Case No. 6006396/2024

EMPLOYMENT TRIBUNALS

Claimant: Mr R Amin

Respondent: Paystream My Max Limited

Heard at: Manchester (in public; via CVP) **On:** 22nd April 2025

Before: Employment Judge Anderson (Sitting Alone)

Representatives

For the claimant: In Person

For the respondent: Mr Johnson (Head of Legal)

JUDGMENT

1. The claim of unlawful deduction from wages is not well founded and is dismissed.

REASONS

Oral reasons having been given at the hearing, the Claimant then requested written reasons which are now provided.

Introduction

1. The Clamant Mr. Amin claims unlawful deduction from wages against his employer Paystream My Max Limited

Procedural Matters

2. Previously, a hearing was listed and the Employment Judge determined that there was insufficient time to hear the case in the 90 mins allotted. Therefore, that hearing was converted to a Private Preliminary Hearing for case

management purposes. At that hearing, the case was discussed extensively and a lengthy, narrative list of issues was produced covering several pages.

3. Those issues can be distilled as follows:

    i. What is the Claimant's contractually agreed rate of pay?
    ii. Was the Claimant paid less than the contractually agreed rate of pay?
    iii. Has the Claimant affirmed the rate of pay?
    iv. If so, was any deduction authorised by statute or the contract of employment? (It is not suggested that the Claimant provided separate written consent out with the written contract).

4. The hearing proceeded by way of video link.

5. The Claimant gave evidence on his own behalf. Mr Johnson gave evidence on behalf of the Respondent. All witnesses gave evidence via oath or affirmation. All witnesses provided a witness statement in advance.

6. The Tribunal had an agreed bundle of documents before it. Prior to the hearing, the Claimant had obtained the permission of the Tribunal to introduce supplementary documents. These documents totalled 35 additional pages, which were numbered at the outset of the hearing and identified as a supplementary bundle. However, neither party referred to the supplementary bundle in cross-examination of the other party or in their oral submissions.

7. During the morning, I took time to explain the concept of affirmation to the parties. The Claimants position was that he could not see why he had to resign from his employment because he was not being paid correctly. Following the conclusion of the evidence, of my own volition, I delayed submissions with a view to taking an extended lunch break and suggested that the Claimant consider his position in relation to affirmation and address me on it in his closing submissions.

8. Both parties made oral submissions following the lunch break. The tribunal then took a further break in order to consider its Judgment which was then delivered at 3:30 pm.

Findings of Fact

9. The Tribunal made the following findings of fact on the balance of probabilities.

10. The Claimant describes himself as a Locum Chartered Legal Executive. In roughly May 2021 he contacted the Sellick partnership which is a recruitment agency. They in turn arranged for him to have an interview at Trafford Council. The Claimant was told that this arrangement would require him to be paid via a payroll company.

11. The Claimant was given the option of four preferred payroll companies. The Claimant shows the Respondent. There was no particular reasoning as to why he chose the Respondent.

12. The basic model is that the Sellick Partnership recruits the Claimant, identifies four potential payroll companies which the individual then chooses from and then the payroll company employees the Claimant. The Claimant is then supplied to the recruitment company who then in turn supplies him to the end client, i.e. Trafford Council.

13. So far as it is relevant the tribunal recognises this model. It is a common payroll company model.

14. This case has focused on the Claimants rate of pay. The Claimant says he was told by the recruitment company that his gross rate of pay would be £40 per hour. However, No wider terms were discussed at this stage.

15. On the 18th of May 2021 the Claimant spoke on the phone with the Respondent. These calls are transcribed. The Claimant says that during this call he agreed £17.50 being deducted in the form of an employer's margin. He says at no point was it discussed that employers National Insurance contributions would be deducted or the apprenticeship levy deducted.

16. The Tribunal pauses here to note at this point that it has also heard peripheral evidence regarding the desirability of umbrella contracts and whom they favour. The Tribunal recognises and understands that parties may not always be in an equal bargaining position. To some extent the law does recognise this fact and on occasion, Parliament has intervened through statute.

