



EMPLOYMENT TRIBUNALS

Claimant

Mr A Dunn

Respondent

Alpha Labour and Recruitment Ltd

Heard at: Sheffield

On: 8 March 2023

Before: Employment Judge Davies

Appearances

For the Claimant:

In person before leaving the hearing

For the Respondent:

Ms Weston (Senior Manager)

JUDGMENT

1. The Claimant's complaint of unauthorised deduction from wages against the Respondent is not well-founded and is dismissed.

REASONS

Introduction

1. This was a complaint of unauthorised deduction from wages brought by the Claimant, Mr A Dunn, against the Respondent, a recruitment business, Alpha Labour and Recruitment Ltd. In its amended response, ordered by EJ Cox on 12 October 2022, the Respondent said that the Mr Dunn's contract was with a different company, Pico Business Solutions Ltd. EJ Cox asked Mr Dunn if he wanted to amend his claim to add that company as another Respondent but he declined.
2. The complaint was originally listed for a CVP (online) hearing on 10 February 2023. However, I postponed that hearing when it became clear that Mr Dunn did not have a hard copy of the file of documents, and was proposing to conduct the hearing and access the documents on a mobile phone. I therefore listed a hearing in person at Sheffield Employment Tribunal today.
3. At the start of the hearing, Mr Dunn represented himself and the Respondent was represented by Ms Weston. Mr Dunn said that he had only just seen the hearing file because he had asked Ms Weston to send it to the Tribunal as he was unwilling to give her his address. He had only just collected it.
4. Mr Dunn then said that he wanted the hearing recorded. I tried to explain to him that Employment Tribunal proceedings are not recorded. He told me I was wrong. He knew that hearings were recorded because he had participated in

criminal and family law proceedings, which had been recorded. He insisted that this hearing must be recorded otherwise he would not participate. He wanted a transcript to protect himself and so that he could appeal. I tried to engage with him, but he was not willing to listen or discuss the situation reasonably. He said that he would walk out if the hearing was not recorded, and demanded more than once to know, "Yes or No?" whether it would be. I warned him that the hearing would carry on if he left. He left.

5. I decided to proceed with the hearing in Mr Dunn's absence. This was the second attempt at a hearing. Mr Dunn was not prepared to discuss the situation reasonably and walked out, having been warned that the hearing would go ahead in his absence. It was not consistent with the overriding objective to delay these proceedings any further. Mr Dunn's approach in both hearings before me has been to insist that he is right and that the Tribunal is unfair and biased towards him. But he has not been prepared to behave in a way that enables the Tribunal to listen to the evidence, hear the arguments, and make a decision about whether or not his complaint is indeed well-founded.
6. I had read the hearing file and the witness statements of Mr Dunn and Mr Collins before the hearing started. After Mr Dunn left and I decided to proceed, Mr Collins gave his evidence on oath. Ms Weston made submissions on the Respondent's behalf. I took into account all the material provided by Mr Dunn.

Issues

7. The Claimant's fundamental complaint is that he was charged £20 per week to receive his wages because the Respondent had no payroll. He says that this is in breach of national agreements made by the Thermal Insulation Contracting Industry with GMB and Unite the Union.
8. I explained to Mr Dunn at the original CVP hearing that the Tribunal can only decide claims that the law says it can decide. It cannot generally police the implementation of National Agreements and it cannot decide generally to investigate matters of concern. Legislation identifies complaints that can be brought to an Employment Tribunal and the Tribunal's legal powers are to determine such complaints.
9. In this case Mr Dunn can bring his complaint as a complaint about an unauthorised deduction from his wages. The Tribunal has power to decide such a complaint under the Employment Rights Act 1996. In accordance with the Employment Rights Act 1996, the issues for me to decide were as follows:
 - 9.1 Did Mr Dunn have a contract with the Respondent?
 - 9.2 If so, was Mr Dunn a worker employed by the Respondent?
 - 9.3 If so, did the Respondent make deductions from his wages for the administration of wages?
 - 9.4 On what dates were those deductions made and how much was deducted on each occasion?
 - 9.5 Were the deductions authorised by contract terms or a written agreement?
 - 9.6 Were the deductions prohibited by legislation or other legal provision?

