not however paid the Inverness supplement for those days by the respondent.

13. The claimant worked in Inverness on 31 December 2023 but did not receive any payment for doing so from the respondent.

14. When the claimant was in Inverness he stayed in an hotel, paid for by the respondent. On one occasion used an air-fryer in his room when he ought not to have done so. The respondent required to pay the hotel £150 for a cleaning fee for doing so. The respondent did not provide the invoice for that to the claimant at the time (and it was not before the Tribunal).

15. The claimant contacted the respondent by telephone after finishing work on 31 December 2023 and was told that he was to be returning to work in Inverness after the new year break. He was told by telephone on or around 4 January 2024 that the respondent wanted to have the van back. On that date he was on holiday in London. He was not able to return the van until on or around 8 January 2024. The claimant had not been told to return the van before 4 January 2024.

Submissions

16. Both the claimant and respondent made brief submissions explaining why they considered that they should prevail.

The law

Worker status

17. Section 230(3) of the Employment Rights Act 1996 provides:

> (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"

18. Section 203 of the Act provides that, save in particular circumstances set out in the section, an attempt to contract out of the terms of the Act is void (meaning of no legal effect).

19. In ***O'Brien v Ministry of Justice [2013] OCR 499*** the Supreme Court held that the distinction between a worker and a self-employed person was to be determined from "the true picture of the reality". Lord Hope explained that:

> "The self-employed person has the comparative luxury of independence. He can make his own choices as to the work he does and when and where he does it. He works for himself. He is not subject to the direction and control of others. Of course he must adhere to the standards of his trade or profession. He must face the reality that, if he is to succeed, he must satisfy the needs and requirements of those who engage his services. They may be quite demanding, and the room for manoeuvre may be small. But the choices that must be made are for him, and him alone, to take."

20. In ***Autoclenz Ltd v Belcher and others [2011] ICR 1157*** the Supreme Court held that "the question in every case is, ……what was the true agreement between the parties?" and made reference to the importance of looking at the reality of the obligations of the situation. All of the evidence is to be considered, and the relative bargaining positions of the parties taken into account.

21. It is not enough that the person carries on a profession or business undertaking so as to be "self employed"; it is also necessary for the exclusion to apply that the other party is a client or customer - ***Hospital Medical Group v Westwood [2012] ICR 415***. Factors that are relevant include whether the individual markets the services offered as an independent person to the world in general, or is recruited to work for the principal as an integral part of its operation – ***Cotswold Developments Construction Ltd v Williams [2006] IRLR 181***.

22. The Supreme Court held in ***Uber BV v Aslam*** **[2021] ICR 657**, that:

> "In determining whether an individual is a 'worker', there can, as Baroness Hale DPSC said in the ***Bates van Winkelhof case [2014] ICR 730***, para 39 , 'be no substitute for applying the words of the statute to the facts of the individual case.' At the same time, in applying the statutory language, it is necessary both to view the facts realistically and to keep in mind the purpose of the legislation. As noted earlier, the vulnerabilities of workers which create the need for statutory protection are subordination to and dependence upon another person in relation to the work done. As also discussed, a touchstone of such subordination and dependence is (as has long been recognised in employment law) the degree of control exercised by the putative employer over the work or services performed by the individual concerned. The greater the extent of such control, the stronger the case for classifying the individual as a 'worker' who is employed under a 'worker's contract'."

Unauthorised deductions

23. There is a right not to suffer unauthorised deductions from wages provided for in Part II of the Employment Rights Act 1996, initially in section 13. This provides as follows:

> **"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) 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….."

24. There are statutory exceptions to this in section 14 which provides as follows:

"**14 Excepted deductions**

(1) Section 13 does not apply to a deduction from a worker's wages made by his employer where the purpose of the deduction is the reimbursement of the employer in respect of—

(a) an overpayment of wages, or

(b) an overpayment in respect of expenses incurred by the worker in carrying out his employment, made (for any reason) by the employer to the worker.

(2) Section 13 does not apply to a deduction from a worker's wages made by his employer in consequence of any disciplinary proceedings if those proceedings were held by virtue of a statutory provision.

(3) Section 13 does not apply to a deduction from a worker's wages made by his employer in pursuance of a requirement imposed on the employer by a statutory provision to deduct and pay over to a public authority amounts determined by that authority as being due to it from the worker if the deduction is made in accordance with the relevant determination of that authority.

(4) Section 13 does not apply to a deduction from a worker's wages made by his employer in pursuance of any arrangements which have been established—

(a) in accordance with a relevant provision of his contract to the inclusion of which in the contract the worker has signified his agreement or consent in writing, or

(b) otherwise with the prior agreement or consent of the worker signified in writing,

and under which the employer is to deduct and pay over to a third person amounts notified to the employer by that person as being due to him from the worker, if the deduction is made in accordance with the relevant notification by that person.

(5) Section 13 does not apply to a deduction from a worker's wages made by his employer where the worker has taken part in a strike or other industrial action and the deduction is made by the employer on account of the worker's having taken part in that strike or other action.

(6) Section 13 does not apply to a deduction from a worker's wages made by his employer with his prior agreement or consent signified in writing where the purpose of the deduction is the satisfaction (whether wholly or in part) of an order of a court or tribunal requiring the payment of an amount by the worker to the employer.”

25. Wages are defined in section 27 and include “any sums payable to the worker in connection with his employment.” In that context it is not restricted to the contract of employment, but includes employment as a worker. The right to make a claim to the Employment Tribunal is provided for at section 23.

