



EMPLOYMENT TRIBUNALS

Claimant: Mr D Khan
Respondent: United Cargo Shipping Limited
Heard at: Birmingham
On: 14 January 2019
Before: Employment Judge Flood (sitting alone)

Representation

Claimant: In person
Respondent: Mr Howson (Consultant)

RESERVED JUDGMENT

The judgment of the Tribunal is that:

1. The respondent has made an unauthorised deduction from the claimant's wages and is ordered to pay the claimant the sum of **£6885**.
2. The above sum is to be paid gross and the claimant is to be responsible for the payment of any income tax and National Insurance Contributions thereon.

REASONS

The Complaints and preliminary matters

1. The claimant brought a complaint of unlawful deduction of wages under **section 23 of the Employment Rights Act 1996 ("ERA")**. He claimed the sum of £6885 unpaid wages by presentation of a complaint on 30 April 2018, having entered into early conciliation between 16 & 26 April and issued with an early conciliation form from ACAS on the latter date. The claimant also initially brought a complaint of unfair dismissal but this was rejected as he did not have

sufficient length of service.

2. The claimant's remaining complaint relates to an alleged failure to pay any wages for work done for the respondent between 4 September 2017 and 18 January 2018. The claimant alleges that this amounts to 918 hours of work, which at the minimum wage applicable at the relevant time of £7.50 per hour amounts to £6885.
3. The respondent submitted a response on 19 September 2018 (having been granted an extension of time in respect of late submission) and initially contended that the claimant did not work for the respondent at all, but was just on probation for 3 days and was not taken on as he did not provide the necessary proof of right to work. The respondent now admits that the claimant did carry out work for him but contends that claimant did not work as many hours as is claimed. The respondent disputes that 918 hours were worked but cannot say for certain how long the claimant did work. The respondent agrees that the relevant rate of pay in respect of hours worked was £7.50 per hour, which is the rate of the national minimum wage applicable at the time. The respondent also contends that Mr Choudhury paid the claimant in cash the sum of £3000, the first payment of £1000 being paid for September to November 2017; a second payment of £1000 being paid for November to December 2017 and a third payment of £1000 being paid to cover January's work. Mr Choudhury does not know when such payments were made. The claimant denies that any such payments were made.
4. The respondent also alleges that the claimant kept £3,500 of the respondent's money (cash taken from customers on the respondent's behalf when the respondent was away in Pakistan between 28 November 2017 and 7 January 2018) when he stopped working for the respondent. It was contended that this sum should therefore be deducted from any wages properly payable to the claimant. The claimant denies that he retained any money that belonged to the respondent. In any event, the respondent conceded at the hearing that there was no legal basis for any such offset to be made in respect of a complaint for unlawful deduction of wages contrary to section 13 and made under section 23 ERA.
5. It was also unclear what the employment status of the claimant was when he was carrying out work for the respondent. The claimant alleges he was employed by the respondent under a contract of employment. This is denied by the respondent but it is conceded that the respondent does amount to a worker as that term is defined under section 230 (3) (b) ERA. The issue of status therefore appears to only be relevant to the extent that section 38 of the **Employment Act 2002 ("EmpA")** is brought into play (see below).
6. The evidence and submissions having only been completed at 3.05 in the afternoon, I adjourned the hearing to consider the matter fully and for a reserved decision.

The Issues

7. Employment status issue

7.1. Was the claimant an “employee” of the respondent i.e. did he enter into or work under a contract of employment?

7.2. If not, the respondent accepts that the claimant was a “worker” of the respondent in any event i.e. either an employee or someone who undertakes to perform personally any work or services for another person whose status is not that of a client or customer or any profession or business carried on.

