

# EMPLOYMENT TRIBUNALS



## Claimants

Ms. J. Davidson

## Respondents

- (1) Employment Solutions Limited
- (2) WYG Consultancy
- (3) SHLB Limited
- (4) Sapphire Accounting Services Limited
- (5) Matchtech Recruitment

Heard at: London Central

On: 20 February 2019

Before: Employment Judge Mason

## Representation

Claimant: In person.

1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents: no attendance or representation.

4<sup>th</sup> Respondent: Mr. A. Stevens, Operations Director.

5<sup>th</sup> Respondent: Mr. D. Howells, Counsel.

## RESERVED JUDGMENT

The judgment of the Tribunal is that:

1. The Claimant's employer at all relevant times was the 4<sup>th</sup> Respondent. The correct and only Respondent to this claim is therefore the 4<sup>th</sup> Respondent. All other named Respondents are dismissed from these proceedings.
2. The 4<sup>th</sup> Respondent did not make unlawful deductions from the Claimants' wages contrary to s13 Employment Rights Act 1996 or breach the Claimant's contract of employment and her claims are dismissed.

## REASONS

### Background and issues

1. In this case Ms. Davidson (“the Claimant”) claims unlawful deductions have been made from her wages. Having contacted ACAS, on 31 August 2018 she presented claims against the 5 Respondents:
  - 1<sup>st</sup> Respondent Employment Solutions Limited: “ESL”.
  - 2<sup>nd</sup> Respondent WYG Consultancy: “WYG.”
  - 3<sup>rd</sup> Respondent SHLB Limited: “SHLB”.
  - 4<sup>th</sup> Respondent Sapphire Accounting Services Limited: “Sapphire”.
  - 5<sup>th</sup> Respondent Matchtech Recruitment (now Gattaca Plc): “Matchtech”.
2. With the exception of Sapphire, all the Respondents deny that they were the Claimant’s employer. Sapphire accepts that it employed the Claimant from 13 July 2015 to 20 May 2018 but denies that any unlawful deductions were made from the Claimant’s wages and says she was paid everything due.
3. The issues to be determined by the Tribunal are as follows:
  - 3.1 Which of the Respondents was the Claimant’s employer?
  - 3.2 Did her employer breach her contract of employment and make unlawful deductions from her wages by failing to pay her at the correct hourly rate? The Claimant says she should have been paid £11.58 per hour; Sapphire says she was always paid the National Minimum Wage (NMW) which is in accordance with her Contract of Employment.

### Procedure at the Hearing

4. The Claimant appeared in person and was not represented or accompanied. There was no representation or appearance on behalf of ESL, WYG or SHLB. However, on 12 February 2019, Mr. Bygrave, Managing Director of ESL sent by email written representations to the Tribunal (copied to the Claimant and the other Respondents).
5. At the outset, Mr. Howell’s applied for Matchtech to be dismissed as a Respondent. I ran through with the Claimant a brief summary of her claim, in which Matchtech played no part, with the Claimant’s agreement Matchtech was dismissed as a Respondent. The Claimant accepts that the reference to Matchtech in a letter dated 8 July 2015 to her from ESL was an error [A36].
6. Mr. Stevens explained that SHLB Limited was a Sapphire group company and is now dissolved (June 2018).
7. Despite directions given by the Tribunal in August 2018 [A20] which included directions regarding exchange and copies of documents, a considerable amount of time was spent at the Tribunal hearing sorting out the documents. Sapphire provided a lever arch file with paginated documents [A1- D18] (“the Bundle”). Any reference in this Judgment to [x] refers to page [x] in the Bundle. Some documents were added to the Bundle:

