



EMPLOYMENT TRIBUNALS

Claimant: Mr Krzysztof Rak

Respondent: Fabicon Limited

Heard at: Leeds Employment Tribunal (CVP)

On: 10 June 2022

Before: Employment Judge G Elliott

Representation

Claimant: In person

Respondent: Mr Arkadiusz Fabisiewicz (director)

RESERVED JUDGMENT

1. The respondent made an unauthorised deduction from the claimant's wages and is ordered to pay to the claimant the gross sum of £350, in respect of the amount unlawfully deducted. This sum is subject to applicable deductions for tax and employee national insurance contributions.
2. The respondent failed to provide the claimant with a statement of employment particulars and is ordered to pay to the claimant the sum of £762.80 amounting to two weeks' pay.

REASONS

A. Introduction

1. The respondent operates a building company. The claimant and respondent agree that they had a working relationship at some point over October/November 2021. The claimant alleges he is owed wages for that work, and that he was not given a written statement of terms.
2. ACAS was notified under the early conciliation procedure on 18 December 2021 and the certificate was issued on 28 January 2022. The ET1 was presented on 14 February 2022. The ET3 was received by the Tribunal on 12 April 2022 with an application to extend time for submission, which was granted by the Tribunal on 11 May 2022.

B. Claims and issues

3. The claimant alleges he is owed wages for the work he did for the respondent, and that he was not given a written statement of terms. The issues were agreed at the start of the hearing, as follows:
4. Did the respondent make an unauthorised deduction from the claimant's wages contrary to section 13 of the Employment Rights Act 1996 and if so, how much was deducted? As part of this:
 - a. was the claimant an employee or worker of the respondent (and if so, was the employer Fabicon Limited or Mr Fabisiewicz) within the meaning of section 230 of the Employment Rights Act 1996?
 - b. what terms were agreed between the parties?
 - c. did the claimant agree in advance, in writing, to any deduction?
5. In the event of there being an unauthorised deduction, did the respondent fail to provide employment particulars to the claimant and if so, what award is due under s.38 of the Employment Act 2002?

C. Procedure, documents and evidence heard

6. Both parties were unrepresented. The Tribunal was ably assisted by Ms Jadwiga Widdop as Polish language interpreter, who gave her affirmation at the start of the hearing. All parties assisted Ms Widdop by pausing and repeating as needed.
7. The parties were asked but did not identify any need for adjustments. Assistance was given to the claimant with IT issues and any items he found hard to hear were repeated. One break was taken at 10.35am until 11am, to allow the parties to better prepare for giving evidence.
8. The claimant was unsure of the correct respondent, having named both Fabicon Limited and Mr Fabisiewicz in his ET1. Although the Tribunal had treated the claim as against Fabicon Limited, I agreed to reconsider the issue of the correct respondent once evidence had been heard.
9. The parties did not prepare a bundle or witness statements. The Tribunal had written to the parties requesting information on 18 February 2022 and 29 March 2022. At the start of the hearing I again explained the need for evidence and took a break to allow the parties to send any evidence to the Tribunal.
10. The parties agreed to take box 8.2 of the ET1 as the claimant's witness statement and box 8.2 of the ET3 as Mr Fabisiewicz's evidence. No other witnesses were called. The parties were not prepared for cross-examination. The parties agreed to affirm the truth of their evidence at the same time and take the discussions that followed as their evidence.
11. Mr Fabisiewicz submitted an English translation of text messages between him and the claimant, on 12 April 2022. At the hearing, he sent screen shots of the Polish originals to the Tribunal. I discussed the option of Ms Widdop reviewing these and confirming the translation. This was not needed as the claimant accepted the texts were sent and that the English translation was a true interpretation of them.
12. Mr Fabisiewicz had also submitted an English translation of text messages allegedly between him and the claimant's son, on 12 April 2022. At the hearing he sent screen shots of the Polish originals to the Tribunal. The Claimant's evidence was that no texts were sent by his son, only telephone calls. I took both parties' evidence on this into account.

