



EMPLOYMENT TRIBUNALS

Claimant: Mr Muaadh Khan

Respondent: Rail Power & Construction Limited

Heard at: Manchester ET (by CVP)

On: 14 February 2023

Before: Employment Judge Poynton (sitting alone)

Representation:

Claimant: In person

Respondent: Ms Louise Hendry (Training Manager & Compliance)

RESERVED JUDGMENT

1. The respondent is granted an extension of time in respect of their response to the claim.
2. The claimant's claim for unpaid wages is well-founded and succeeds in part, to the extent that it relates to 14 July 2022. The respondent made an unauthorised deduction from wages by failing to pay the claimant for attending work on 14 July 2022 and is ordered to pay the claimant the sum of **£140**.
3. The claimant's claim for unpaid wages in relation to 11 July 2022, 13 July 2022, 24 September 2022, 25 September 2022, 26 September 2022 and 28 September 2022 is not well founded and is dismissed.
4. This is a gross payment and the respondent is to deduct income tax and national insurance contributions properly payable in respect of such sum before making payment to the claimant and is to pay over such sums deducted to the appropriate authorities.

REASONS

Introduction

1. The claimant works in the rail industry as a site warden.
2. Sentinel is the rail industry's authority to work system that enables people to work safely on the rail infrastructure. Sentinel is owned and run by Network Rail, for the industry, and is supported by the Sentinel Scheme Rules. The Sentinel Scheme Rules apply to everyone who uses Sentinel and outline responsibilities and policies that must be adhered to. The Rules apply to all organisations undertaking the role of sponsor and to all individuals holding a valid Sentinel smartcard. Individuals register with a sponsoring organisation in order to source work. Sponsored operatives are required to wear the sponsoring company's branded protective clothing for identification purposes when working on the rail infrastructure network in accordance with the Sentinel Scheme Rules.
3. The respondent is a business which supplies the rail industry with services and labour. The respondent is a sponsoring organisation for the purposes of the Sentinel Scheme Rules.
4. The claimant brings a complaint of unlawful deductions from wages in relation to the respondent's failure to pay him monies owed for work carried out on 11 July 2022, 13 July 2022, 14 July 2022, 24 September 2022, 25 September 2022, 26 September 2022 and 28 September 2022.

Preliminary issues

Respondent's application for an extension of time

5. At the outset of the hearing, I heard submissions from both parties in relation to the respondent's application for an extension of time for submitting their response to the claimant's claim. The respondent asked me to consider that their response to the claimant's claim was sent to the Tribunal on 6 January 2023 and that the deadline was 3 January 2023. The respondent asked me to take into account that the person responsible for filing the response was off sick for three weeks and there was nobody else who could pick up this matter in their absence. The claimant confirmed that he had no objection to the extension being granted. On the material before me today, I granted the respondent an extension up to 6 January 2023 so that its substantive position could be put forward at today's hearing.

Late evidence

6. The claimant provided some additional evidence provided during the hearing which comprised:
 - a. A statement prepared by the claimant;
 - b. A number of screenshots from the claimant's phone;

- c. A screenshot of the claimant's Sentinel Card.
7. It was agreed that these documents were relevant to the issues before the Tribunal and were therefore accepted as late evidence.

Issues for the Tribunal to decide

8. Having dealt with the preliminary matters, the issues for me to decide were as follows:

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 an employee of the respondent within the meaning of section 83 of the Equality Act 2010?
- 1.3 Was the claimant a worker of the respondent within the meaning of section 230 of the Employment Rights Act 1996?

2. Unauthorised deductions

- 2.1 Did the respondent make unauthorised deductions from the claimant's wages and if so how much was deducted?
- 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?
- 2.6 How much is the claimant owed?

Procedure, documents and evidence heard

9. The claimant was a litigant in person. The respondent was represented by Ms Louise Hendry, Training Manager and Compliance. I heard evidence from the claimant on his own behalf. I heard evidence from Ms Hendry and Mr Dean Gray, Director on behalf of the respondent.