17. In terms of pay, the law does provide for a national minimum wage. However, it does not decide what are commercial rates of pay or interfere in the jobs market where principles of supply and demand amongst other factors dictate rates of pay. Pay is agreed between the parties. If it is not a good bargain, then the individual is free to leave and work elsewhere. In evidence before us, the Claimant says that he could have explored other opportunities and been employed elsewhere rather than work for a company at this rate. The Tribunal does not accept this assertion. The Claimant has been employed on this basis for four years. If he considered that better rates of pay were available elsewhere, he was (and is) free to leave and obtain those rates. That is the proper operation of the market economy.

18. Furthermore, the power dynamics must be seen in the context of there being no sense of exploitation or risk of someone’s basic rights being undermined.

19. The Claimant was not obliged to enter into an umbrella contract generally in that he was not obliged to take this role. If he wanted this particular job then this job was available in an agency form using a payroll company. The benefits of the umbrella contract in contrast to agency work generally was that the

Claimant would be an employee and would gain continuity of employment and pay.

20. In evidence before the Tribunal, much was said about the specific and technical nature of the words used. This was an employment contract not a consumer contract. Alongside this, the Tribunal was concerned that the Claimant did not approach matters at the time with much diligence. In evidence, the Claimant referred to making assumptions or saying that he saw something, did not understand it and then take no additional steps.

21. Following the phone call the Claimant is provided with what is described as a personal illustration. The Claimant says that he did not understand this document. Upon receipt he does not challenge it or seek to enquire further.

22. The Tribunal finds that the personal illustration document is clear in terms of how the Claimants pay will be calculated. It is not in strange or oblique terms. It is clear. If the Claimant wished to challenge this document it was open to him to do so. The Claimant says that this document isn't a contract, that is correct and in turn the Respondent does not rely upon the document contractually. What it does represent is the Respondent being clear as to the correct position and no steps being taken in response by the Claimant. The result of this is that the Tribunal finds that the Claimant either agreed with the position in the illustration or failed to understand the correct position and in turn failed to take steps to clarify what that meant at the time.

23. The Tribunal accepts the evidence of the Respondent as to the authenticity of its internal recruitment documents and the process that a potential employee goes through in order to be employed by the payroll company. This evidence is in documentary form with corroboration provided by the oral evidence of Mr. Johnson.

24. The Tribunal has before it the entry on the Respondents internal system indicating that the Claimant had agreed to the terms and conditions. The Tribunal also had before it the final page of the internal process which includes the page on which the employee formally accepts and enters into the contract.

25. The Tribunal accepts the documentary evidence that on the 18th of May 2021 the Claimant accepted the terms conditions and did so as per the process which is available concluding at page 57 as corroborated by page 58. There are a number of reasons for this finding. Firstly, the Claimant's evidence did no more than say he “could not recall”. Secondly, the Respondents evidence at page 58 is derived directly from its system. The evidence of Mr Johnson in support of this is not contradicted. Thirdly it is the most obvious and logical course of events. These points enable such a finding on the balance of probabilities.

26. The contract of employment is hyperlinked as part of the process at page 57. In addition to that a welcome e-mail is sent out at page 66 which includes on its first page *“here's some important information you need to know...”* The

Claimant suggested that this had the appearance of a marketing email and inferred that this was a way of the Respondent hiding things from employees and that the Respondent was not being transparent. The Tribunal rejects this assertion. The Respondents process is transparent. It enables the parties to see the terms on which someone is employed.

27. The tribunal finds that notwithstanding the fact that bright colours are used in this welcome email, the immediate language makes clear that this is an important email. It draws the employees attention to its contents. The Tribunal rejects the Claimants description of this document as akin to a marketing e-mail. The tribunal finds that where a welcome letter is sent by an employer, clearly marked, ignoring its contents is ill advised. A range of important points are covered in the e-mail or such as pensions and so on however for the purposes of this case the online portal is referenced and underneath it says this *"the online portal is available to you 24/7 and contains useful information like your pay slips, employment contract, FA cues plus much more, it is certainly worth logging in to take a look. The e-mail address used above is your username and the first time you log in you'll be asked to choose a password."* The online portal is hyperlinked.

28. The Tribunal finds that the Respondent provided the Claimant with his contract of employment. It further finds that this contract represented the true agreement between the parties. These were the terms and conditions upon which the Claimant was employed by the Respondent. The fact that the Claimant did not read the contract does not mean that he did not enter into the contract. The Claimant had the opportunity to read the contract and to refuse to enter into those terms. He did not do so.