13. The claimant stated he had an audio recording of a telephone call between him and a supervisor of one of the respondent's sites but was unable to send it to the respondent or Tribunal. He was not sure of the name of the individual, who he said was not employed by the respondent, and the respondent did not know who the claimant was referring to. No transcript had been prepared and the individual was not providing witness evidence. Late in the hearing, after the claimant had had ample opportunity to share any evidence, the claimant also stated he had photographs taken from within a building site at which he worked for the respondent. Balancing the interests of the parties and taking into account the overriding objective, I did not allow the recording or photographs into evidence but invited the claimant to tell us about them in his own witness evidence, which I took into account.
14. The hearing was listed for two hours commencing at 10am. The parties agreed to continue the hearing past 12pm, concluding at 12.30pm. Given the time, I reserved judgment.

D. Fact-findings

15. The respondent is a small building company with fewer than ten employees.
16. In October 2021 the claimant called a number given in an advert on Facebook, seeking people to perform labouring work for the respondent company Fabicon Limited. He was put in touch with Mr Fabisiewicz who notified him of the address at which to attend. Telephone calls and conversations took place between the claimant and Mr Fabisiewicz in which it was agreed the claimant would perform labouring work on an ad hoc basis for Fabicon Limited, on such occasions and at such places as notified to the claimant from time to time.
17. The claimant and Mr Fabisiewicz agreed a day rate of pay as £70 per day based on an 8-hour day (giving an hourly rate of £8.75), plus a £5 per day allowance in respect of travel expenses. They agreed this would be paid as cash in hand in arrears on the Friday of any week worked. There was no written contract but an oral contract was in place between the parties. No term was agreed around notice or around deducting wages.
18. The claimant attended work at a site in Bradford on 20, 21 and 22 October 2021. He was then notified by Mr Fabisiewicz of another address in Leeds and attended work there on 25, 26, 27, 28, 29 October and 1, 2, 3, 4, 5, 8, 9, 10, 11, 12 November 2021. He was paid on 22 and 29 October, and 5 November, as agreed. He was not paid on 12 November 2021, in respect of his work done on 8, 9, 10, 11, 12 November 2021, nor thereafter.
19. When working, the claimant was required to provide his services personally to the company and was not permitted to send a substitute. He was under the direction and control of the company's employees – his direct supervisor was usually a man called Kuba. He used the company's materials and equipment. Once work had been offered to the claimant and he had accepted it, he and the company were mutually obliged to provide those services/that work. The claimant believed work would be provided every day but I find that Mr Fabisiewicz did not hold the same belief and accordingly that was not agreed. The claimant performed no other work for any third-party during the relevant period and was not set up as a self-employed service-provider.
20. On 12 November 2021, the claimant and Mr Fabisiewicz had a serious argument. The claimant asked for a contract and to be formally "registered" with the company, saying he would not work illegally. Mr Fabisiewicz was unhappy with this and declined to provide formal paperwork to the claimant. The parties agreed the arrangement between them was at an end. The claimant acknowledged this in a text message that

afternoon stating "I do not want to work for you" and asking to arrange a time to collect his payment.

21. Over the period 12 to 15 November 2021 various text messages and telephone calls took place between the claimant and Mr Fabisiewicz and the claimant's son and Mr Fabisiewicz, in which all parties acted inappropriately and with emotion. The claimant asked for his pay and Mr Fabisiewicz did not deny that this was owed to the claimant. Mr Fabisiewicz indicated he would meet the claimant but no meeting took place.
22. On 14 and 15 November 2021 the claimant indicated that he planned to, and did, turn up to work on Monday 15 November 2021. In evidence, the claimant contended that he was employed until 19 November and Mr Fabisiewicz stated that, if he was employed at all, that employment ended on 12 November 2021 in light of the breakdown in relationship on that date. On this point I prefer the evidence of Mr Fabisiewicz, as the claimant accepts there was a breakdown on 12 November 2021 and the text messages support the contention that the relationship ended on that date. I find that the relationship between the parties ended on 12 November 2021 with immediate effect.
23. Mr Fabisiewicz gave evidence putting forward a very different set of facts on behalf of the respondent, namely that the claimant had been engaged by him personally only, on one occasion only, to provide a valet service on his private car and that the relationship broke down over damage to the car and a failure to properly valet the car. The claimant maintained throughout that this was a lie and that he has never valeted anyone's car. I accept the evidence of the claimant over that of Mr Fabisiewicz for the following reasons:
 - a. The text messages in evidence do not support this version of events – although Mr Fabisiewicz explains the several dates mentioned as being attempts by the claimant to rectify poor car-cleaning work, I do not find this credible.
 - b. Although the claimant did not submit documentation, he claimed to have a recording with a site supervisor acknowledging his work done and photographs taken from within the site – based on his experience over the CVP hearing, I find that his failure to provide those to the Tribunal or respondent was based on a lack of understanding of the process and IT systems, rather than that they did not exist. He also claimed that there was a written record of him signing into site each day and submitting to temperature checks, which is not within his possession or control. I found this a credible background fact supporting the truth of the claimant's story.
 - c. Mr Fabisiewicz alleged both that the claimant smoked cannabis whilst working and that the claimant was drinking alcohol whilst in the hearing. Both of these allegations felt calculated to discredit the claimant's evidence. The claimant meanwhile was fact-based in giving evidence and did not seek to discredit the respondent, beyond stating that Mr Fabisiewicz's evidence was a lie.
 - d. The claimant's evidence around how he heard of the job, via Facebook, was given first and Mr Fabisiewicz then confirmed that he does advertise for people to do building work via Facebook.
24. Notwithstanding that I have accepted the evidence of the claimant over that of Mr Fabisiewicz as to the general narrative, I have examined each individual fact and allegation carefully in order to reach a view as to whether on the balance of probabilities it occurred and what it signified.