10. There was no bundle of documents provided to the Tribunal before the hearing and no witness statements. I had the claimant's ET1 claim form, the respondent's ET3 response to the claim. The respondent's response to the claim included a number of documents in support of their position. The claimant provided a number of items as late evidence during the hearing (see paragraph 6).

Findings of fact

11. It is not the Tribunal's purpose to resolve each and every last dispute of fact between the parties. My function is to make such findings of fact as are necessary to answer the issues in the claim and to put them in their proper context. On that basis, and on the balance of probabilities, I make the following findings of fact.

Employment status

12. The claimant works in the rail industry and works as a site warden, which is a safety critical role.
13. The claimant was registered with the respondent as Primary Sponsor for the period encompassing the July dates for which he claims unpaid wages. The claimant was de-sponsored with the respondent in August 2022 and was then registered with a company called OnPoint TRAC as Primary Sponsor for the period encompassing the September dates for which he claims unpaid wages.
14. Those companies which wish to make use of the claimant's services send a request to the Primary Sponsor. The role of the Primary Sponsor is, in part, to ensure that safe working hours are not being exceeded and to be a single point of oversight about the hours worked by the claimant. They are the organisation that is accountable for the claimant's continued competence and fitness for work, through a contract of sponsorship. A sub-sponsor is a company that, with the permission of the Primary Sponsor, can use an individual to work on their behalf. An individual can have up to two sub-sponsors as well as their Primary Sponsor.
15. The claimant could therefore obtain work through either his Primary Sponsor or one of his sub-sponsors. The claimant was able to negotiate his rate of pay for each individual job. The claimant advised that this was around £140 per day.
16. Sponsored operatives are required to wear the sponsoring company's branded protective clothing for identification purposes when working on the rail infrastructure network in accordance with the Sentinel Scheme Rules.
17. The respondent supplies the rail industry with services and labour. The respondent acts as both a primary sponsor and as a sub-sponsor in order to supply various clients with services and labour.
18. There was no written agreement produced to the Tribunal which governed the relationship between the claimant and the respondent. The claimant submitted

an application to the respondent in December 2020 although he did not recall the exact date.

19. When the claimant's services were requested by a Primary Sponsor or sub-sponsor, it was open to the claimant to refuse the work offered. The Primary Sponsor could decline work offered by a sub-sponsor in the event that the claimant had exceeded safe hours of work. There was no obligation for the respondent to offer work to the claimant. The claimant did not need to seek permission to take holiday or time off, he was able to simply decline work when he wanted to take time off.
20. Where a sub-sponsor requests the claimant's services, the sub-sponsor is responsible for payment of the claimant's wages for that job. Where no sub-sponsor is involved, the Primary Sponsor is responsible for the claimant's wages for that job.

July dates

21. The claimant's primary sponsor for this period was the respondent.
22. The claimant's case is that he attended the Shrewsbury site on 11 July 2022, 13 July 2022 and 14 July 2022 but has not been paid by the respondent for attending. The claimant advised the Tribunal that he attended site on all three dates but that he only worked the full day on 14 July 2022.
23. The claimant says that it is common practice for people to work on the rail infrastructure network without swiping in and out. The respondent says that heavily regulated nature of the work means that this is not the case. The respondent states that the Sentinel system records a swipe in and out on each site which allows Primary Sponsors to monitor the hours worked in turn, enabling them to ensure people do not work in contravention of the Sentinel Scheme Rules.
24. Having considered the evidence from both parties, I find that on balance, the respondent's evidence is more plausible. The Sentinel Scheme is there to protect the safety of those working on the rail infrastructure and the swiping in and out allows Primary Sponsors to monitor and manage the working hours of individuals and the management of fatigue. I therefore find that the swipe in and out is an accurate record of whether the claimant worked on site on a given date.
25. The claimant states that he was not allowed on site on 11 July 2022 due to not having the protective equipment that was branded by the client who had secured his services, rather than the branded protective equipment of his sponsoring company. The claimant accepted in his oral evidence that he did not work on site that day. The claimant stated that he was told by Jack Gray to go home and that it "will get sorted". I did not find the claimant's explanation for him not going on site to be plausible. I accept the respondent's evidence that sponsored operatives are required to wear the sponsoring company's branded

protective clothing for identification purposes and that this is provided for in the Sentinel Scheme Rules.

