EMPLOYMENT TRIBUNALS

Claimant: Michelle Appiah

Respondents: Tripod Partners Ltd (1)
Home Office (2)

Heard at: London South (by video) **On:** 21 & 22 November 2024

Before: Employment Judge Housego

Representation

Claimant: In person

Respondents: Ambrat Singh, Solicitor, of Peninsula (1)
Patrick Keith, of Counsel (2)

JUDGMENT

1. The claim against the 1st Respondent is struck out.

2. The Respondent made unlawful deductions from the wages of the Claimant.

3. The Respondent is ordered to pay the Claimant the sum of £36,826.65

REASONS

Summary

1. The Claimant is an independent social worker. The 1st Respondent is a health and social care recruitment agency. The 1st Respondent placed the Claimant with the 2nd Respondent, to carry out age assessments for them on young people arriving in the UK unlawfully, at a reception centre in Kent.

2. The Claimant first worked for the Respondent outside IR35, and through umbrella companies. She then changed to a personal service company ("PSC"). The 2nd Respondent had assessed the Claimant on the HMRC tool CEST (Check Employment Status for Tax). It decided that she fell within IR35,

and so should be taxed as if an employee.

3. The 1st Respondent then made deductions from the £58 an hour pay she was to be paid for her work. This was the Claimant's income tax, employee's National Insurance ("ee's NI"), and employer's National Insurance ("er's NI"), and a small amount of Apprenticeship Levy. The Claimant accepts that she falls within IR35, and that income tax and ee's NI was properly deducted. She says that the er's NI was an unauthorised deduction contrary to S13 of the Employment Rights Act 1996 ("S13"). It is agreed that the Apprenticeship Levy should not have been deducted.

4. The 2nd Respondent says that it was not obliged to pay the Claimant anything – it paid the 1st Respondent. Accordingly, even taking the Claimant's case at its highest the claim against them cannot succeed, because it made no deduction from money paid to the Claimant, not being liable to pay her anything.

5. I agreed that this was the case and so struck out the claim against the 2nd Respondent. Michael Lee, Head of Tax for the Home Office in the Finance Directorate in the Home Office, kindly agreed to remain to give evidence for the Claimant about the effect of IR35. It was agreed that he would not be asked for opinion evidence (as he was not an expert witness) nor anything about the Claimant herself.

6. The 1st Respondent (subsequently referred to as "the Respondent") defends the claim on the following grounds:

   6.1. The Claimant was not a worker, and so cannot bring a claim under S13.

   6.2. If she was a worker:

      6.2.1. the contract contained written authority for the deductions; or

      6.2.2. statute required the deductions to be made and paid over to HMRC; or

      6.2.3. written consent had been given for the deductions to be made.

7. I decided that the Claimant was a worker, that the contract did not authorise deductions from the wages of the Claimant, that statute did not require the Respondent to deduct the er's NI from the wages of the Claimant, and that she had not consented in writing to the deductions, so that the Respondent should not have deducted er's NI from the Claimant's wages.

8. The Claimant is not part of a multiple claim, but this is a company-wide practice of the Respondent and so this judgment has an importance for them wider than just this claim. I have approached this on that basis and dealt with matters they raised for the first time during the hearing. I decided to do so even though (as Mrs Singh accepted) an application to amend was required. I would not have given leave to amend on day 2 of this hearing. This is, therefore, not part of the Respondent's case, but I did so in order that they have a judicial opinion on the matters they raised.

Evidence

9. The Claimant gave oral evidence and was cross examined at length. Michael Lee, from the Home Office also gave oral evidence about IR35, about which he has great knowledge. I asked Michael Lee a series of open questions, the Claimant asked him no questions, and Mrs Singh asked him very few. Graham Smith, Chief Financial Officer of the Respondent gave oral evidence, and was also cross examined at length.

10. There was a bundle of documents of 587 pages.

Submissions

11. Both Claimant and Respondent provided detailed written submissions which I do not set out or paraphrase. Mrs Singh and the Claimant spoke to them. I deal in the findings of fact and in my conclusions with what they contain.