E. Law

25. The parties did not put forward any relevant law for consideration.

Unauthorised deductions from wages

26. The claimant's claim in respect of his wages falls to be considered under section 13 of the Employment Rights Act 1996, which states as follows:

27. "s.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..."

28. Wages are defined in s.27(1) of the Employment Rights Act 1996 as, "any sums payable to a worker in connection with his employment", but under s.27(2)(b) expressly excluding "any payment in respect of expenses incurred by the worker in carrying out his employment". This statutory exception is interpreted widely by case law and captures allowances which contain an element of profit for the worker, not just directly reimbursable expenses (*Barrie v Rochdale Metropolitan Borough Council* EAT 224/94).

Employment status

29. The protection afforded by s.13 of the Employment Rights Act 1996 is only available to "employees" and "workers". These terms are defined in s.230 of the Employment Rights Act 1996 as follows.

30. "s.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"...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..."
- 31. This test has been considered by many cases and no single factor is determinative. The principal test set out by the court in *Ready Mixed Concrete v Minister of Pensions* [1968] 2 QB 497 set out three key questions to determine whether an individual is an employee:
 - a. did the individual agree to provide their own work and skill in return for remuneration?
 - b. did the individual agree expressly or impliedly to be subject to a sufficient degree of control for the relationship to be one of employer and employee?
 - c. were the other provisions of the contract consistent with its being a contract of service (i.e. employment)?
- 32. This test has been further developed over many years and most recently by the Supreme Court in *Uber and others v Aslam and others* [2021] UKSC 5. The Supreme Court highlighted that the employment status of a claimant is a question of statutory interpretation, rather than contractual interpretation.
- 33. The factors to consider include, in particular, the "irreducible minimum" of:
 - a. personal service – whether the individual was required to perform the services or whether they could provide a substitute. If the claimant has an unfettered right to substitute someone else to perform the services, the necessary element of personal service will not be met and the claimant will not satisfy the definition of employee or worker; however, a limited right of substitution will not prevent someone from being a worker (*Pimlico Plumbers Ltd v Smith* [2018] ICR 1511).
 - b. control – the degree of control exercised by the potential employer over the individual; and
 - c. and mutuality of obligation – whether there was an obligation on the potential employer to provide work to the individual and an obligation on the individual to perform that work.
- 34. Thereafter, other factors are relevant including whether the claimant undertakes outside activities, the extent of integration into the business, pay structure and extent of control of financial risk/reward, use of company equipment, length of engagement, tax, and the description given by the parties. I note that the Court of Appeal has warned that a 'checklist approach' must be avoided and that the Tribunal should consider the 'bigger picture' when determining these issues (*Hall (Inspector of Taxes) v Lorimer* [1994] ICR 218, CA).
- 35. The EAT noted in *Byrne Brothers (Formwork) Ltd v Baird and others* [2002] IRLR 1996 that the effect of the definition of "worker" is to lower the "pass mark", such that claimants who fail to satisfy the test of employee status may still qualify as workers.
- 36. In considering an unauthorised deductions claim, the Tribunal may construe a contract where necessary to decide if a sum is properly payable (*Agarwal v Cardiff University and another* [2018] EWCA Civ 2084). In the absence of a written contract the Tribunal must make findings as to the relevant terms of the contract.