29. This is not a situation in which there is an after the event the contract of employment. This is at the start of the employment relationship. This is not a situation whereby a contract is being imposed on employee after a period of service and the contract does not represent the agreement between the parties.

30. Following the formation of the contract, the Claimant entered into employment with the Respondent, working for the ultimate end user, Trafford Council.

31. In June 2021, the Claimant sought clarity as to his pay with the Respondent. The Respondent replied and set out how his pay was calculated.

32. In October 2022, the Claimant again sought clarity as to his pay with the Respondent. Again, the Respondent replied and set out how his pay was calculated.

33. In evidence before the Tribunal, the Claimant accepted that following each of the above explanations, he took no further action.

34. The Tribunal finds that whilst the Claimant may have been unhappy with the bargain that he had entered into or alternatively had not read his contract, there was no ongoing protest.

35. The Claimant disputed his pay in May 2024 following his P60 and issued proceedings for unlawful deduction from wages in July 2024.

36. As of the date of the Tribunal, the Claimant remains in employment. He has continued to derive the benefits of the contract There were two occasions in which the Claimant sought clarity as to his pay. Neither of those occasions amounted to him objection. He issued proceedings in July 2024.

The Law

37. The right not to have sums unlawfully deducted from wages is provided for in s.13 Employment Rights Act 1996.

38. Section 13(1) of the Employment Rights Act 1996 provides that an employer shall not make a deduction from wages of a worker employed by him unless 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 the worker has previously signified in writing his agreement or consent to the making of the deduction. An employee has a right to complain to an Employment Tribunal of an unlawful deduction from wages pursuant to Section 23 of the Employment Rights Act 1996.

39. The Tribunal also had regard to authorities such as Autoclenz v Belcher [2011] IRLR 820 regarding interpretation of employment contracts. Whilst Autoclenz is a status case, it is authority for the wider proposition that a Tribunal is entitled to analyse the factual situation to ensure that the contract reflects the reality of the situation.

40. Where an employee is faced with a unilateral variation to the contract of employment, case law has repeatedly set out the options available to the employee. A recent version of this can be found in Jackson v The University Hospitals of North Midlands NHS Trust [2023] EAT 102, the Employment Tribunal President, Judge Clarke, sitting in the EAT held:

"The case of Hogg v. Dover College and its usual companion, Alcan Extrusions v. Yates [1996] IRLR 327, are familiar fare to employment lawyers when giving advice about the consequences of an employer's decision to restructure its workforce. When an employer has neither sought nor achieved agreement with the affected employees, and when it does not wish to take the so-called "fire and re-hire" option, it may consider the risky option of unilaterally imposing a change to terms and conditions of employment. The options available to an employee in response are widely understood to comprise: (1) to resign and claim constructive unfair dismissal, subject to qualifying service and showing that the breach was repudiatory; (2) to waive any repudiatory breach/affirm the contract and agree to work under the new terms; (3) depending on the nature of the change, to refuse to work under the new terms and (in terms) dare the employer to dismiss; (4) to "stand and sue" by working under protest but bringing proceedings for breach of contract and/or any shortfall in wages (the classic case being Rigby v. Ferodo Ltd 1988 ICR 29 HL); and (5) to work under

the new contract but assert dismissal from the old contract, which – subject again to qualifying service – can form the basis for a complaint of unfair dismissal. The fifth option is the Hogg dismissal." (Para 30).

41. It is the law in respect of affirmation that is relevant to the present case. Where there is no ongoing protest and the employee continues to perform the contract, it follows that after a period of time the contract has been affirmed by the employee. i.e. their continuing performance of the contract and the acceptance of pay means that they accept the terms of the contract. In the present case the Claimant was paid at the same rate of pay for three years before deciding to state that the rate of pay did not represent his terms and conditions relating to pay.

Conclusion

42. The Tribunal concludes as follows.

43. The Tribunal finds that the written terms and conditions in the bundle represents the contractual agreement between the parties.

44. Further, that contract represents the reality of the situation. It genuinely reflects the true relationship between the parties.

45. That contract provides for the Claimant to paid the national minimum wage with the remainder of the pay made up of commission. It expressly provides that all monies paid by the customer shall belong to the employer from which the employer will deduct its own costs including the employers margin, the employers NI and apprenticeship levy. The remaining amount is then paid to the Claimant.

46. There are other express terms, for example the confirmation of the Claimant that they have read and understood the personal illustration provided.