8. Unpaid Wages claim

8.1. What were the terms and conditions of the claimant with respect to hours and pay?

8.2. What work was performed by the claimant for the respondent and when was this performed?

8.3. What pay, if any, did the respondent pay to the claimant for any such work performed?

8.4. How much pay (if any) is outstanding to be paid to the claimant?

9. Section 38 EmpA issue

9.1. If the claimant was an employee, as he was not issued with a written statement of his terms and conditions of employment within 2 months of the commencement of his employment, how much (between 2 and four weeks pay) should the Tribunal increase any award to be made to the claimant?

9.2. Are there exceptional circumstances which would make an award or increase unjust or inequitable?

Findings of Fact

10. The claimant attended to give evidence and I have taken into account his oral evidence in answer to my questioning and cross examination by Mr Howson. Mr Choudhury also gave evidence on behalf of the respondent in response to examination in chief by Mr Howson, cross examination by the claimant and in answer to my questions. I have considered the ET1 and the ET3 together with the bundle of documents produced by the claimant and the respondent (“Bundle”). I make the following findings of fact:

10.1. The respondent is in business as a cargo shipping and courier services provider. Mr Choudhury is the sole shareholder and director of the respondent company and has owned it since 2016. The customer base of the respondent is predominantly (but not exclusively) Pakistani nationals living in the UK who wish to ship items to Pakistan and worldwide. The

respondent mostly deals in cash payments received from its customers but some customers also make online payments. The respondent is a small company and most of the work has historically been done by Mr Choudhury himself, although he does sometimes pay for people to help him.

10.2. The claimant met Mr Choudhury in September 2017 after he moved close to the claimant's home. The claimant alleges that Mr Choudhury asked him if he would like to work in his business and Mr Choudhury alleges that the claimant came to him seeking work. In any event, the parties agreed that the claimant would work for the respondent in some capacity and he started work on Monday 4 September 2017.

10.3. It is in dispute what was agreed about the terms and conditions. Nothing in writing was ever recorded or issued to the claimant from the respondent. The claimant states that he was offered £50 a day to work for the respondent and that Mr Choudhury told him that if he worked more hours he could earn more. He contends that hours of work were agreed to be 8 hours a day on 5 days each week with the claimant having every Friday and Sunday off work. Mr Choudhury gave evidence that he informed the claimant that he could not employ him permanently (as he contended that the claimant could not produce originals of his immigration status paperwork). I accepted this evidence (which explained the initial denial by the respondent that it had employed the claimant at all). Mr Choudhury stated that the intention was that the claimant would work 3 days a week. I find that the parties agreed that the claimant would be engaged to work for the respondent for at least £50 a week depending on how much work was done and this would not be on the basis of "permanent employment" i.e on the official payroll of the respondent. The parties did not agree specifically what the hours of work would be at the outset but that the claimant understood that he would be working every day other than Friday and Sunday which is what he went on to do. I do not find any basis to accept that the claimant only agreed to work three days a week as appears to be contended by the respondent. The parties agree that the relevant rate of pay is £7.50 per hour being the national minimum wage applicable during the period.

10.4. For the first two days of work, the claimant was in the respondent's shop located in Perry Bar, Birmingham where he was involved in packing up, naming, addressing and weighing parcels to be shipped (mainly) to Pakistan by air and sea. For the next few days, he went with Mr Choudhury as he drove the van around collecting parcels from customers. He remembers going to Gloucester on the first day on the van, Wednesday 6 September. He then says the following week starting on 11 September 2017 he started carrying out this work unsupervised driving the van and working in the respondent's office. He would receive instructions from Mr Choudhury in person and also by Mr Choudhury sending him text and whatsapp messages instructing him where to go to collect various parcels. He worked very closely with Mr Choudhury during this period both in the respondent's shop but also driving the van and loading the container (see below).