26. The claimant also accepted in his oral evidence that he did not work on site on 13 July 2022. The claimant advised the Tribunal that he was only there briefly and could understand the respondent's perspective. I find that the claimant did not work on site on 13 July 2022.
27. The claimant provided the Tribunal with a screenshot of part of his Sentinel record which showed that he attended a safety briefing with George Allman on 14 July 2022.
28. The respondent's case is that the claimant did not attend on any of the dates mentioned and that as a result, they were not paid by their client, Vital Rail, for the supply of the claimant for the job. The respondent's evidence is that Vital Rail has refused to pay the respondent as the claimant did not attend for any of those shifts. The respondent provided an email dated 5 January 2023 from Network Rail which states that the claimant was signed on to one of their sites on 14 July 2022. The respondent also provided an email dated 3 January 2023 from Vital confirming that they had not issued any payment to the respondent for the shifts on 11 July 2022, 13 July 2022 and 14 July 2022. I find that the respondent has not paid the claimant for any of these dates.
29. Whilst I accept that the respondent's evidence that they have not been paid for the claimant's attendance on 11 July 2022, 13 July 2022 and 14 July 2022, I also accept the evidence presented by the respondent that Network Rail's records show that the claimant was signed into one of their sites on 14 July 2022. Having made the finding that the Sentinel swipe in and out is an accurate record of whether the claimant worked on site, it follows that the claimant worked at the Shrewsbury site on 14 July 2022.

September dates

30. The claimant accepted in his evidence that the respondent was not his Primary Sponsor for this period. The claimant's Primary Sponsor for this period was OnPoint TRAC and the respondent was the claimant's sub-sponsor for the job for which the claimant seeks unpaid wages.
31. The claimant's case is that he drove to Inverness for a job with DJ Civil that was scheduled for Saturday 24 September 2022 through to Wednesday 28 September 2022. The claimant stated that he took the job as he had always wanted to travel to Scotland. He advised the Tribunal that at the time, his wife was heavily pregnant and that the baby's movements were reduced. He stated that his wife had been booked in for delivery of the baby to be induced on 28 September 2022. The claimant stated that he informed Jack Gray at the respondent that he could only work until the Wednesday due to the booked induction. The claimant advised the Tribunal that it was a 9-hour drive from his home to Inverness. The claimant travelled to Inverness and checked into a hotel. The claimant's evidence was that he and his wife returned at the end of

the day on 28 September 2022 and went straight to the hospital for the scheduled induction, arriving at the hospital at around 1am or 2am.

32. The claimant's evidence was that when he arrived at the site at Inverness on 24 September 2022, he couldn't find anyone so contacted Andy Dove at the respondent and was told to "hang tight". The claimant says he waited in his car but nobody contacted him. The claimant produced a screenshot of a series of messages exchanged with Andy Dove on 24 September which support his oral evidence. I accept the claimant's evidence that he arrived at the site on 24 September 2022.
33. The claimant states that it was also the case on 25 September 2022, 26 September 2022 and 28 September 2022 that he turned up to site but that there was nobody there and that he spent the whole of those days in his car. The claimant did not produce any evidence of contact with the respondent on these dates.
34. The claimant accepted in his evidence that he did not work on site for any of the days for which he seeks unpaid wages. The claimant's position is that because he had to travel to site, he should be paid for those days. The claimant advised the Tribunal that it was common to turn up for site warden shifts and find out that he was not needed. When questioned about what happened in terms of payments for wages in this situation, the claimant could not confirm that he had been paid in similar situations. There was no evidence that payment had been made on previous occasions where the claimant had turned up to a site and found out that he was not needed. I find that the respondent had not previously made payments to the claimant for days where he had arrived at site to find out that he was not needed. There was no evidence of any contractual requirement that the claimant would be paid for shifts where he arrived and discovered that he was not needed. I therefore find that there is no obligation on the respondent to pay the claimant for attending at a site but not working due to no longer being required.
35. The respondent's case is that the claimant did not turn up for work on the Inverness site and that their contact at DJ Civil advised that nobody on site had seen or spoken with the claimant. The respondent was informed by DJ Civil that they had made alternative arrangements for the site warden role. The respondent's position is that they have not been paid by DJ Civil for the job as the claimant did not attend and that there is no requirement for them to pay the claimant for work he did not carry out.
36. I do not accept the claimant's evidence as plausible. I am not persuaded that the claimant would remain sat in his car on site for four days, when his wife was heavily pregnant and was booked in for an induction on 28 September 2022. I do not accept that it is plausible that the claimant would have left it until the end of the day on 28 September 2022 to drive a 9-hour journey to hospital for his wife to attend a scheduled induction. Whilst I have found that the claimant did arrive at site on 24 September 2022, I accept the respondent's evidence that the claimant did not work on site for those dates. The respondent's evidence is consistent with the claimant not having worked on site. They have not been

