



EMPLOYMENT TRIBUNALS

Claimant: Mr Peter Gates
Respondent: Ace Protection Services Limited
Heard at: East London Hearing Centre
On: 18 January 2021
Before: Employment Judge Barrett

Representation

Claimant: Mr James Roddy, Gowling Law
Respondent: Did not attend and was not represented

JUDGMENT

The judgment of the Tribunal is that: -

1. The Respondent made unauthorised deductions from wages by failing to pay the Claimant the full amount of wages due for the period from 13 January 2020 to 16 June 2020 and is ordered to pay to the Claimant the sum of £44,352 being the total gross sum deducted.
2. The Claimant's claim for holiday pay fails and is dismissed.

REASONS

This has been a remote hearing, which has not been objected to by the parties. The form of remote hearing was by telephone. A face-to-face hearing was not held, because it was not practicable, and all issues could be determined in a remote hearing.

Introduction

1. The Claimant is employed by the Respondent as a Trainee Close Protection Driver. The Respondent is a company set up to provide private security and protection

services, although it has not in fact commenced trading. Its Managing Director is Mr Mark Devlin.

2. The Claimant brings a claim for unauthorised deductions from wages and holiday pay relating to the period from the commencement of his employment on 13 January 2020 to the date he presented his ET1 on 16 June 2020.

The hearing

3. The telephone hearing was conducted in the absence of the Respondent.

4. Rule 47 provides:

'If a party fails to attend or to be represented at the hearing, the Tribunal may dismiss the claim or proceed with the hearing in the absence of that party. Before doing so, it shall consider any information which is available to it, after any enquiries that may be practicable, about the reasons for the party's absence.'

5. I had regard to the Court of Appeal case of *Roberts v Skelmersdale College* [2004] IRLR 69. Although it was decided under the old rules, there is sufficient similarity between the two rules that it remains good law. The following principles emerge (so far as they apply to new rule 47):

- 5.1. the rule confers a very wide discretion;
- 5.2. the rule does not impose on an employment tribunal a duty of its own motion to investigate the case before it;
- 5.3. the Tribunal has a discretion to require the party attending to give evidence, but no duty to do so;
- 5.4. before making a decision the Tribunal shall have regard to the information required under the rule.

6. In deciding to proceed in the Respondent's absence, I took into account the following information that was available:

- 6.1. The Respondent had not submitted an ET3. On 10 August 2020, Parry and Co, who are or were the Respondent's accountants and whose office is also the Respondent's registered address, wrote to the Tribunal. They confirmed that the Tribunal's correspondence had been sent to the Respondent's registered address but that the Respondent had not provided a forwarding address and had not seen the correspondence. On 20 October 2020, the Tribunal wrote to the parties confirming that the claim had been properly served and that the Tribunal would proceed to a hearing.
- 6.2. Mr Roddy, who represented the Claimant, informed me that he had forwarded all Tribunal correspondence to Mr Devlin of the Respondent. I saw documentary evidence in the bundle of this email correspondence. Mr Roddy sent Mr Devlin the Notice of Claim, ET1 and Particulars of Claim before the deadline for service of the ET3 expired. Mr Roddy also sent Mr Devlin the Notice of Hearing. Mr Devlin evidently received the documents because he replied to Mr Roddy's emails. In that

correspondence, Mr Devlin explained he was in difficult financial circumstances and that going to court would have a detrimental effect on his mental health.

- 6.3. On 17 January 2021 at 18.36, the day before the hearing, Mr Devlin emailed the Tribunal stating that he was the Director of the Respondent. He wrote, *"I've been notified late last week that I've been summoned to court over a payment dispute by peter against ace protection services."* He then detailed health problems he has been recently struggling with and stated, *"I believe Im meant to attend a phone call tomorrow at 10am of which I will not be able to attend as I have an asthma review at 9.50am"*. In relation to the substance of the claim itself, he stated, *"I understand peter's concern as we still remain friends but ace protection was let down by a verbal contract I was due to carry out with Peter which halted us actually doing any work at all. Ace protection services never traded one single day and me and peter never did one days work for ace protection services it never traded a single penny"*. He went on to describe the devastating financial and emotional impact this had on him.
- 6.4. The Tribunal clerk called Mr Devlin's mobile telephone several times on the morning of 18 January 2021 and the calls went straight to voicemail.
- 6.5. The Claimant wished to proceed with the hearing. He had prepared a witness statement and a bundle of relevant documents.

7. From the above information I concluded that the Respondent was aware of the hearing. Although Mr Devlin explained he had a medical appointment shortly prior to the hearing, he did not request that the hearing be adjourned. Neither did he answer the Tribunal's calls at approximately 10.15-30am, when his appointment might be expected to have ended. Mr Devlin did not suggest the Respondent had a defence to the claim which he sought to present at a hearing. To the contrary, it was apparent from his correspondence with the Tribunal and Mr Roddy that he found the prospect of a Tribunal hearing stressful and detrimental to his mental health. The Claimant was ready and wished to proceed. Through his representative, he had made all reasonable efforts to communicate with Mr Devlin in advance of the hearing.