Findings of fact

12. The first two paragraphs of the summary set out the basis of the relationship between the Claimant and the Respondent.

13. The Claimant had previously carried out a project for the Home Office which was outside IR35. This was successful. She was asked to undertake a further project for them. By then the Home Office had other independent social workers, who were inside IR35 (and so subject to PAYE tax and NI).

14. The Home Office conducted an analysis (by Annamaria Cassella-Hall of the Home Office commercial department) on 11 June 2021 (94). It was decided that the new project was within IR35. The Claimant had already started work on it.

15. When the Home Office decided that the Claimant fell within IR35, the Respondent told the Claimant that she had three choices. They were to go to a pay as you earn ('PAYE") basis, to form her own PSC or to form a relationship with an umbrella company.

16. The Claimant asked a series of questions about a PSC. In an email dated 09 June 2021 (84 *et seq*) Graham Welch replied. He said there was no choice about the IR35 decision, and that if the Claimant wished, she could switch to a PSC, seek another umbrella company or move to PAYE. He stated:

> *"We therefore can facilitate the payment of hours to your PSC/Limited Company, however deductions would be made, including Employer and Employee NI along with PAYE, in accordance with Off-Payroll rules…"*

17. The Claimant replied the same day (84) asking what a PAYE contract would look like. She then opted for PAYE, recorded by Gareth Welch on 09 June 2021 (83).

18. On 14 June 2021 Graham Smith emailed his team (81) stating that a team member (Sam) had created a Key Information Document (KID) for all scenarios.

19. In an email on 18 June 2021 (96) Graham Smith emailed the Claimant and gave her examples of each type of arrangement with advantages and disadvantages. It stated:

> *"Effectively all options should provide the same take home, but there are small differences."*

He also stated, in relation to a PSC:

> *"…we deduct all employment taxes before transferring the monies"*

20. The KID (101) was also provided to the Claimant on 18 June 2021 with the email from Graham Smith. The KID stated that there would be deductions required by law and specified those deductions as income tax and ee's NI. It gave a worked example of income based on the Claimant's hourly rate, with deductions. Neither the text nor the example deals with er's NI.

21. The contract was signed on 07 July 2021.

22. The contract between the Claimant and the Respondent was drawn by the Respondent and was not capable of amendment by the Claimant.

23. The contract is a standard form "Tripod Partners Agreement for use if Personal Service Company". The Respondent supplies the contract for use. It is not the subject of any negotiation or amendment. If a worker wants to use a PSC this is the document that they must sign.

24. The contract:

24.1. is dated 09 July 2021 (79).

24.2. The Respondent is described as "Employment Business", the Home Office as "Client", the PSC as "Contractor" and the Claimant as "Representative of Contractor".

24.3. In the definitions, *"**"Off-Payroll"** means amendments to Chapter 8; and Chapter 10 Part 2 of Income Tax (Earnings and Pensions) Act 2003"* ("ITEPA")

24.4. At 7.2 (74) *"Where Off-Payroll applies to Assignment and where required in accordance with Off-Payroll, Contractor acknowledges and agrees that Employment Business shall deduct sums in respect of PAYE Income Tax and National Insurance Contributions Employment Business calculated in accordance with Off-Payroll prior to payment of Contractor's invoice. Employment Business shall remit such sums deducted under this clause 7.2 and Employer's NICs to HM Revenue and Customs to comply with its statutory duty Where Off-Payroll applies to Assignment and where required in accordance with Off-Payroll, Contractor acknowledges and agrees that Employment Business shall deduct sums in respect of PAYE Income Tax and National Insurance Contributions Employment Business calculated in accordance with Off-Payroll prior to payment of Contractor's invoice. Employment Business shall remit such sums deducted under this*

clause 7.2 ***and*** *Employer's NICs to HM Revenue and Customs to comply with its statutory duty."* [Emphasis added]

24.5. At clause 6 (74) there is an obligation on the PSC to send invoices to the Respondent.

24.6. *"12.1. This Agreement, or any Assignment hereunder, is not intended by the Parties to constitute or give rise to a contract of service or an employment contract."*

