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EMPLOYMENT TRIBUNALS

Claimant: Mr K Okwara

Respondent: Construction Alliance Recruitment Services (UK) Ltd

Heard at: East London Hearing Centre

On: Wednesday 13 February 2019

Before: Employment Judge Ross (sitting alone)

Representation

Claimant: In person

Respondent: Mr A Colucci (Managing Director)

RESERVED JUDGMENT

The judgment of the Employment Tribunal is that:-

- (1) The complaint of unlawful deduction from wages contrary to section 13 of the Employment Rights Act 1996 is upheld.**
- (2) The Respondent shall pay the Claimant £760 in respect of the unlawful deduction from wages.**

REASONS

1 This matter was not allocated and was listed for only one hour. It was not possible to deliver judgment and reasons on the same afternoon as the hearing took place, due to the length of the hearing, the documents served and filed on the day and the other work of the Tribunal.

2 By a claim presented on 18 November 2018, the Claimant brought a complaint of unlawful deduction from wages. The claim was presented after a period of early conciliation between 16 October 2018 and 16 November 2018. The Claimant was engaged in work as a taper in the construction industry.

The issues

3 At the outset of the hearing, I identified with the parties the issues. This was an unusual deduction from wages case in that the parties agreed that the wages claimed (corrected to £760 by the Claimant before me) were owed to the Claimant. The main issue was whether there was any contract between the Respondent and the Claimant. The Respondent's case was that the Claimant's contract was with the building contractor, Radford Group, the alleged end-user of the Claimant's services. Radford Group are in liquidation.

4 The Respondent did not adduce any evidence that the Claimant was not a worker nor argue this, save to allege that the Claimant had wanted to be paid as a self-employed person. I prefer the Claimant's evidence on this, which was that the Respondent had asked him whether he wanted to be paid PAYE or through the CIS scheme, not that he had demanded to be paid through the CIS scheme.

The evidence

5 I heard oral evidence from the Claimant and from Antonio Colucci, the Managing Director of the Respondent. Each witness approved the contents of their pleading as correct, in the absence of any witness statements. There was considerable argument which, in part, was why the hearing lasted two hours. This reflected that both witnesses had a strong belief that they were right.

6 The witnesses produced various documents: R1, a small bundle produced by Mr Colucci; C1, a timesheet; C2, a selection of other documents including an invoice sent by the Claimant to Radford Group on 17 August 2018.

Findings of fact

7 On 3 August 2018, the Claimant began working for an agency, Premier Recruitment. He was directed to work for a company, Radford Group, at a site at Canary Wharf.

8 On Monday 6 August 2018, the Claimant commenced work for Premier Recruitment.

9 On 10 August 2018, Premier Recruitment telephoned the Claimant and said that his job had finished on that day. The Claimant was informed that he should not worry and they would pay him for the five days worked. Radford Group managers approached the Claimant and on learning the agency had called him to stop work they said that they had concluded arrangements with another agency because they were happy with his work.

10 A few hours later, Mr Colucci of the Respondent called the Claimant and introduced himself as the new agency. Mr Colucci asked how much the Claimant was paid by the previous agency. After negotiation, the parties agreed on payment of £20 per hour. The Claimant did not insist on being paid under the CIS scheme.

11 Mr Colucci asked about the Claimant's qualifications. Mr Colucci informed the Claimant that he would start work for his agency on Monday 13 August.

12 The Claimant worked from 13 to 16 August 2018 at the Radford Group site. On Monday 13 August, Mr Colucci called the Claimant to confirm that he was at work.

13 On Tuesday 14 August 2018, Mr Colucci requested identification documents for the Claimant and his bank details.

14 On 16 August 2018, Mr Colucci called the Claimant and said he was pulling out of the contract with the Radford Group. Mr Colucci told the Claimant that the company's credit rating had dropped and he would not continue to do business with Radford Group. The Claimant asked Mr. Colucci about the four days' work that he had carried out. He was informed that he should invoice Radford Group directly; the Claimant objected. Subsequently, the Claimant was informed by the Radford Group that there was no contract with him and that he should go to the Respondent agency.

15 The Claimant informed the contractor that he would stop work. The contractor signed his timesheet, which was a timesheet for the Respondent agency, and it was sent to Mr Colucci. The Respondent did not pay the wages of the Claimant.

16 The Claimant submitted invoices to Radford Group. It did not pay him either. I accepted the Claimant's evidence that he invoiced Radford Group because he had no option. He wanted and needed to be paid his wages. This was not because he had intended that there be a contract with Radford Group at any time, nor because he did, in fact, contract with them.

17 The Claimant did not attempt to cheat anybody. He was just trying to get his wages.

18 Mr Colucci presented the Respondent as, basically, a payroll vehicle for the contractor.

19 I found that the Respondent engaged the Claimant before Mr Colucci learned of the Respondent's credit rating. I infer that he found out about their credit rating when Radford Group failed to sign and return his terms and conditions, which included matters such as rates of pay.

20 Mr Colucci has added in the allegation that the Claimant insisted on being self-employed to try to justify his failure to pay wages. I found this to be inconsistent with him engaging the Claimant at all to do the work.

21 I find that the documents are generally consistent with the Claimant's evidence. Indeed C1, the timesheet dated 17 August 2017, corroborates his case showing that his first claim for wages was against the Respondent.

The law

22 Section 13 Employment Rights Act 1996 provides:

- (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.*
- (5) *For the purposes of this section a relevant provision of a worker's contract having effect by virtue of a variation of the contract does not operate to authorise the making of a deduction on account of any conduct of the worker, or any other event occurring, before the variation took effect.*
- (6) *For the purposes of this section an agreement or consent signified by a worker does not operate to authorise the making of a deduction on account of any conduct of the worker, or any other event occurring, before the agreement or consent was signified.*
- (7) *This section does not affect any other statutory provision by virtue of which a sum payable to a worker by his employer but not constituting “wages” within the meaning of this Part is not to be subject to a deduction at the instance of the employer.*

23 “Worker” is defined at section 230 ERA 1996. The definition is wider than that of “employee”, evident from the express incorporation of those working under a contract of employment within the definition of “worker”. Section 230 provides, so far as relevant:

- (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.

- (4) *In this Act “employer”, in relation to an employee or a worker, means the person by whom the employee or worker is (or, where the employment has ceased, was) employed.*
- (5) *In this Act “employment” –*
 - (a) *in relation to an employee, means (except for the purposes of [section 171](#)) employment under a contract of employment, and*
 - (b) *in relation to a worker, means employment under his contract;*

and “employed” shall be construed accordingly.”

Conclusions

24 There was an oral contract made on 10 August 2018 between the Claimant and the Respondent, made through Mr Colucci acting as its Managing Director. The parties agreed that the Claimant would provide his work to the Respondent at a wage of £20 per hour, and continue working at the Radford Group site.

25 The Claimant was a worker of the Respondent. He was engaged under an express oral contract whereby he agreed to undertake work personally. The Respondent was not a client or customer of any undertaking carried on by the Claimant.

26 In conclusion, the Claimant is entitled to unpaid wages in the sum of £760 to be paid by the Respondent.

Employment Judge Ross

Date: 12 March 2019