8. In the circumstances, I determined that it would be in the interests of justice to proceed in the absence of the Respondent. The burden of proof lay with the Claimant, and therefore I considered it would be fair to require the Claimant to give evidence and to determine his claims on the merits according to the documentary and oral evidence provided.

9. The Claimant accordingly gave evidence on his own behalf. He referred to documentary evidence in the 69-page bundle presented to the Tribunal. Mr Roddy made a concise and helpful closing submission.

Postscript

10. Following the hearing, I was informed that Mr Devlin had returned the Tribunal's call and said he was in hospital. He did not object to the hearing having proceeded or ask for a postponement.

11. In the circumstances, my decision stands. However, should the Respondent wish to, it may apply for a reconsideration of the judgment under rules 70 and 71 of the

ET Rules, setting out reasons why a reconsideration is necessary. The test the Tribunal applies is whether reconsideration would be in the interests of justice. A copy of any medical evidence relied upon should be submitted with the application. The deadline for such an application is 14 days from the date these Reasons are sent to the parties. If for any reason an application is made after the deadline has expired, the reasons for delay should be explained.

Findings of fact

12. The Claimant met Mr Devlin through the course of his previous employment when he worked in retail and Mr Devlin was a frequent customer in his shop.

13. In late 2019, Mr Devlin told the Claimant that he intended to set up a company (namely, the Respondent) providing protection services to a high-net-worth client who intended to visit the UK from abroad. He offered the Claimant a job as a Trainee Close Protection Driver.

14. The Claimant had several conversations with Mr Devlin about the prospective job. Mr Devlin told him that he would be paid £42 per hour for 48 hours per week, over 4 twelve-hour shifts. In addition, if required to be on standby during the other three days per week there would be a further standby payment of £15 per hour, rising to the normal £42 per hour if called in to do overtime.

15. On 4 January 2020, the Claimant verbally agreed to take the job. He resigned from his previous employment in order to do so.

16. The Respondent was incorporated on 6 January 2020.

17. Mr Devlin commissioned an external professional to draft the Claimant's contract of employment. The Claimant spoke to that person to stipulate that he wanted the contract to include holiday and sick pay. He did not negotiate over the rate of pay, which was included in the contract on Mr Devlin's instructions and reflected the earlier conversations he had had with the Claimant.

18. On 8 January 2020 Mr Devlin wrote to the Claimant as follows:

"Re: Offer of Employment

Further to recent discussions, I am delighted to enclose your contract of employment as Trainee Close Protection Driver..."

19. The enclosed contract included the following terms:

"Commencement of Employment *Your fixed term of employment with the Company will be for 12 months, commencing on 13th January 2020 and renewable thereafter. No other period of previous employment with any former employer will count as part of your continuous period of employment with the Company.*

Probationary Period *All employees are required to complete a one month probationary period on commencement of employment to ensure their suitability for the job. We reserve the right to extend this period by a further three months at our absolute discretion should we require more time to make such a judgement.*

Job Title You will be employed by the Company as a **Trainee Close Protection Driver** By accepting our offer of employment, you agree to carry out all such duties as might reasonably be required to fulfil your job and further the goals of the Company. We reserve the right to vary your duties from time to time according to the needs of its business. We expect all of our employees to comply with all reasonable directions given by us and to carry out their work in a professional manner.

Hours of Work Your normal working hours will total 48 hours per week, worked over four (12 hour) shifts. If necessary you must be prepared to work such other hours or days as may be appropriate to meet the needs of the business, which may include being scheduled to undertake standby duties. Should you undertake standby duties, you will be entitled to receive additional pay in the form of an allowance as set out in the Standby Allowance section below. ...

Remuneration Details Your basic pay on commencement will be £42.00 per hour. Your salary will be payable in 12 instalments monthly on or around the last Friday of each month less any statutory and voluntary deductions, by direct bank transfer to your nominated bank account. If you are, for any reason, indebted to the Company for any amount however arising, you agree and authorise the Company to deduct that amount from your pay or from any other allowances, expenses or payments payable from the Company to you. You will be notified of any such deductions not less than seven days in advance of the date on which the deduction is to be made, unless this is not reasonably practicable. Your salary will be reviewed by the Company annually on or around 1st January and written notification of any salary increase will be given to you. You will not be eligible to participate in any salary review if you are serving out your notice. Any increase will take effect from the 1st of January. However, a salary review will not necessarily result in a salary increase.

Standby Allowance You will be entitled to receive additional remuneration in respect of being placed on standby and as agreed with your line manager. The current standby rate will be paid at £15.00 per hour. Standby will be offered on a rotational basis and must be pre-arranged and agreed with your manager. If no prior agreement made, any standby payments claimed will not be paid. These payments will also be subject to normal tax and NI deductions. ...