10.5. The claimant was largely involved in collecting parcels from customers

(consisting of a variety of different items including clothes and electrical items). When an item was collected, a receipt was given to the customer describing the item and the cost and showing either a cash payment received or online payment made. This receipt was given to the customers and a carbon copy was taken and returned to the office. Examples of such receipts were shown at pages 87 and 88 of the Bundle. The claimant retained the cash collected and returned it to the respondent's shop or alternatively used the money to pay business costs or as instructed by the respondent paid cash into various bank accounts, including the respondent's business account. There was a log book tracking the monies coming in and out and showing a running cash balance. The entries made by the claimant in this book between 28 November 2017 and 6 December 2017 were shown at pages 100 and 101 of the Bundle. The claimant says that this is only an extract from the book and that there were further entries before and after these showing cash payments in and out. As at 7 December, the balance is showing as being £1520.

10.6. The items were then taken to the respondent's shop where they were packed, weighed and labelled and put into plastic bags (each holding 20kg) and then stored until there was sufficient items to send on a container to be shipped. The packages were then loaded into a container ready to be shipped to Pakistan. The claimant says he was also involved in packing the container along with the respondent and other casual workers who just came in to assist with loading. A log of all the items loaded on to each container was kept and the claimant showed me the records of how parcels for each contained were recorded on pages 24 to 32 of the Bundle. This log showed the parcel number, the date collected, a reference number, name of sender, name and address of intended recipient, how many parcels each was, the weight and the shipping agent used. A further schedule showing parcels loaded for shipping by Pakistan Air Cargo is shown at pages 38-40 Bundle. The claimant showed me photographs taken of him at work with Mr Choudhury and of the container being loaded (pages 83-86 Bundle). The claimant continued to carry out work when the claimant was in Pakistan from 28 November 2017 onwards and effectively ran the respondent's business in the UK under the instructions of Mr Choudhury in Pakistan during that period.

10.7. The key factual dispute to be resolved was how many hours the claimant worked for the respondent between 4 September 2017 and 18 January 2018. The claimant's evidence was that he recorded his hours each week and at pages 69-74 of the Bundle he says is the record of the hours he worked each day. He makes reference to what he was doing on various days above by pointing to the text message instructions he received from Mr Choudhury at pages 75-80 and also to documents at page 33 about a shipment of barrels to the Jamaica and page 34 about parcels in Wolverhampton.

10.8. Mr Choudhury contended that the claimant did not work as many hours as he is claiming. He was not able to be specific though about the hours he says were worked as no records were kept. He stated that he estimated that the claimant worked only 2-3 days each week in September 2017 on average each day working between 4 and 6 hours but sometimes 7 or 10

hours. He contended that the working pattern was similar in October and November but that when he went to Pakistan on 28 November onwards he was even less sure how much the claimant worked. He estimated that he opened the office for 3-4 hours each days

- 10.9. The claimant had another job which he carried out when he was not working for the respondent. He worked for Sentinel Group Security doing out of hours deliveries for River Island shops at the Bull Ring and Merry Hill shopping centres. He said he worked each Saturday morning from 3am and then again every Sunday starting at 10pm. He described being contracted to work two 10 hour shifts and receiving approximately £200 per week for this (his pay being £9.20 per hour). He was paid for 10 hours for each shift even though he did not always actually work for 10 hours. He said he would also work additional hours when he was asked to cover sickness and holiday absence and on these days would agreed with Mr Choudhury that he could leave his work with the respondent early.
- 10.10. Mr Howson asked me to prefer the evidence of Mr Choudhury on the hours worked by the claimant, recognising that there was a paucity of evidence produced by both parties. He submits that the contention that the claimant worked 8 hours a day, 5 days a week isn't borne out by the evidence supplied by the claimant. He suggests that the claimant was only working 2-3 days a week for between 4-7 hours a day at least until 28 November when Mr Choudhury went to Pakistan when he accepts that the hours probably did increase. I have considered this carefully but ultimately I prefer the claimant's evidence on this issue. He has produced a detailed account of the days he worked for the respondent, showing the dates clearly and noting where additional hours were worked on particular days. He was able to describe accurately what he was doing on particular days. The claimant was not strongly challenged on the contents of this schedule and the respondent was not able to produce any evidence at all on the detail of what the claimant was actually working other than an estimate as described by the evidence of Mr Choudhury.
- 10.11. I appreciate that the whatsapp messages that we looked at in detail do not show messages being sent and received on each of the days that the claimant worked. It is not clear though whether such phone records are complete and indeed what exactly they cover. I also accepted the claimant's evidence that as well as this method of receiving instructions, he also worked closely with Mr Choudhury and was told what was required verbally. On balance therefore I found the claimant to be a more credible witness than Mr Choudhury on the hours he worked. Accordingly my finding is that the claimant worked a total of 918 hours between 4 September 2017 and 16 January 2018.
- 10.12. The next dispute of fact to be resolved is whether Mr Choudhury on behalf of the respondent, paid the claimant three separate sums of £1000 in October, November and December as payment for work done or indeed made any other payments to the claimant for work done. The claimant's evidence was that when it came to the end of September, the claimant was expecting to be paid, but states that Mr Choudhury told him he could not pay him this month, but that he would sort it out next month. He said that