47. No legal argument has been made before the Tribunal that this is an unlawful method of paying employer NI. If this argument is made, I would note that the deduction for employers NI is being made from the sum paid to the Respondent by the customer, not the sum paid to the Claimant. It is an express contractual term.

48. In turn, the Claimant has been paid in accordance with those written terms and conditions. There is no deduction.

49. Further, this is not a case in which the situation lacks transparency. The Claimant accepted in evidence that he received weekly pay slips. He also accepted that he received weekly invoices which detailed the sums that were paid to the Respondent.

50. For the sake of completeness, the point regarding affirmation is considered in the alternative. This is very much in the alternative because the primary finding is that the contractual position is clear.

51. In the alternative, the Tribunal finds that the Claimant has affirmed the contract. Proceedings were issued in July 2024 when the Claimant had been employed for three years and paid at the same rate. Subsequently, the Claimant has continued in employment for a period of just under four years. In those years he has continued to perform the contract and derived benefit from the contract in the form of pay. He has also received that level of pay without protest. His conduct indicates that he accepts that is the correct rate of pay.

52. The Claimant points to raising a query in 2022 and then raising a further query in 2023 and then raising it again in 2024 and issuing proceedings.

53. The actions in 2021 and 2022 are not objections. The Claimant cannot sensibly be said to be working under protest. The communications are by way of seeking an explanation.

54. Furthermore, the Claimant accepted in evidence that having received the Respondents explanation in 2021 and then October 2022, he took no further action. That is inconsistent with working under protest or maintaining an objection. It is consistent with consenting to the contractual situation as it then was.

55. Through his conduct, the Claimant has affirmed the contract at his current rate of pay. The result is that any claim made in July 2024 would be significantly out of time.

56. Both parties have referred me to first instance authorities. First instance decisions are not binding on this Tribunal, though they may be of persuasive value. I have read the first instance decisions. I consider the question of what terms were entered into and the actions of the employee in terms of whether they affirmed the contract to be fact sensitive questions. In the present case, the clear facts in terms of the contract and then length of time the contract has been existence are sufficient to allow the present case to stand on its own facts and be distinguishable from other authorities.

57. In particular, in contrast with the Binns case, the contractual situation in the present case is much clearer. The Claimant has/had a contract of employment that complied with s.1 Employment Rights Act 1996. In Binns, much of the case was dependent upon interpreting the assignment details. Further, unlike the present case, applying Autoclenz meant that there was a different situation in reality whereas in the present case, the contract is the correct representation of the factual position.

58. A further distinguishing factor is that in the present case there is not a claim under the Working Time Regulations or in respect of holiday pay, claims which succeeded elsewhere. A significant distinguishing factor is the fact that holiday pay is a legal minimum which an employer may not derogate from. There is also supplementing case law which explains that the calculation of holiday pay

need to be transparent. An employee cannot consent or affirm a contractual position which falls below an employees legally entitled minimum. These factors are not present in this case.

59. To add some overall context, though it may not be relevant to the strict legal conclusions, this is not a situation in which the Claimant has been taken advantage of. Whilst the Claimant may find the terms to be financially disadvantageous to him, the Tribunal does not find that these terms were onerous. This was well-remunerated employment. The Claimant is a professional. If the overall remuneration received was not to the Claimant's advantage, he was in a position to seek employment elsewhere. In so far as it may or may not be relevant, this is distinct from a situation whereby someone is living on low wages and may not have flexibility in the jobs market. The Tribunal makes this observation because of the extent to which the Claimant referred to turning down other opportunities in order to work for the Respondent.

60. Therefore to summarise

    i. £40.00 is the rate paid by the recruiter to the Respondent
    ii. From that rate the Respondent pays employers National Insurance and the apprenticeship levy. The administrative fee of £17.50 is also expressly provided for. This is permitted by the contract of employment in any event
    iii. The Claimant has been paid in accordance with the contract of employment.
    iv. Even if that conclusion were wrong the Claimant has affirmed the contractual arrangement. He did not object. In any event a significant period of time is expired and the Claimant has derived the benefit of the contract in the meantime. That is affirmation

61. The claim of unlawful deduction from wages is not well founded and is dismissed.

Employment Judge Anderson
22nd April 2025

JUDGMENT SENT TO THE PARTIES ON
28 April 2025

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