paid by their client and the Sentinel swipe system has no record of the claimant having been at this site on any of the dates that the claimant says he was there. Having previously found that the Sentinel swipe in and out is an accurate record of whether the claimant worked on site, it follows that the claimant did not work at the Inverness site on 24 September 2022, 25 September 2022, 26 September 2022 and 28 September 2022. The absence of a swipe in and out record for the dates in question is consistent with the respondent's case that the claimant did not work at the site on those dates.

Relevant Law

Employment status

37. Section 230 of the Employment Rights Act 1996 states:

- (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" (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;*

Unauthorised deduction from wages

38. Section 13(1) of the Employment Rights Act 1996 provides that an employer shall not make a deduction from wages of a worker employed by him unless 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 the worker has previously signified in writing their agreement or consent to the making of the deduction. A worker has a right to complain to an Employment Tribunal of an unlawful deduction from wages pursuant to section 23 of the Employment Rights Act 1996.

Conclusions

Employment status

39. The claimant can only claim unauthorised deductions from wages if he was an employee or worker. All employees are workers, but not all workers are employees.
40. The starting point for my consideration is whether there is a contract between the claimant and the respondent, express or implied. There was no express written contract between the claimant and the respondent produced to the Tribunal. In view of the findings I have made in relation to relationship between the claimant and the respondent, I have concluded that there was an implied contract between the claimant and the respondent to undertake work. The contract was underpinned by the sponsorship agreement and evidenced by the responsibility that the respondent had for ensuring that the claimant was fit to work on sites for their clients.
41. As I have concluded that the reality is that there was a contract between the claimant and the respondent, I then considered whether there was a contract of service. There was no mutuality of obligation which is a quintessential ingredient of a contract of service. The respondent was under no obligation to offer work to the claimant and the claimant was not obliged, if offered work, to undertake it. Absent mutuality of obligation there could be no contract of employment.
42. I then considered whether the claimant was a worker within the meaning of s230(2) of the Employment Rights Act 1996. I am required to consider whether the claimant was required to perform personally any work or services for another party.
43. I have little difficulty in concluding that the claimant was required to personally perform the work he was assigned to do. The Sentinel Scheme Rules, the sponsorship system, Network Rail oversight and supervision on site mean that the claimant could not have proposed someone else to work in his place. The respondent could only permit individuals it sponsored and were authorised to work to attend trackside.
44. The claimant was therefore required to provide personal service for the work he undertook and is therefore a worker for the purposes of section 230 of the Employment Rights Act 1996. As a worker, the claimant is entitled to pursue his claim for unauthorised deductions from wages.

Unauthorised deductions from wages - July

45. I have found that the Sentinel Scheme swipe in and out system provides an accurate record of whether an individual worked on site on a particular date. I have found that the claimant was on site on 14 July 2022 but was not on site on 11 July 2022 and 13 July 2022. The respondent accepts that they have not paid the claimant for any of those dates. I am therefore satisfied that the claimant has not been paid for the work undertaken on 14 July 2022. I conclude

that the claimant's claim for unpaid wages succeeds to the extent that it relates to 14 July 2022. The claimant's claim for unpaid wages in relation to 11 July 2022 and 13 July 2022 fails and is therefore dismissed. I accepted the claimant's evidence that he was paid around £140 per day and I therefore order the respondent to pay this amount to the claimant. The respondent will be entitled to deduct any tax and national insurance contributions due on this amount before payment to the claimant.