37. In order for there to be a relationship of employee or worker and employer, there must be a contract. For there to be a contract, there must be offer and acceptance, consideration i.e. something of value exchanged between the parties, and the parties must intend to create legal relations. To determine the terms of a contract in the absence of written terms, the Tribunal must consider the intention of the parties at the time at which the contract was entered into, the conduct of the parties during the period for which the contract subsisted and any terms implied in to the contract by the courts or legislation.

Failure to provide written statement of employment particulars

38. The claimant's separate claim that the respondent failed to provide a written statement of employment particulars relates to his entitlements under s.1 etc of the Employment Rights Act 1996 which states, "Where a worker begins employment with an employer, the employer shall give to the worker a written statement of particulars of employment."
39. Where the claimant succeeds in an unauthorised deductions claim, the Tribunal has jurisdiction under s.38 of the Employment Act 2002 in respect of a failure to give a statement of employment particulars. If there has been such a failure, the Tribunal must award him two weeks' pay and "may, if it considers it just and equitable in all the circumstances, award" four weeks' pay instead.
40. A weeks' pay for these purposes is calculated in accordance with s.221 to 229 of the Employment Rights Act 1996, which require the calculation of normal remuneration. Normal remuneration for these purposes excludes expressly reimbursed expenses but includes a flat travel allowance provided as a perk of employment (*S&U Stores Limited v Wilkes* [1974] ICR 645). Where a worker is paid less than the applicable statutory minimum wage, the calculation of a week's pay is based on the pay the worker should have received (*Paggetti v Cobb* [2002] IRLR 861). For the purposes of calculating minimum wage, expenses or allowances are not taken into account (regulation 10 of the National Minimum Wage Regulations 2015).

F. Conclusions

41. Referring back to the issues as agreed by the parties, I set out here my conclusions.
42. The correct respondent is Fabicon Limited. The claimant agreed to provide services to that company not to Mr Fabisiewicz personally.
43. *Unauthorised deductions from wages*
44. *Was the claimant an employee or worker?* The claimant was engaged by Fabicon Limited as a zero-hours worker under an express oral contract for personal service. The claimant was not in business on his own account providing services to the respondent as his client or customer. As the claimant has worker status, he has the right to claim for unauthorised deductions from wages so whether or not he was an employee is not determinative. However, I doubt he was an employee as the required level of mutuality of obligation to provide and accept work was not sufficiently strong. The findings of fact supporting this conclusion are, in particular, those at paragraphs 16, 17 and 19.
45. *What terms were agreed between the parties?* I have made findings of fact as to the terms agreed between the parties, at paragraph 16, 17 and 19.
46. *Did the claimant agree in advance, in writing, to any deduction?* I have found that there was no written contract between the parties and as such no authorised

deduction.

47. *Did the respondent make an unauthorised deduction from the claimant's wages and if so, how much?* Taking all of the above into account, the claimant was engaged as a worker between 20 October 2021 and 12 November 2021 when his engagement ended immediately without notice. On the claimant's termination date of 12 November 2021 he was owed wages for 8, 9, 10, 11 and 12 November 2021. Accordingly, the respondent made an unauthorised deduction from the claimant's wages equating to five days' pay in the sum of £70 per day. No breach of contract claim was brought in respect of failure to give notice or failure to pay expenses and these items do not amount to an unauthorised deduction from wages. The payment of £5 per day in respect of expenses does not fall within the definition of "wages" for these purposes.

48. *Failure to provide employment particulars*

49. I have found that there was no written contract between the parties. As such, the respondent failed to provide employment particulars to the claimant. I have considered whether it is unjust and inequitable to award two weeks' pay and whether it would be just and equitable to award four weeks' pay. I have decided to award two weeks' pay, given the short length of the parties' relationship and small size of the respondent entity.

50. The respondent does not receive credit for the £5 per day allowance in respect of travel expenses for the purpose of calculating whether the national living wage rate was met. However, the £5 per day does fall within the definition of a week's pay, so falls to be included in the calculation of remedy here.

51. Accordingly, a week's gross pay for the claimant is calculated as follows:

- a. £8.75 per hour rate adjusted to £8.91 per hour being the applicable national living wage rate at the time x 8 hours per day x 5 days = £356.40
- b. £5 travel allowance per day x 5 days = £25
- c. TOTAL £381.40

Employment Judge G Elliott

Date: 30 June 2022