Findings of fact

10. Based on the written documents, Mr Dunn's written statement and Mr Collins's written and oral evidence, I make the following findings of fact.
11. The Respondent is a recruitment agency, specialising in sourcing temporary labour in the construction and engineering sectors. It advertises vacancies on its website, social media and job platforms such as Indeed. Its consultants also contact people who have registered with the Respondent directly about suitable vacancies.
12. The Respondent says that it does not engage the services of individual workers directly. It uses an intermediary or umbrella company to register the individual contractually and deal with employment law, payments, tax and so on. This is common in the construction industry. The end-user will pay the agency (the Respondent in this case) for the work done by the individual. The agency takes a fee and pays the umbrella company for the individual's services. The umbrella company will deduct its own fee and any income tax and National Insurance, before paying the net sum to the worker. Workers can obtain engagements through different agencies, all of whom pay the umbrella company for the worker's services.
13. The Respondent has a contract with an umbrella company called Pico Business Solutions Ltd, trading as Red Ark ("Pico"). Under that contract Pico agrees to provide services in relation to individual workers referred to it by the Respondent and the Respondent agrees to pay for those services. The agreement records the understanding that the individual referred workers are not employees of the Respondent and that the individual referred workers are free to engage in services for any other third party.
14. Mr Collins said that he understood that Pico in fact had a further contract with a company called Biapix Ltd, which actually contracted with and paid Mr Dunn.
15. Mr Dunn first contacted the Respondent on 13 November 2020, in response to an advert on the Respondent's website. The advert was for Thermal Insulation Engineers/Laggers to work on a project in Manchester. It said the hours would be 8/9 per day for two weeks, and that the rate of pay was £19 per hour.
16. Mr Collins texted Mr Dunn and then they spoke by phone. Mr Collins followed up with a text providing the address, contact details and other requirements for the assignment. He confirmed the rate of pay was £19 per hour.
17. Mr Collins said that he spoke to Mr Dunn by phone. In his witness statement he said that was on 13 December 2020 but when I asked him about the date, he thought it was earlier, closer to when Mr Dunn started his first engagement. He said that he explained to Mr Dunn that his engagement and payment would be outsourced to Pico (known as Red Ark). He said that he explained to Mr Dunn that Red Ark would retain a weekly margin, prior to paying Mr Dunn. He told him that a representative from Pico would call him. I accepted his evidence. It was obviously not challenged, but the text messages and other written evidence

also support the position that Mr Dunn was aware of these arrangements and participated in them.

18. Mr Collins produced a printout said to record a conversation between Mr Dunn and Ryan at Pico on 17 November 2020, during which Mr Dunn was “registered as CIS” and confirmed his details. The note records, “margin – worker calling back with UTR number.” Mr Collins’s understanding was that Mr Dunn was told during that call that Pico would retain a “margin”, i.e. that it would deduct a payment from his wages before paying the remainder to him, and that that was what the reference to “margin” was in the notes.

19. Mr Collins said that a Key Information Document (“KID”) was also issued to Mr Dunn by Pico (on the Respondent’s behalf). I accept that it was. The KID says:

This document sets out key information about your relationship with us and the intermediary or umbrella company used in your engagement, including details about pay, holiday entitlement and other benefits.

For further information please contact Alpha Labour and Recruitment.

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20. After giving contact details for the Employment Agency Standards Inspectorate and ACAS, the KID sets out general information in a table. That table identifies the Respondent as the employment business and Pico as the intermediary or umbrella company. It says that Mr Dunn will be self-employed under a contract of services, and that a company called Biapix Ltd will be responsible for paying him.

21. The next section is headed “Intermediary or Umbrella Company Pay Information.” It says:

You are being paid through an intermediary or umbrella company: a third-party organisation that will calculate your tax and other deductions and then pay you for the work undertaken for the hirer. We will still be finding you assignments.

The money earned on your assignments will be transferred to the umbrella company as part of their income. They will then pay you your remittance. All the deductions made which affect your remittance are listed below. If you have any queries about these please contact us.