- 7.1 The copy Contract of Employment in the Bundle was not the copy signed by the Claimant but a later revised version. Fortunately the Claimant had a copy of her original contract and I adjourned briefly to allow the Claimant time to take copies; this was then added to the Bundle (B1A-G).
- 7.2 I asked the Claimant if she had any other documents to add to the Bundle and stressed to her the importance of all documents being available from the outset; I then gave her time to go through her files. Having done so she confirmed to me that she had no other documents she wished to rely on.
- 7.3 I asked the Claimant to clarify how much she is seeking and she referred me to a schedule which was not in the Bundle. I asked the Claimant to provide me and Mr. Stevens with copies; I adjourned again to allow the Claimant to make copies. This was then added to the Bundle (E5-8).
- 7.4 I stressed again in no uncertain terms to the Claimant that all documents must be in the Bundle regardless of whether or not she had previously sent a document to the Tribunal or any of the Respondents. She confirmed to me again that all documents were now in the bundle.
- 7.5 Later in the proceedings, after conclusion of her own evidence she referred to various additional documents not in the Bundle, specifically payslips. I refused to allow these to be admitted in evidence having given her every opportunity to produce these beforehand.
8. Having finalised the Bundle, I then adjourned to read the documents and also the Claimant's witness statement.
9. I then heard from the Claimant and, on behalf of Sapphire, from Mr. Stevens, Operations Director. The Claimant adopted her witness statement as her evidence in chief and Mr. Stevens adopted his letter dated 30 November 2018 [A23-26] as his evidence in chief. Mr. Stevens cross-examined the Claimant and the Claimant cross-examined Mr. Stevens. The brevity of the cross-examinations is in keeping with the fact the issues largely concern legal construction of the Claimant's contract of employment.
10. The Claimant and Mr. Stevens made brief verbal submissions and I then reserved my decision which I now give with reasons.

### **Findings of fact**

11. Having considered all the evidence I make the following findings of fact having reminded myself that the standard of proof is the balance of probabilities. I have only considered documents in the Bundle which are cross-referred to in the Claimant's witness statement or which I was taken to at the Hearing.
12. Sapphire is an outsourced payroll, employment and accountancy business. Sapphire provides temporary workers with full employment status and associated benefits and agrees an hourly Assignment Rate with recruitment agencies (e.g. ESL) for the provision of an employee's services on an agency basis. The recruitment agent (e.g. ESL) then supplies the services of the worker to the end-user (e.g. WYG). Sapphire's

gross income is the Assignment Rate multiplied by the number of hours worked by the employee; Sapphire's margin is the sum remaining after deduction of employment costs including the employee's salary, National Insurance contributions, holiday pay and other benefits. Sapphire's margin varies depending on the Assignment Rate and the employment costs.

13. The Claimant has several years' experience of working in both the corporate and public sector, including junior financial roles. In July 2015, the Claimant successfully applied for a vacancy for a Junior Technician via ESL. On 6 July 2015 ESL introduced the Claimant to Sapphire. Sapphire then contracted with ESL for her services to be provided on an agency basis to the end-user, WYG.
14. On 7 July 2015 the Claimant signed a contract with Sapphire [B1A-G]. This Contract is headed "Sapphire Accounts Solutions Limited Employment Contract". The key relevant parts of this contract are as follows:
  - "1. **Definition of Legal Terms**
    - "1.1 *The "Agreement" means this Employment Contract.*
    - "1.3 *"The Client" means any third party other than a Customer for whom or at whose premises the Services are performed.*
    - "1.6 *The "Company" means Sapphire Accounts Solutions Limited ...."*
    - "1.7 *The "Employee" means the individual who has printed and signed their name at the bottom of this Employment Contract under Employee.*
    - "1.11 *"Remuneration" is the aggregate of any monies payable by the Company to the Employee in respect of the Employee performing the Services.*
    - "1.12 *The "Services" means those consulting services to be undertaken by the Employee as directed by the Client.*
    - "1.15 *Unless made in writing and signed by both parties, no modification, variation or amendment to the Agreement shall be considered to have come into effect.*
  - "3.1 **Job Title and Duties**
    - 3.1 *The Employee is employed by the Company ....*
    - 3.8 *This Agreement replaces any previous arrangements (verbal or otherwise) relating to the Employment Contract of the Employee by the Company".*
  - "5. **Remuneration**
    - 5.1 *The rate of remuneration will vary according to the rates agreed by the Company with Clients for whom you provide services. You will be notified in writing by the Company of the hourly rates applicable to a project as soon as reasonably practicable. Unless otherwise agreed this will be at a rate at least equivalent to the then current National Minimum Wage.*
    - 5.2 *The Employee shall keep a timesheet record of the hours spent performing the Services. The timesheet must show the number of hours the Employee has worked each day and be signed by both the Employee and the Client. The Employee must submit a copy of each timesheet to the Company. The Employee can only claim payments for hours worked that are supported by correctly completed and authorised timesheets. Original timesheets must be forwarded to the Customer.*
    - 5.3 *The Company will pay the Employee the current National Minimum Wage and Holiday Pay for correctly submitted and authorised timesheet hours or days only.*
    - 5.4 *The Company will reimburse to you all expenses reasonably and properly incurred in the proper performance of your duties ....*
    - 5.5 *The Company shall be entitled to make the necessary legal deductions from the Remuneration for both the Employee and the Company as required by UK and/or foreign tax and social security authorities."*

