



EMPLOYMENT TRIBUNALS

Claimants: (1) Mr L Bailey
(2) Mr I Bainsal

Respondent: Capital Contractors Limited

Heard at: Central London Employment Tribunal
On: 3 March 2023

Before: Employment Judge Keogh

Representation

Claimants: In person

Respondent: Mr Daniel Jones

JUDGMENT

1. The claims brought by the first and second claimants are dismissed.

REASONS

1. A judgment was given orally in this matter and written reasons were requested by both claimants at the conclusion of the hearing.
2. The claims in this matter are for unlawful deductions from wages under section 13 Employment Rights Act 1996. Despite clear directions no bundle was prepared for the hearing. However each party sent various documents to the Tribunal. I heard evidence from both claimants and from Mr Daniel Jones for the respondent. I considered all the evidence before me in reaching a decision. Only the key points are referred to in this judgment.

Issues

3. The issues were discussed and agreed at a case management hearing before Employment Judge Bromige on 9 December 2022:

1. Employment status

1.1 Was the Claimant an employee of the Respondent within the meaning of section 230 of the Employment Rights Act 1996?

1.2 Was the Claimant a worker of the Respondent within the meaning of section 230 of the Employment Rights Act 1996? (in reality, given the substantive claim only requires the Claimants to have been workers at the material time, the Tribunal may only have to determine worker, rather than employee, status).

2. Unauthorised deductions

2.1 Were the wages paid to each Claimant in March 2022 less than the wages he should have been paid?

2.2 Was any deduction required or authorised by statute?

2.3 Was any deduction required or authorised by a written term of the contract?

2.4 Did the Claimant have a copy of the contract or written notice of the contract term before the deduction was made?

2.5 Did the Claimant agree in writing to the deduction before it was made?

3.6 How much is the Claimant owed?

Law

4. Section 13 Employment Rights Act 1996 provides:

(1) An employer shall not make a deduction from wages of a worker employed by him unless—

(a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or

(b) the worker has previously signified in writing his agreement or consent to the making of the deduction.

(2) In this section “relevant provision”, in relation to a worker's contract, means a provision of the contract comprised—

(a) in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or

(b) in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.

(3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as

a deduction made by the employer from the worker's wages on that occasion.

5. 'Worker' is defined in section 230 as follows:

(2) In this Act "worker" (except in the phrases "shop worker" and "betting worker") means an individual who has entered into or works under (or, where the employment has ceased, worked under)—

(a) a contract of employment, or

(b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual;

and any reference to a worker's contract shall be construed accordingly.

Findings and conclusions

6. Mr Bailey undertook 4½ days work between 8 March 2022 and 15 March 2022 and claims a day rate of £200, a total of £900, subject to a 20% deduction for Construction Industry Scheme (CIS) tax.

7. Mr Bainsal undertook 5 days work between 9 March 2022 and 15 March 2022 and claims a day rate of £200, a total of £1,000, subject to a 20% deduction for CIS tax.

8. The respondent does not dispute the amounts claimed. It says that it did not pay the claimants because of poor work done, which required them to hire other contractors to rectify the work at a cost to them. There is no counter claim made in this matter for that cost (nor would the Tribunal have jurisdiction to hear such a counter claim).

9. Arrangements for the work to be done were originally made between Mr Bainsal and Mr Large, who is Mr Jones' business partner. There were discussions about price work but it was agreed that there would be a daily rate in the first instance. Mr Bainsal said in evidence that he thought they were going to work on a price work basis and the day rate was going to be for a week or two. When the claimants turned up to work a day rate was agreed. It was an option that they could go onto price work after a couple of weeks or a month. Mr Bailey does not appear to have taken part in discussions about price work, but was simply told about the day rate when he attended for induction. Mr Jones said that it was intended to offer a day rate initially for the claimants to get their heads around the rooms, then it would have been price work. I find that what Mr Bainsal and Mr Jones have said indicates that the day rate offered was intended to be temporary and there would, had the claimants stayed, have been price work offered within a short period of weeks.

10. I accept Mr Jones' evidence that from his point of view all contractors on site were self-employed. There was no obligation on the claimants to accept work and no obligation on the respondents to offer it. If the claimants did not attend work there was nothing he could do about it. It is not in dispute that Mr Bailey did not attend work one day and makes no claim for that day.
11. Both claimants were registered under the government's CIS scheme. Under that scheme contractors deduct money from a subcontractor's payments and pass it to HMRC. These deductions count towards the subcontractor's tax and national insurance. If subcontractors are registered with the scheme tax is deducted at 20%. The scheme applies to subcontractors who are sole traders, owners of a limited company, or partners in a partnership or trust.
12. Mr Bailey gave unclear evidence as to his status at the time the work was done. Although registered under the CIS scheme his evidence was that he did not think he was a sole trader. He was somewhat evasive when asked about his tax arrangements. He said he paid his national insurance and gave receipts to his accountant. When asked if he submitted a self-employed tax return he said he did not submit a self-employed tax return for this type of work. When asked how his tax would be paid, he said his employer would take it out of his wage. He did however submit an invoice to the respondent which refers to a 20% deduction for CIS tax. Mr Bainsal accepted in evidence that he was working as a sole trader.
13. There was a dispute between the parties as to whether damage was caused by the claimants and if so, what. I have not found it necessary to resolve that dispute. Mr Jones accepted that there was no discussion prior to work commencing about deductions which might be made to pay as a result of damage caused.
14. The first question to answer is whether the claimants were workers of the respondent within the meaning of section 230 Employment Rights Act 1996. Neither claimant contends that there was a contract of employment in place. I have therefore considered whether the claimants fall under section 230(3)(b). I find that they do not. Firstly, there was an option for price work which strongly indicates that the claimants were independent contractors operating their own individual businesses. Secondly, both were registered under the CIS scheme and both accept that their pay should be subject to a 20% deduction for CIS tax. That indicates that both were sole traders. Being self-employed does not necessarily mean that the claimants are not workers. However if they are undertaking a profession or business and the respondent was a client or customer of that business then they fall outside the scope of section 230(3)(b). This is a classic case of a main contractor hiring independent subcontractors. I find the respondent was a client of the individual businesses operated by the claimants and they therefore fall outside of the definition of 'worker'. In the circumstances both claims must fail and the claims are dismissed.

Employment Judge Keogh

Date 3 March 2023

JUDGMENT & REASONS SENT TO THE PARTIES ON

06/03/2023

FOR THE TRIBUNAL OFFICE