this happened again at the end of October when Mr Choudhury again stated that there was no money to pay him. The claimant said he asked about his pay many times in person but did not put this in writing or text or whatsapp message Mr Choudhury about this. The claimant said that before Mr Choudhury went to Pakistan, he told the claimant he would sort out arrears of pay on his return. It was suggested that this was unusual but I accepted the evidence of the claimant that throughout this period, he regarded the respondent as a friend and he came to his house to eat and socialize with him regularly in the evening. He is adamant that Mr Choudhury did not make any payments to him.

10.13. Mr Choudhury's version of events is very different. He accepts that he did not pay the claimant any money during September but his evidence was that he paid the claimant £1000 in cash in October to cover work done in September and the same pattern was followed in November when the claimant was paid £1000 for October's work and in December when he was paid £1000 for November's work. Mr Choudhury cannot remember when he paid these sums to the claimant but states that all the payments were made in cash. Mr Howson for the respondent pointed out that it would be highly unusual for someone to have gone a full 5 months without receiving any payment for work done and points to the lack of whatsapp messages or other written communications from the claimant to Mr Choudhury complaining about lack of payment. I also pushed the claimant during questioning as to how he was able to manage without receiving any pay at all for all the work he did.

10.14. Ultimately though, I preferred the evidence of the claimant on this point and find that the claimant was not paid three sums of £1000 by the respondent or Mr Choudhury nor was any other payment by way of wages for work done paid to him. Mr Choudhury's evidence was very vague on this matter. He was not able to produce any records to verify that such sums were paid. indeed he cannot even recall the dates on which he says he made the payments. In addition, he claims that he paid the claimant in cash in December, even though he was out of the country for the whole of December. Moreover paying the sum of £1000 for each month worked is inconsistent with his earlier suggestion that the claimant only worked 2-3 days each week. For those reasons I was not able to accept his evidence on this particular point. I also accepted the claimant's explanation that he regarded Mr Choudhury as a friend by this point, and was prepared to carry on working with the promise from Mr Choudhury that he would be paid in due course. He also had another job that enabled him to cover his basic living expenses.

10.15. Mr Choudhury returned from his trip to Pakistan on January 2018. The claimant states that he first saw Mr Choudhury again on 18 January and the Mr Choudhury was rude to him when he arrived for work and parked the van, complaining about the way he had parked. He then started to complain about problems in the business he said had taken place when he was away. Mr Choudhury accepts that there was an argument about the way the claimant had run his business. Mr Choudhury gave evidence that he had taken a number of calls from customers complaining about where their packages were and when he asked the customer for a receipt, he was

told that the claimant had not given the customer a receipt. He also suggested that the claimant had been giving out some receipts without the respondent's business name printed on it and that he may be trying to take business from the respondent to service the clients himself.