25. Nothing in the contract refers to ee's NI or to er's NI.

26. The Respondent accepts that is the deemed employer by reason of the IR35 decision.

27. The Government provides guidance entitled "Deemed employer responsibilities under off-payroll working rules"[1]. This contains a section:

> *"**Your responsibilities as the deemed employer***
> *If you are the deemed employer you must:*
> - *calculate the deemed direct payment to account for employment taxes and National Insurance contributions associated with the contract*
> - *deduct those taxes and employee National Insurance contributions from the payment to a worker's intermediary*
> - ***pay employer National Insurance contributions***
> - *report to HMRC through Real Time Information the Income Tax and National Insurance contributions deducted*
> - *use the 'off-payroll worker subject to the rules' indicator in PAYE Real Time Information (the name of this indicator may be different in your software)*
> - *apply the Apprenticeship Levy and make any payments"*
>
> [Emphasis added]

It also states:

> *"The client is responsible for deducting Income Tax and employee National Insurance contributions,* ***and paying employer National Insurance contributions*** *until they share the SDS with the worker and person or organisation they contract with."* [Emphasis added] The Client in this case is the Respondent.

Conclusions

Business to business

28. The first issue is whether this is a business-to-business arrangement and so not within the jurisdiction of the Employment Tribunal, as the Respondent asserts.

29. The contract is between two limited companies. That is not the sole consideration in construing a contract. This is clear from a line of cases from Autoclenz Ltd v Belcher [2010] IRLR 70 including Uber BV & Ors v Aslam & Ors [2021] UKSC 5. Paragraphs 71 onwards are helpful especially §76:

[1] https://www.gov.uk/guidance/fee-payer-responsibilities-under-the-off-payroll-working-rules#:~:text=If%20no%20party%20in%20the,and%20paying%20these%20to%20HMRC

> *"…it would be inconsistent with the purpose of this legislation to treat the terms of a written contract as the starting point in determining whether an individual falls within the definition of a "worker". To do so would reinstate the mischief which the legislation was enacted to prevent. It is the very fact that an employer is often in a position to dictate such contract terms and that the individual performing the work has little or no ability to influence those terms that gives rise to the need for statutory protection in the first place. The efficacy of such protection would be seriously undermined if the putative employer could by the way in which the relationship is characterised in the written contract determine, even prima facie, whether or not the other party is to be classified as a worker. Laws such as the National Minimum Wage Act were manifestly enacted to protect those whom Parliament considers to be in need of protection and not just those who are designated by their employer as qualifying for it."*

30. These are cases about worker status, but the same principles apply to cases under S13. This is because the Employment Rights Act 1996 gives rights to workers. It is self-evident that the Claimant was a worker. She is an independent social worker. The whole point of the arrangement was that she should work for the Home Office through the agency of the Respondent. The efficacy of statutory protections afforded to workers would be eroded if everyone working through a PSC was thereby excluded from the rights afforded by the Employment Rights Act 1996.

31. The Claimant sent timesheets to the Respondent, not invoices, and the Respondent submitted them to the Home Office which approved them and then paid the Respondent (a sum £5 an hour more than the Claimant's hourly rate, for that is their business model). The contract in this respect did not reflect reality as there were no invoices from the PSC, just timesheets from the Claimant, provided to the Respondent and tendered by them to the Home Office for payment along with their £5 an hour uplift.

32. Clause 12.1 of the contract stated that the arrangement is not intended to create an employment or contract of service, and the Respondent relies on this clause. Whether or not this was the intention of the Claimant (which is doubtful) this clause does not, and cannot, exclude the finding which I make that this is a contract for services. The contract did not reflect the reality of the situation, which is that the Claimant is in effect an agency worker.

33. The Claimant worked full time on her assignment with the Home Office, performing services personally. The Respondent accepts that while working for the Home Office the Claimant was subject to their supervision, direction and control. The PSC is no more than a vehicle for payment for the Claimant's work through the agency of the Respondent. Mr Smith accepted that this was the case.

34. In practical terms there was no difference in substance between the Claimant working though PAYE or through a PSC. This is apparent from the comparison email of 18 June 2021 from Graham Smith (96). It is apparent that what was being evaluated was how the remuneration of the Claimant would be routed to her. The fact that it could as well be structured under PAYE as through a PSC strongly indicates that this was not a business-to-business arrangement.