22. There is then a table that sets out the deductions that might be made. Those include tax and National Insurance under s 44 Income Tax (Earnings and Pensions) Act 2003. In the box for “any other deductions from umbrella income (to include amounts or how they are calculated)”, the entry is “Margin e.g. £5 per week.” There is an example calculation. It shows the deduction of a margin of £5 by the intermediary or umbrella company.

23. Mr Collins and the Claimant exchanged further text messages. In one message, Mr Dunn asked whether he was “PAYE or self-employed” so that he could register CIS if he was self-employed. Mr Collins replied to say “self-employed.” Mr Dunn confirmed that that was ok. A little later, Mr Dunn said that he had been offered overtime. He asked Mr Collins what the overtime rate was and whether he should “go umbrella or CIS”. Mr Collins told him that it was up to

him; if he had his UTR (Unique Taxpayer Reference) go CIS but if not go umbrella.

24. The references to CIS are to the Construction Industry Scheme, under which contractors in the construction industry deduct money from a sub-contractor's payments and pass it to HMRC by way of advance payments of the sub-contractor's tax and National Insurance.
25. I was provided with a copy of a written contract apparently entered between Mr Dunn and Biapix Ltd on 13 September 2021. It was not signed by Mr Dunn but in the absence of any evidence to the contrary, I accept that it was the contract between him and Biapix Ltd. Under the contract, Mr Dunn was identified as a sub-contractor providing services to Biapix Ltd. The contract specifies that there is no obligation on Biapix Ltd to offer Mr Dunn work and no obligation on Mr Dunn to accept work. The contract says that the fee for the services provided by Mr Dunn (which may be a fixed price, day rate or hourly rate) will be agreed between them from time to time, and that Biapix Ltd operates a self-billing system, under which it will provide Mr Dunn with periodic remittance advice. The contract requires Mr Dunn to keep accurate timesheets, have them signed and deliver them to the client or Biapix Ltd. The contract says that if Mr Dunn is subject to the CIS scheme, he must provide a UTR number. The contract itself contains no reference to the deduction of a margin by Biapix Ltd or anybody else.
26. Mr Dunn was placed in roles via the Respondent on the following dates at the following agreed rates of pay. Entries in italics are for periods after he presented his claim:

Start date	End date	Hourly pay rate
16 Nov 2020	24 Nov 2020	£19
11 Feb 2021	24 Feb 2021	£16.03
4 May 2021	16 May 2021	£16.03
17 May 2021	17 May 2021	£19
26 May 2021	2 Jun 2021	£18
21 Jun 2021	24 Jun 2021	£18
28 Jun 2021	2 Jul 2021	£23.43
15 Sep 2021	24 Sep 2021	£20
<i>17 Nov 2021</i>	<i>19 Nov 2021</i>	<i>£20</i>
<i>7 Dec 2021</i>	<i>10 Dec 2021</i>	<i>£20</i>
<i>24 Jan 2022</i>	<i>26 Jan 2022</i>	<i>£20</i>

27. Mr Dunn had to complete timesheets and get them signed by the client (the end hirer). The client returned them to the Respondent. The timesheets included a statement to "confirm that" Mr Dunn was under his own supervision, direction and control in the manner in which he provided his services. The Respondent would raise their invoice to the client and then pass the timesheets on to Pico, to enable Mr Dunn to be paid and to enable Pico to invoice the Respondent for the agreed rate x hours worked.
28. I saw an example of a "self-billed invoice" produced by Biapix Ltd. It showed sums received by Biapix Ltd (which totalled £386 for 16 hours' work at £20 per

hour and 2 days' travel at £33) and then sums paid to Mr Dunn (£366 less a 20% CIS deduction, giving a net payment of £292.80). While there was a £20 difference between the total of the sums received by Biapix Ltd and the total gross sum identified as payable to Mr Dunn, there was no explicit reference to the deduction of a margin of £20.