10.16. Mr Choudhury said that he had calculated that the claimant must have £3,500 in cash belonging to the respondent that had been collected whilst he was away. However no evidence was produced to show how this figure had been calculated and Mr Choudhury was not able to explain how the figure had been reached. It is not necessary for the purposes of the claim before me to determine whether the claimant retained in his possession the sum of £3,500 in cash belonging to the respondent as even if this is the case, there is no legal basis for any such amounts to be set off against wages owing. However I do find it highly unlikely that the claimant retained such a large sum of the respondent's cash. The claimant rightly points out that when he was asked to update the claimant on the balance held as at 7 December, he confirmed it was £1520. A number of payments were made by the claimant after this date on behalf of the respondent. A deposit of cash to the account of a travel agency in Bradford called Goldfly. He says he did this in the HSBC branch in the Jewellery Quarter in Birmingham. He also recalls paying for airbills for air shipping and shows examples of these at pages 44 and 45 and the respondent accepted that the claimant paid the sums of £382.50 and £357.50 on his behalf on 12 and 19 December 2017 respectively. It is also certainly the case as contended by the respondent that the claimant did collect money from customers during this period. However in the absence of any information at all in writing or by way of verbal evidence about how the respondent says it concludes that £3500 has been retained, I am unable to make any such finding of fact in any event.

10.17. The claimant stated that he again asked to be paid that day the respondent asked him to give him all the money he had received from customers first and once he had done this, the claimant would be paid what was owed to him. The claimant denies having any money belonging to the respondent at that time and stated that all monies received from customers had been accounted for during the period the respondent was away. The claimant asked the respondent to produce receipts for the sums collected by him which he was being alleged to have retained. An argument followed and the respondent told him to return his keys for the van and shop and the claimant did not work for the respondent after 18 January 2018.

The Law

11. Is the claimant an employee?

11.1. **Section 230 (1) ERA** an employee is defined as "an individual who has entered into or works under (or where the employment has ceased, worked under) a contract of employment". **Section 203 (2) ERA** defines a "contract of employment" as a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing".

11.2. The question of who is an employee must be decided after weighing

up all the relevant factors and applying a number of tests. The decision of *Ready-Mixed Concrete (South East) Limited v the Minister of Pensions and National Insurance [1968] 2 QB 497* determined that the key tests for the existence of a contract of service (the multiple tests) were that:

- 1.1.1 An agreement exists to provide the servant's own work or skill in the performance of service for the master ('personal service') in return for a wage or remuneration.
- 1.1.2 There is control of the servant by the master ('control').
- 1.1.3 The other provisions are consistent with a contract of service ('other factors').

12. Is the claimant a worker?

12.1. **Section 230 (3) ERA** defines a "worker" as

"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"

13. **Section 13 ERA** provides that a worker has the right not to suffer unauthorised deductions from their wages. The relevant sections are set out in full below:

"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.

14. **Section 23 ERA** provides a right for a worker to present a complaint to Employment Tribunal that their employer has made an unlawful deduction from their wages, contrary to **section 13**.
15. **Section 1 of the ERA** provides that where an employee begins employment *“the employer shall give to the employee a written statement of particulars of employment”* and that this *“shall be given not later than two months after the beginning of employment”*.
16. If an employer fails to provide such a statement, a complaint can be brought under **section 12 (3) of the ERA**. In addition under **section 38 of EmpA** if an Employment Tribunal makes a finding in favour of an employee in a number of specified claims (including for unfair dismissal and unlawful deduction of wages) and makes an award to the employee in respect of those claims, and in so doing finds that the employer was in breach of its **section 1 ERA** duty when the proceedings were begun *“the tribunal must...increase the award by the minimum amount [2 week’s pay] and may, if it considers it just and equitable in all the circumstances, increase the award by the higher amount [4 week’s pay] instead”*. This does not apply if there are *“exceptional circumstances which would make an award or increase.....unjust or inequitable”*.