35. Plainly what the Claimant was doing is work, for the Respondent places workers, and the Claimant was working for the Home Office. She could be paid by PAYE or through a PSC or an umbrella company. She had been paid through umbrella companies until she changed to a PSC. When she changed to a PSC (because of the decision of the Home Office that she was within IR35) no change occurred to her work. It was only a change to the way the money paid by the Home Office for her work was channelled to her. She was not in business on her own account. Neither the Home Office nor the Respondent was her customer or client. Her work (while professional work and so autonomous in outcome) was controlled by the Home Office. She worked as they wished, evaluating such young people as they directed. She did not send them invoices: they paid the Respondent direct after approval of timesheets. She had to perform the work personally. She worked for the Home Office full time.

36. This arrangement meets none of the possible routes by which an arrangement is found to be a business, and so I decide that this was not a business-to-business arrangement.

37. For these reasons I find that the Claimant is entitled to the protection of the Employment Rights Act 1996 relevant to workers, including S13.

38. In my conclusions I do not accept the Claimant's submission that the contract was void. This is clear from the fact that VAT was paid to the PSC as shown in her payslips. The contract existed, but that does not preclude the Claimant from being a worker. The incidence of VAT is transparent for the parties, as it is paid by the Home Office via the Respondent and the PSC and then to HMRC.

S13

39. S13 applies to workers. Removing unnecessary words, an employer shall not make a deduction from wages of a worker employed by him unless one of three things are established:

    39.1. the deduction is authorised by a statutory provision;
    39.2. or by a term in the worker's contract;
    39.3. or the worker has signified in writing consent to the making of the deduction.

40. The Respondent accepts that it is the deemed employer by reason of the IR35 decision. That means they were the deemed employer for tax purposes. Since the tax is levied on the income this can be construed only as being treated as employer for all pay purposes, including S13.

41. The Respondent accepts that the Government guidance on the obligations of the deemed employer includes deduction of ee's NI, but not the deduction of er's NI. They say this is wrong and does not meet Part 10 of ITEPA (which was a revision of their case, as Mrs Singh cross examined the Claimant referring to Part 8 – Part 10 applies to public bodies, Part 8 to small employers).

42. The Claimant was a worker. She had a contract with the Respondent for delivery of services by her to the Home Office as end user. The phrase

"employed by them" in S13 is in a non-technical sense, as plainly not all workers have contracts of employment.

43. By reason of IR35, the Claimant was taxed as an individual, and the Respondent was liable to pay all the income tax and NI arising from the Claimant's work. The PSC is not relevant to the working relationship, which is personal, not corporate.

44. For these reasons S13 applies to the Claimant's work for the Home Office through the Respondent, as the Respondent is deemed to be her employer.

Statutory provision

45. The starting point is that an employer cannot make a deduction from pay to meet er's NI. That is a cost to the employer of employing the worker. This does not address the issue of who is the employer for this purpose. The answer is that the Respondent is deemed to be the employer by reason of the IR35 decision of the Home Office.

46. There is statutory provision requiring the payment of er's NI. Since it is the employer who is obliged by statute to pay NI, that statutory provision cannot be the one relied on to permit the deduction.

47. The Respondent relies on the Income Tax (Earnings and Pensions) Act 2003, parts 8 and 10. They accept that the guidance, set out above, states that the deemed employer must pay the er's NI. They say that this guidance is wrong.

48. They based this on Part 8, S54. This provides the means of calculating the deemed employment payment in a series of steps. The argument is fundamentally flawed, for Step 6 is to deduct the amount of any er's NI paid by the intermediary. This does not require the intermediary to pay er's NI (that is via other legislation) but it does envisage the intermediary paying the er's NI and does not require the worker to do so. It simply reduces the amount of taxable pay. If it were otherwise the worker would be paying tax on the amount paid by the deemed employer as er's NI.