29. In the text messages included in the file of documents for the hearing, there were occasions when Mr Dunn told Mr Collins that he was not available for an assignment, or referred to having worked on other sites or projects that were not assignments of the Respondent. For example, he referred to working on a project near Blyth Services, to being "fixed up" for the next two weeks, and to doing 8 weeks' work at Drax power station. There was no reference in any of the text messages prior to March 2022 to any unhappiness from Mr Dunn about deductions being made from his pay by Pico or anybody else. There were occasional messages where he queried his hourly rate. On 23 June 2021 Mr Dunn referred to registering his own business from that date. In September 2021 Mr Dunn told Mr Collins that he wanted to swap his bank details and asked who to send them to. Mr Collins told him to give Red Ark a call.
30. Mr Dunn relies on the Thermal Insulation Contracting Industry National Agreement 2019-2021 ("TICA"). That is an agreement between the Thermal Insulation Contractors Association and the GMB and Unite the Union. The parties agree to rates of wages for relevant skilled operatives, along with a whole range of other terms and conditions. I did not hear any argument from Mr Dunn, but on the face of it those terms appear to me to apply to employees of relevant members of the association, rather than self-employed contractors. The agreement says on its front page that it is an agreement "as to working rules and conditions for Craftsmen, Craft Apprentices, Adult Trainees, Asbestos Removers and Labourers covered by this Agreement **who are employees of employers that are members of the association** ... and employed in the: THERMAL INSULATION CONTRACTING INDUSTRY." [my emphasis].

Legal principles

31. The first issue in this case is whether there was a contract between Mr Dunn and the Respondent. A contract is made when the parties reach an agreement, intending to create a legal relationship between them, for consideration. That means they must agree, they must intend this to be a legal relationship, and one of them must "pay" something of benefit to the other. The terms of the contract must be sufficiently clear for a court to be able to give them meaning.
32. There is detailed case law about whether individuals engaged under contracts to do work are employees, workers or self-employed. Given my conclusions on the first issue, I do not set those principles out here.

Application of the law to the facts

33. On the findings of fact above, I have concluded that there was no contract between Mr Dunn and the Respondent. This was a typical three (or four) way arrangement between end-user, employment agency and worker.

34. The Respondent had contracts with the end-users. They paid it a fee for sourcing workers for them. The Respondent also had a contract with Pico. The Respondent paid Pico a fee for providing employment services in relation to workers sourced by it and placed with end-users.
35. The Respondent did not have a contract with Mr Dunn. There was no agreement between them, entered into with the intention of creating legal relations, and supported by payment or other consideration. Mr Collins made clear to Mr Dunn when they spoke on the telephone that his engagement would be outsourced to Pico. Mr Dunn was provided with the KID, which clearly set out the roles of the different companies. It explained that the Respondent was an employment business, which would find assignments for the Claimant, and that there would be an intermediary or umbrella company that would calculate his tax and National Insurance and pay him for the work undertaken by the hirer. The KID identified Pico as that intermediary, but confirmed that Biapix Ltd would in fact be responsible for paying Mr Dunn. There was then a clear written contract between Biapix and Mr Dunn, consistent with those arrangements.
36. What happened in practice reflected the written arrangements. Mr Dunn completed his timesheets when he worked an assignment and had them signed by the end-user. The end-user passed them to the Respondent, so that the Respondent could bill the end-user. The Respondent then passed them to Pico, who in turn passed them to Biapix. Biapix raised "self-billed invoices" on Mr Dunn's behalf, dealt with his tax and National Insurance, and physically paid him for work done.
37. There was therefore no legally binding agreement between Mr Dunn and the Respondent. The Respondent simply identified possible work opportunities for Mr Dunn. It was not obliged to do so and he was not obliged to do anything for the Respondent. If Mr Dunn took up one of the opportunities, the Respondent was paid by the end-user and Mr Dunn was paid by Biapix Ltd. The Respondent did not pay Mr Dunn or provide any other consideration to him.
38. If there was no contract between Mr Dunn and the Respondent, Mr Dunn cannot have been an employee or worker of the Respondent's and his claim cannot succeed.
39. Mr Dunn was previously asked whether he wanted to join Biapix Ltd as a Respondent to this claim and he said that he did not. There is no claim against them. In view of the fact that I did not hear from Biapix Ltd (or Mr Dunn), I have concluded that it would not be appropriate to consider whether Mr Dunn was an employee or worker of Biapix Ltd or whether he was self-employed, as that is not necessary for the determination of this claim.

Employment Judge Davies
8 March 2023

Sent to the parties on:
10 March 2023

Case Number: 1801676/2022

For the Tribunal:

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