Conclusion

17. I started by determining the basis for the relationship between the claimant and the respondent. It was not clear what the parties intended the status of the relationship to be, although the claimant contended he was employed by the respondent. The respondent did not accept that a contract of employment existed between the parties but conceded that the claimant was a worker. The only direct relevance of this issue to the claim relates to the failure to provide a statement of initial employment particulars. I have found (and it is not disputed) that the claimant never received anything in writing from the respondent in respect of his terms and conditions of employment at any time let alone within 2 months of his employment beginning. However the respondent contends that **section 38 of the EmpA** which provides that when the Employment Tribunal makes an award to the employee in respect of the claim to which the proceedings relate and when the proceedings begun the employer was in breach of their duty under **Section 1(1) or 4(4) of the ERA** the Tribunal must, subject to subsection (5) increase any award by two week’s pay and may, if it considers it just and equitable in all the circumstances, increase the award by four weeks pay) is not engaged unless the claimant is an employee.
18. Looking at **section 230 (1) of the ERA**, I have concluded that the claimant was not an employee of the respondent. There was an agreement in place between the claimant and the respondent to provide his own work or skill in the performance of service ('personal service'). It was also conceded that there was sufficient control of his activities by the respondent. Accordingly tests 1 and 2 for the existence of a contract of service as outlined in the **Ready Mixed**

Concrete case (see above) were satisfied. However the other provisions in place at this time are inconsistent with a contract of service. Following discussions about the claimant's ability to be permanently employed, it was agreed that the claimant would carry out work for the respondent on a less formal footing, rather than being placed on the permanent payroll (paragraph 9.3 above). There was nothing in writing and there was flexibility as to start and end times depending on what was agreed. Therefore test 3 of the **Ready Mixed Concrete** multiple tests approach is not satisfied and the claimant was not an employee of the respondent as defined in section **230 (1) ERA**. Accordingly, I accept the respondent's contention that **section 38 EA 2002** is not relevant (as it only applies to employees) and any award made will not be subject to an increase in respect of a failure to provide a statement of employment particulars.

19. The respondent concedes that the claimant was a worker of the respondent during the period 4 September 2017 and 16 January 2018. It is clear that as a worker he is able to present a complaint for unlawful deduction of wages under section 23 ERA. I identified at the outset the questions that needed to be answered, and I will deal with each in turn below:

20. What were the terms and conditions of the claimant with respect to hours and pay?

20.1. As per my findings of fact above (paragraph 10.3) the claimant was engaged to work for the respondent every day other than Friday and Sunday. The parties agree that the relevant rate of pay is £7.50 per hour being the national minimum wage applicable during the period.

21. What work was performed by the claimant for the respondent and when was this performed?

21.1. I have found above (paragraphs 10.7-10.11) that the claimant worked a total of 918 hours for the respondent between 4 September 2017 and 16 January 2018.

22. What pay, if any, did the respondent pay to the claimant for any such work performed?

22.1. I have found above (paragraphs 10.12-10.14) that the claimant was not paid by the respondent for the work he did between 4 September 2017 and 16 January 2018. I did not accept the respondent's contention that 3 separate payments of £1000 were paid to him. I could also not conclude whether any monies belonging to the respondent were retained by the claimant. Even if I had made such a finding of fact regarding such monies, there was no legal right to set any such sums off as in effect part payment of wages. If the respondent does have a basis for showing that the claimant has retained sums of money that he is not entitled to, there are likely to be other ways in which the respondent can take action to recover this money. However more than a mere assertion that he is owed this money is going to be necessary.

23. How much pay (if any) is outstanding to be paid to the claimant?

23.1. Having found that the claimant worked 918 hours for the respondent, then at the hourly rate of £7.50 per hour, the claimant is owed £6,885 by way of outstanding pay. As no sums were paid to the claimant by way of pay, then the full amount of £6,885 is outstanding.

Employment Judge Flood
25 January 2019