Annual Leave The Company's annual leave year runs from 1st January to 31st December. Full time employees are entitled to take 28 days leave per annum which includes the 8 paid public bank holidays. Annual leave for part-time employees will be pro-rated in line with hours worked and in reference to the Company's standard contractual hours for that location. Annual leave will be calculated on a pro-rata basis in the first year of employment. You will receive a certain number of days' annual leave entitlement for each month or part month worked. Fractions of days resulting from the calculation may, at the Company's discretion, be rounded up to the nearest half day. All employees are also entitled to take paid public holidays from their date of commencement. Public holiday entitlement will be calculated on a pro-rata basis for part-time employees. If you are required to work a public holiday you will be paid at the normal rate and you will be eligible for a day off in lieu in addition to your annual leave entitlement. Holidays may only be taken with the prior agreement of your line manager and due consideration will be given to the number of employees

requiring the same holiday period off. In these situations, it may be necessary to approve on a first come, first served basis to ensure business operational and continuity needs are met. You will be expected to follow the Procedures regarding Annual Leave as may be amended and published by the Company from time to time.”

20. The Claimant signed and returned a copy of the contract. The signed copy was not in the bundle, but I accept the Claimant’s evidence on this point. By doing so, he accepted the Respondent’s offer of employment. His employment commenced in accordance with the terms of the contract from 13 January 2020.

21. Unfortunately, the high-net-worth client decided not to utilise the Respondent’s services. As a result, Mr Devlin’s plans for building up the Respondent as a profitable business were scuppered.

22. The Claimant was not provided with any work by the Respondent and he was not paid.

23. During the period January to May 2020, the Respondent reassured the Claimant that he would be paid. This was initially on the basis that the high-net-worth client would arrive, and then on the basis that the high-net-worth client would pay compensation for their loss of earnings, out of which Mr Devlin could pay the Claimant. However, the Claimant has not received any pay to date.

24. The Claimant has not resigned or been dismissed. He remains employed by the Respondent.

25. The Claimant did not take any holiday during the period of his claim, namely 13 January to 16 June 2020. He did not request to take any holiday.

The law

Unauthorised deductions from wages

26. Section 13(1) of the Employment Rights Act 1996 (‘ERA’) provides that an employer shall not make a deduction from wages of a worker employed by them 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 his or her agreement or consent to the making of the deduction. An employee has a right to complain to an Employment Tribunal of an unlawful deduction from wages pursuant to Section 23 ERA.

Holiday pay

27. The Working Time Regulations 1998 (‘WTR’) provide for minimum periods of annual leave, amounting to 5.6 weeks leave per annum. Regulation 14 WTR provides for payment to be made in lieu of any leave accrued but not taken in the leave year in which the employment ends.

28. There will be an unauthorised deduction from wages if an employer fails to pay an employee on termination of employment in lieu of accrued but untaken leave for that year (and, in some circumstances, the preceding period).

Breach of contract

29. Under article 3 of the Employment Tribunals Extension of Jurisdiction Order 1994, the Tribunal only has jurisdiction to hear a breach of contract claim on the termination of an employee's employment.

Submissions

30. For the Claimant, it was submitted that there had been an unlawful deduction contrary to s.13 ERA and that the payments set out in the Claimant's ET1 had fallen due. It was noted that the Respondent had not contested the claim.

31. For the Respondent, Mr Devlin's email of 17 January 2021 stated that the Claimant did not do one day's work for the Respondent. However, he neither conceded nor disputed that the Claimant entered into a contract of employment under which he was entitled to wages and has not received them.

Conclusions

Unauthorised deductions

32. The Respondent made a contractual offer of employment by Mr Devlin's letter of 8 January 2020. The Claimant accepted the offer by returning a signed copy of the contract.

33. Under the contract, the Claimant was entitled to a gross salary of £2,016 per week (£42 per hour multiplied by 48 hours).

34. The Claimant was not paid any wages from the date his employment commenced on 13 January 2020 to the date he submitted his claim on 16 June 2020, a period of 22 weeks.

35. There was no lawful authorisation for this deduction from the Claimant's wages, either in statute, contract or by written consent.

36. I therefore conclude that the Respondent made unauthorised deductions of £44,352.00 in total in respect of wages due for the period 13 January 2020 to 16 June 2020 and order the Respondent to pay this amount to the Claimant.

37. The sum is calculated as follows: 22 weeks multiplied by £2,016 per week.

38. The Respondent will be entitled to deduct any tax and employee's national insurance contributions due on this amount before payment to the Claimant.

Holiday pay

39. The Claimant's employment is continuing and therefore the statutory entitlement to be paid for accrued and untaken holiday under regulation 14 WTR has not arisen.

40. Further, the Tribunal does not have jurisdiction to hear a claim for breach of contract relating to unpaid holiday pay as the Claimant's employment has not terminated.

41. The Claimant's claim for holiday pay therefore fails and is dismissed.

**Employment Judge Barrett
Date: 19 January 2021**