49. The Respondent relies on Step 8:

> *"Assume that the result of step 7 represents an amount together with employer's national insurance contributions on it, and deduct what (on that assumption) would be the amount of those contributions."*

This does not pass any obligation on either party to do anything. It is an assumption that is part of the calculation of the taxable pay.

50. In short, the point of S54 is to stipulate the way taxable pay is calculated, starting from the gross amount, so that tax (and NI) is calculated on the correct amount. That is why expenses of employment are excluded at Step 3, pension payments at Step 5 and er's NI is excluded at Step 6. It does not say which person should or must pay anything, for it provides a framework for calculation of taxable pay covering all circumstances. Accordingly, I decide that the Respondent is incorrect in its contention.

51. However, the Claimant pointed out during the hearing that Part 8 was not relevant. Part 10 applies to government bodies, in particular S61Q. In cross examination, Mr Smith accepted that this was the case but as he was not familiar with S61Q he was not able to deal with the point.

52. Both Part 8 and Part 10 lead to the same government guidance, so the difference did not affect the guidance the Respondent followed. This guidance is said to be wrong, but that contention cannot be made out as the Respondent has given no consideration to Part 10 of ITEPA, and so cannot say why.

53. For these reasons I reject the argument that statute requires the Respondent to deduct er's NI on the Claimant's earnings. I find that the guidance note (set out above) is accurate and requires the Respondent to pay er's NI. The Respondent accepts this, and this is the reason it says the guidance is wrong. As the guidance requires the Respondent to pay er's NI, er's NI cannot be deducted lawfully from the Claimant's wages.

K&K legal employer

54. The Respondent points out that K&K employed the Claimant, and they did not, and they say that for that reason it is right that her company pays the er's NI, which is the result of the deduction. The problem with this argument is that the Off-Payroll Rules provide that the intermediary – the Respondent - is the deemed employer, and the deemed employer is responsible for paying the er's NI.

55. The Claimant is the employee of her PSC. But for IR35 the Respondent is the deemed employer. That is for all questions of income tax and NI. The starting point is that an employer cannot deduct er's NI, and the Respondent has shown no reason why this has been negated for them as deemed employer.

56. The issue is not who pays it, for it is common ground that the Respondent pays the er's NI to HMRC, but whether the intermediary can take that money from the money paid by the end user, the Home Office. That is a deduction and so leads back to S13.

No deduction

57. Graham Smith argued (witness statement §16) that the calculation of the deemed pay carried out in the manner prescribed in S54 ITEPA means that the deemed pay is after er's NI has been paid and so this was not a deduction at all. This was not pleaded in the Grounds of Resistance and there has been no application to amend. As this claim has wider significance for the Respondent I deal with the point as obiter dictum. I repeat that this could not be a reason the Respondent could succeed, as it is not part of their case.

58. The argument is misconceived. This is not what S54 and S61Q provide. They provide a method of calculation of pay subject to the PAYE regime. Only after the calculation is performed can the amount of NI be worked out. In S54, for example, Step 6 reduces pay by the amount of er's NI paid by the employer. This is because the intermediary will negotiate with the end user for a sum which will include er's NI (because the intermediary has to pay it), so that in calculating the deemed income of the worker that amount must be deducted –

if not the worker is paying tax on the er's NI. Doubtless S61Q has something similar.

59. Also, the assignment document (79) refers to the "Contractor fee" and so is specifically linked to the amount payable from the end user to be paid to the Claimant. Any amount paid to the Claimant by the Respondent which is less than £58 an hour must be a deduction, not a reduction prior to calculation of deemed pay.

60. The NI cannot be calculated until the deemed payment has been calculated. It is not possible for the contracted payment to be subject to a reduction of er's NI to arrive at a sum from which there are deductions for income tax and ee's NI for the NI and tax are calculated from the deemed income.

Written consent - contract

61. The remaining issue is whether the contract, or other document, signifies in writing the consent of the Claimant to the deduction of er's NI.