- “6. **Warranty**  
*The Employee warrants that he:*  
 6.1 *Has read and understood this Agreement; “*  
 “7. **Annual Leave**  
 7.1 *You are currently entitled to 28 days annual leave per year ... Holiday leave will be rolled up and will be paid in your weekly/monthly salary payments ...”*  
 “8. **Pension**  
 8.1 *The Company makes available a stakeholder pension arrangement for the Employee ....”*  
 “9. **Incapacity**  
 9.1 *The Company will pay the Employee for any absences due to sickness in accordance with his entitlement under the UK Statutory Sick Pay Scheme”*  
 “16. **Entire Agreement and No Variation**  
 16.1 *This agreement sets out the entire agreement between the parties with respect to the subject matter of this Agreement and supersedes all prior communications, representations, warranties, stipulations, undertakings and agreements whether oral or written between the parties and may not be varied except in writing as agreed between the parties. All other terms, express or implied by statute or otherwise are excluded to the fullest extent permitted by law.”*  
 “ **Jurisdiction**  
 “*The Employee acknowledges that they have received a copy of this Agreement and that they have read and understood the same and agree to be bound by all contractual terms contained in it”.*

15. On 8 July 2015, ESL wrote to the Claimant [A36]:

*“I hope you will enjoy working at Matchtech Group UK limited as a Junior Technician. Copies of both the Limited Company Contract and Assignment Schedule have been forwarded on to Sapphire Accounts Solutions Limited on your behalf. Your Pay Rates are as indicated:*

<i>HOURS:</i>	<i>PAY RATE</i>
<i>Standard Hours 37.5 Hours Monday-Friday</i>	<i>£11.58 per hour</i>

*Please report to David Scanlan  
 Timesheets must be completed weekly, authorised by your supervisor and returned to our office every Monday. Expense forms must be submitted directly to Sapphire Accounts Solutions Limited”*

I agree with Mr. Stevens (oral evidence) that this letter from ESL was “poorly worded”; I accept that Sapphire had no idea ELS had sent this letter to the Claimant until these proceedings.

16. On 8 July 2015, Sapphire entered into an agreement with ESL for provision of the Claimant’s services as an agency worker [C2-6]. This shows [C2] that the “Pay Rate” was £11.58 per hours. I accept that this was the Assignment Rate; it was not a reference to the Claimant’s rate of pay. I also accept that this Assignment Rate subsequently increased to £13.00 per hour on 20 November 2017.

17. On 13 July 2015, the Claimant started providing services to WYG. Her hours varied.

18. The Claimant was paid an hourly rate in accordance with National Minimum Wage:

18.1 There is one income statement for the Claimant in the Bundle [E1]; this is for the period ended 16 December 2016. It is in two sections.

(i) The top section shows as follows:

<i>“Company Income and Costs</i>	<i>£347.40</i>
<i>Allowance</i>	<i>£ 0.00</i>

Salary Deductions	(£ 15.41)
Company Margin	(£ 25.00)
Employer's NI	(£11.40)
<b>Net wage + Total Expenses</b>	<b>£259.59"</b>

- (ii) The bottom section is the Claimant's payslip for week 38 (23 December 2016) and shows:  
 Gross Pay: £311.00  
 Deductions: £15.41  
 Net Pay: £259.59
- 18.2 The Claimant worked 36.5 hours in week 38 2016 and was therefore paid at an hourly rate in excess of the NMW at that time (£7.20 per hour).
19. The Claimant queried her pay. There is evidence in the Bundle [D1A-B and D1-18] that she took this up with Sapphire, ELS and WYG in December 2017. Mr. Stevens wrote to the Claimant on 4 December 2017 [D1-2] to explain the difference between the Assignment Rate and the Claimant's hourly rate of pay and calculation of Sapphire's margin. On 8 December 2017, Mr Stevens offered as a gesture of goodwill to reduce Sapphire's margin to £7.50 per week [D6]; the Claimant refused this offer [D9] because she felt Sapphire had "obtained income" on her earnings.
20. In December 2017, the Claimant refused an offer of direct employment with ESL. After further communications in February 2018, Mr. Stevens made the decision in any event to reduce Sapphire's margin per time sheet to £7.50 [D10]
21. The Claimant then resigned on 3 May 2018. She contacted ACAS on 17 July 2018 and Early Conciliation Certificates were issued on 2 August 2018. She presented this claim on 31 August 2018.