Discussion

26. I considered that both witnesses were giving evidence they genuinely believed to be true. There was some dispute on facts. I generally preferred the evidence of the claimant. He was clear and convincing in what he said had happened, and there was some support for what he said from WhatsApp messages that were tendered in evidence. Mr Anderson had not been present during the material times, and relied on what he believed others had said. His evidence was either based on a form of assumption, or hearsay, in material part. Those who had spoken to the claimant, as he claimed, were not called as witnesses. Nor was documentation that could have been produced provided to me.

27. Although this case is of moderate value it raises what are not simple questions in law. As Mr Anderson had considered that the claimant was not a worker I set out above the statutory test and some of the commentary from case law above in detail. I asked him during the hearing if he was aware of the ***Uber*** case, and he said that he was not.

28. I firstly considered the issue of whether or not the claimant was a worker. Mr Anderson argued that he was not, and relied on the contract principally for that. I gave him an opportunity to give further oral evidence about that (and to cross examine the claimant on the point when the claimant gave evidence first). In reality there was no further evidence.

29. I was satisfied that this case is sufficiently similar to the facts in ***Uber*** that the same outcome should follow. The claimant was not truly self employed as the authorities refer to – he was integrated into the respondent’s organisation. He was provided with a van and fuel card, and told what parcels to deliver where and on what days. Hotel stays where required were paid for by the respondent. He was included in a WhatsApp group. There was a material level of control by the respondent. Section

203 operates to disapply terms of contract inconsistent with the legal status. I was therefore of the opinion that he was a worker, and the answer to the first issue is in the affirmative.

30. The second issue is whether or not the respondent made unauthorised deductions. That in turn raises the question of whether he was entitled to the Inverness supplement. I was entirely satisfied that he was. Mr Anderson argued that it was discretionary, but there was no documentary evidence of that, the documents before me indicated that the Inverness supplement had been paid, and I accepted the claimant's evidence that he had been told that it would be paid. Doing so makes sense when an overnight stay in an hotel is required, with that hotel being paid for by the respondent. There was some support from WhatsApp messages to the claimant, even though they were not dated and Mr Anderson challenged their admissibility. It appeared to me that I should accept the claimant's evidence about them, and that their terms also accorded with the common sense view I have referred to. As stated the respondent did not call any witness who spoke to the claimant and allegedly told him that the Inverness supplement was discretionary. Taking all the evidence into account it appeared clear to me that the Inverness supplement was due, and it had not been paid as there were other concerns the respondent had.

31. Mr Anderson accepted in his evidence that the claimant was due to be paid for work on 31 December 2023. His argument in effect was that the sums due should be set off against what he claimed the respondent was due from the claimant.

32. The first sum sought was £150 for cleaning charges. The second was a fuel card payment of £200 for which the respondent claimed the claimant had used for private purposes. The third was a claim for not returning the van when the claimant had been asked to do so. The fourth was an allegation that the van was returned damaged and cost about £2,000 to repair.

33. The problem for the respondent in these regards is that none of these matters fall within the terms of sections 13 and 14 of the Employment

Rights Act 1996 as sums that they are entitled to deduct from wages due to a worker. I can understand Mr Anderson's frustration that he was denied the use of a van and says that it came back damaged, but once wages are payable for work carried out the law restricts what can be taken from sums due. The contractual provision in clause 17 was in my view restricted to the particular provision as to vehicle rental. It was not I consider more widely effective to allow deductions for entirely different matters such as those the respondent seeks now to rely on. In the circumstances of the contract being given to the claimant, I consider that it is to be construed *contra proferentem*. That means in very simple terms that it is construed against the respondent in so far as there is ambiguity.

34. There is one potential argument for the respondent, which arises from the terms of the Compensation Act 1592, an Act in old Scots which in the most general terms provides for a set off where sums are due to and by each of two parties. It appears to me however that that statute was impliedly superseded so far as workers are concerned by the terms of the 1996 Act, which is a statute applying across Great Britain. No submissions were made on that matter, unsurprisingly given that each party was not legally represented, and if the respondent wishes to make further arguments on the law in this, and any other respect, it can make an application for reconsideration under Rule 92 setting out its submissions on the law in that regard and making the argument that it seeks to.

35. In light of the statutory provisions as I have construed them, and the conclusions on the contract I have reached, I considered that there were unauthorised deductions from the wages due to the claimant for the work he had performed.

36. For completeness, lest this matter go further, the claimant accepted that in principle he ought not to have used an air-fryer in the hotel room, he had not seen any invoice for the amount claimed by the hotel. So far as the van was concerned his position was that it had been returned not in a damaged condition. No evidence of damage was before me, such as photographs or invoices for repairs, or similar. Mr Anderson simply said that the cost of repair had been £2,000. He also claimed to have lost income from not being able to use it until it was returned, but no evidence

of that loss was presented. It appeared to me from the evidence heard that the claimant had not been told to return the van on 2 January 2024 as Mr Anderson claimed, and although I appreciate that Mr Anderson was frustrated by its being returned late, as he saw it, I was not satisfied that any loss had been proved, even if it had been established that the claimant was in breach of contract or breach of duty in some way.

37. The calculation of remedy, the third issue, is for five days of work at the Inverness supplement of £71.75 per day, which had not been paid when due, a total of £358.75. The claimant is also entitled to wages for the one day of 31 December 2023 when he worked in Inverness and therefore the sum of £200. The total is £558.75. That is the amount that I award. It is payable gross, such that to the extent that there is tax or other statutory deductions due they are payable by the claimant.

Employment Judge: A Kemp
Date of Judgment: 17 October 2024

Date sent to parties 17/10/2024