Unauthorised deductions from wages - September

46. The claimant accepted that he did not work on site on any of the dates for which he seeks unpaid wages. Whilst I have found that the claimant arrived at site on 24 September 2022, he did not swipe in or out on the Sentinel system. I have also found that there is no obligation on the respondent to pay the claimant for arriving at a site but not working.
47. Having made the findings I have in relation to the claimant not having swiped in at the Inverness site and that the Sentinel swipe system represents an accurate record of whether an individual worked on site, I conclude that the claimant's claim for unpaid wages for on 24 September 2022, 25 September 2022, 26 September 2022 and 28 September 2022 fails and is therefore dismissed.

Employment Judge Poynton

Date 12th March 2023

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

Date: 23rd March 2023

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FOR EMPLOYMENT TRIBUNALS



NOTICE

THE EMPLOYMENT TRIBUNALS (INTEREST) ORDER 1990

Tribunal case number:2409606/2022

Mr Muaadh Khan v Rail Power & Construction Limited

The Employment Tribunals (Interest) Order 1990 provides that sums of money payable as a result of a judgment of an Employment Tribunal (excluding sums representing costs or expenses), shall carry interest where the full amount is not paid within 14 days after the day that the document containing the tribunal's written judgment is recorded as having been sent to parties. That day is known as "*the relevant decision day*". The date from which interest starts to accrue is called "*the calculation day*" and is the day immediately following the relevant decision day.

The rate of interest payable is that specified in section 17 of the Judgments Act 1838 on the relevant decision day. This is known as "the stipulated rate of interest" and the rate applicable in your case is set out below.

The following information in respect of this case is provided by the Secretary of the Tribunals in accordance with the requirements of Article 12 of the Order:-

"the relevant decision day" is: 23 March 2023

"the calculation day" is: 24 March 1023

"the stipulated rate of interest" is: **8%**

Mr P Guilfoyle
For the Employment Tribunal Office

INTEREST ON TRIBUNAL AWARDS

GUIDANCE NOTE

1. This guidance note should be read in conjunction with the booklet, 'The Judgment' which can be found on our website at

www.gov.uk/government/collections/employment-tribunal-forms

If you do not have access to the internet, paper copies can be obtained by telephoning the tribunal office dealing with the claim.

2. The Employment Tribunals (Interest) Order 1990 provides for interest to be paid on employment tribunal awards (excluding sums representing costs or expenses) if they remain wholly or partly unpaid more than 14 days after the date on which the Tribunal's judgment is recorded as having been sent to the parties, which is known as "the relevant decision day".

3. The date from which interest starts to accrue is the day immediately following the relevant decision day and is called "the calculation day". The dates of both the relevant decision day and the calculation day that apply in your case are recorded on the Notice attached to the judgment. If you have received a judgment and subsequently request reasons (see 'The Judgment' booklet) the date of the relevant judgment day will remain unchanged.

4. "Interest" means simple interest accruing from day to day on such part of the sum of money awarded by the tribunal for the time being remaining unpaid. Interest does not accrue on deductions such as Tax and/or National Insurance Contributions that are to be paid to the appropriate authorities. Neither does interest accrue on any sums which the Secretary of State has claimed in a recoupment notice (see 'The Judgment' booklet).

5. Where the sum awarded is varied upon a review of the judgment by the Employment Tribunal or upon appeal to the Employment Appeal Tribunal or a higher appellate court, then interest will accrue in the same way (from "the calculation day"), but on the award as varied by the higher court and not on the sum originally awarded by the Tribunal.

6. 'The Judgment' booklet explains how employment tribunal awards are enforced. The interest element of an award is enforced in the same way.