## The Law

### Unlawful Deduction from Wages

22. Section 13 ERA 1996 gives workers the right not to suffer unauthorised deductions from their wages:
- "13 (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."*

23. Sections 23-26 ERA 1996 sets out provisions relating to complaints to employment tribunal the relevant parts of which are as follows:

“23(1) A worker may present a complaint to an employment tribunal —

(a) that his employer has made a deduction from his wages in contravention of section 13 ...”

“24(1) Where a tribunal finds such a complaint under section 23 well-founded, it shall make a declaration to that effect and order the employer –

(a) in the case of a complaint under section 23(1)(a), to pay to the worker the amount of the deduction made in contravention of section 13.”

24. Construction of the contract:

24.1 In accordance with the decision of the Court of Appeal in **Agarawal v Cardiff University [2018] EWCA Civ 2084**, employment tribunals have jurisdiction to resolve disputes about the construction of the employment contract when considering claims for unlawful deductions from wages under section 13 ERA.

24.2 If express terms are wholly in writing, then it is a matter of interpreting the document containing them unless it is alleged that the written agreement (i) mistakenly fails to reflect an earlier oral agreement or (ii) it has been replaced or revoked by a subsequent agreement.

### **Conclusions**

25. Applying the relevant law to my findings of fact to determine the issues, I have concluded as follows.

#### Identity of the Claimant’s employer

26. I have concluded that Sapphire was the Claimant’s employer for the following reasons:

26.1 It is clear from the Contract of Employment that this was the case.

26.2 The Claimant herself accepts in her claim form [A10] that she “*was employed by Sapphire Accounting Solutions ...*”

26.3 Where there is a clear agreement as to the identity of the employer, I see no requirement to look behind this.

#### Unlawful deductions from wages:

27. Sapphire did not make unlawful deductions from the Claimants’ wages. My reasons are as follows:

27.1 The Contract of Employment provides for a variable rate of remuneration subject to a rate at least equivalent to National Minimum Wage. The Claimant does not suggest that she was at any time paid less than the NMW and therefore payment was in accordance with the Contract of Employment.

27.2 I cannot conclude that the Contract of Employment mistakenly fails to reflect an earlier oral agreement or that it was replaced or revoked by a subsequent agreement. The letter from ESL is “poorly worded” and the Claimant’s confusion is understandable. However, I am satisfied that £11.58 was the Assignment Rate agreed (at that time) between Sapphire and ESL and not in fact the Claimant’s rate of pay.

27.3 In any event, the Claimant cannot rely on this letter as it was not an agreement entered into and signed by Sapphire/the Claimant and the Contract of Employment (which the Claimant signed) provides:

*“1.15 Unless made in writing and signed by both parties, no modification, variation or amendment to the Agreement shall be considered to have come into effect.”*

*3.8 This Agreement replaces any previous arrangements (verbal or otherwise) relating to the Employment Contract of the Employee by the Company”.*

*16.1 This agreement sets out the entire agreement between the parties with respect to the subject matter of this Agreement and supersedes all prior communications, representations, warranties, stipulations, undertakings and agreements whether oral or written between the parties and may not be varied except in writing as agreed between the parties. All other terms, express or implied by statute or otherwise are excluded to the fullest extent permitted by law.”*

27.4 By signing the Contract of Employment the Claimant warranted (clause 6.1 and Jurisdiction) that she had read and understood the Contract of Employment *and agreed to be bound by all contractual terms contained in it”.*

28. The Claimant’s claim therefore fails and is dismissed.

Signed by \_\_\_\_\_ on 21 February 2019

Employment Judge Mason

Judgment sent to Parties on

22 February 2019