62. The contract contains no such provision.

63. The contract at 7.2 provided for deductions from money payable to the Claimant for tax and ee's NI. The clause then provides for the Respondent to pay these deductions and er's NI to HMRC. The word "and" can only mean that er's NI is not within the deductions authorised by the contract. The clause ends "to comply with its statutory duty", which can only mean to pay income tax and ee's NI and er's NI to HMRC. That is only consistent with the Respondent accepting that it had a statutory duty to pay over the deductions from the Claimant's pay which are authorised by the clause and, in addition, er's NI. The way this is phrased means that er's NI is not a deduction authorised by the clause.

Written consent outside the contract

64. The Respondent says that the Claimant agreed to the deduction in emails.

65. The email of 14 June 2021 said that "all employment taxes" would be deducted. The Respondent relies on this. There are two reasons why this argument fails. First, unless the email said "including er's NI" no-one reading it would think that is what it meant. Secondly, even if it did include er's NI there was nothing in reply from the Claimant to agree – to signify written consent. That is a prerequisite to a lawful deduction.

66. The email of 18 June 2021 (96) from Graham Smith clearly stated that the PSC route would provide the same take home pay as PAYE (save for small differences). This is a very clear indication that there would be no er's NI deduction, for that is a major expense, and it is not payable by a worker remunerated under PAYE. The email says that PAYE is lower than PSC as there is the Apprenticeship Levy and employer pension to deduct. Leaving aside why employer pension should be a deduction, if er's NI was to be deducted from money routed through a PSC the PSC route would inevitably be lower than PAYE, not the other way round. This email is clearly written on the basis that er's NI would not be deducted from money paid via a PSC.

67. Even if that is not so, the email stating that er's NI would be deducted does not amount to consent to the deduction of er's NI. After it was received, the Claimant rejected that option and decided on PAYE. Then she was given the comparison email with the KID. The KID envisages the Respondent paying the er's NI. It was on that basis the Claimant decided on a PSC.

68. The email from Graham Smith on 18 June 2021(96) stated that *"all employment taxes"* would be deducted. If that was intended to include er's NI it would have to have been expressly stated. It cannot have intended to mean that, for that email which enclosed the KID indicated that the Respondent would be paying er's NI. Nor did the Claimant write back to signify consent in writing to the deduction.

69. The KID (104) stated that deductions from intermediary income required by law were er's NI, apprenticeship levy, employer's pension and 12.07% holiday pay. This was incorrect as to apprenticeship levy, as the Respondent accepts. It must be incorrect as to 12.07% holiday pay, because that would be the Claimant's entitlement with reference to her PSC. The Respondent has not pointed to any statute requiring them to deduct er's NI from the money paid to the Claimant's PSC, and she did not signify consent in writing to the contents of the KID.

70. For these reasons I conclude that the Claimant has never consented to the deduction of er's NI from her pay.

71. Mrs Singh submitted that the Claimant was not guaranteed a series of engagements and so could not be a worker throughout, so that there was no series of deductions. That contention cannot succeed given Nursing and Midwifery Council v Somerville [2022] EWCA Civ 229.

72. This is a very technical area. My judgment is that the Respondent has not been able to fall within any exception to the provisions of S13.

Summary of conclusions

73. Accordingly, my conclusions are:

    73.1. There is no jurisdictional impediment to the claim.
    73.2. S13 applies to the Claimant's pay.
    73.3. The Respondent deducted er's NI from the wages of the Claimant.
    73.4. There is no statutory obligation on the Respondent to deduct er's NI from the wages of the Claimant.
    73.5. The contract provides no right for the Respondent to deduct er's NI from the wages of the Claimant.
    73.6. The Claimant did not signify in writing her consent to the deductions.
    73.7. Therefore the deductions were unlawful.
    73.8. The unlawful deductions were a series extending back to the start of the PSC.

74. The Claimant had set out the er's NI deductions at £36,798.40 and £28.25 Apprenticeship Levy, a total of £36,817.65. The Respondent had not filed a counter schedule of loss, and Ms Singh had no instructions as to the amount deducted. I accept the Claimant's evidence as to the amount deducted and so

order the Respondent to pay the Claimant £36,817.65.

Employment Judge Housego

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Date 22 November 2024

JUDGMENT & REASONS SENT TO THE PARTIES ON

20 December 2024

FOR THE TRIBUNAL OFFICE

P Wing