



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Azhar Hussain

v

Claymont Technologies Ltd

Heard at: Watford

On: 26 February 2021

Before: Employment Judge Shastri-Hurst

Appearances

For the Claimant: In person

For the Respondent: Mr Ul-Abideen (Director of R)

RESERVED JUDGMENT

1. The Claimant's claim of unauthorised deductions from wages under s13 of the **Employment Rights Act 1996** succeeds, in part.
2. The Claimant was entitled to be paid at the rate of £2,500 per month (gross) for the following periods:
 - 2.1. 1 February to 26 April 2019 = 12.2 weeks
 - 2.2. 18 June to 2 September 2019 = 11 weeks
3. The Respondent is ordered to pay to the Claimant the sum of £13,384.54.
4. The sum at paragraph 3 is awarded as a gross figure: any liability for tax and national insurance contributions will be the responsibility of the Claimant.

REASONS

1. The Claimant entered the ACAS Early Conciliation process on 11 February 2020, with that period concluding on 11 March 2020. Following this process, the Claimant presented a claim by ET1 dated 24 April 2020 detailing a claim for unauthorised deduction of wages.

2. In short, the Claimant says he should have been paid his monthly salary (agreed to be £2,500 gross) for a period from February 2019 to January 2020 (12 months); he was in fact paid nothing for that period of work. The Respondent says that the Claimant provided limited work during this period, and so is not owed any wages.
3. In order to assist me in my decision, I have a bundle of 114 pages: this bundle is not paginated, but I will refer to the page numbers of the pdf version of the bundle. In that bundle I have witness statements from the Claimant, as well as from Mr UI Abideen and Mr Ahmed for the Respondent. I heard evidence from all three of these individuals.
4. Mr Hussain represented himself, and Mr UI-Abideen represented the Respondent. As I said at the end of the hearing, I am grateful to them both for the way they had prepared for this hearing, and how they conducted themselves during the hearing. It is not an easy process to go through for those who are not legally trained, and both sides presented their respective cases to the best of their ability. Both Mr Hussain and Mr UI-Abideen gave helpful submissions.

PRELIMINARY ISSUE

5. As well as the three witnesses mentioned above, it transpired that two further individuals attended to give evidence on behalf of the Claimant; Mr Merazga and Mr Saeed. These individuals had not provided statements.
6. The Claimant explained that he had not understood that this was necessary, and apologised for his lack of understanding. I asked what relevant evidence the witnesses could provide to the Tribunal, and was told that they could both speak to whether the Claimant was at work during the period covered by this claim.
7. On that basis, I permitted them both to give oral evidence. This was done by me asking them a few open questions about their relationship with the Claimant, specifically during the period of 1 February 2019 to 27 January 2020. I then asked Mr Hussain whether he was content that they had covered the evidence he envisaged them giving, which he was. The two witnesses were then cross-examined by Mr UI-Abideen.
8. I considered this approach to these two witnesses was in line with the overriding objective at rule 2 of Schedule 1 of the **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013**. I particularly bore in mind the need to avoid unnecessary formality and to seek flexibility, as well as ensuring both parties were on an equal footing and were able to put all the evidence they wanted to put before the Tribunal. Nothing was said in their evidence that Mr UI-Abideen could not deal with in cross-examination. I was satisfied that this was a proportionate way forward.

ISSUES

9. At the commencement of the hearing, I went through the issues as I understood them to be with both parties. They agreed that I had summarised the relevant issues accurately. Those issues are as follows:
- 9.1 It is common ground that the Claimant was an employee during the relevant period and that the deductions he claims took place fall within the definition of “wages” in s27 **Employment Rights Act 1996**.
- 9.2 Has the Respondent made a deduction under s13(3) **Employment Rights Act 1996**? This question requires consideration of the following matters:
- 9.2.1 What wages were properly payable to the Claimant between the period of 1 February 2019 to the date of termination of his contract on 27 January 2020?
- 9.2.2 What were the terms of the Claimant’s contract?
- 9.2.3 What was the Claimant entitled to be paid under his contract of employment for the relevant period of the claim?
- 9.3 If there was a deduction, was it authorised?
- 9.4 If there was a deduction, was it an exempt deduction?
10. In fact, it seemed to me that the key factual issue was what work the Claimant had provided between 1 February 2019 and 27 January 2020. The Claimant’s case is that, barring the periods he was away in Pakistan, and when he was sick, he provided work as normal for the Respondent. The Respondent’s position is that the Claimant, when at work, was distracted and focusing on personal issues rather than working.

LAW

11. S27(1) **Employment Rights Act 1996** defines wages as:
- “any fee, bonus, commission, holiday pay or other emolument referable to his employment, whether payable under his contract or otherwise”.
12. The Claimant’s claim relates to his salary, which falls squarely within this section, and is not an excluded payment under s27(2) **Employment Rights Act 1996**.
13. S13(3) **Employment Rights Act 1996** provides as follows:
- “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."

14. The question of what is properly payable generally requires the Tribunal to determine what payment the worker is entitled to receive by way of wages. This is an issue to be decided in line with the approach of the civil courts in contractual actions – **Greg May (Carpet Fitters and Contractors) Ltd v Dring 1990 ICR 188, EAT.**
15. In other words, the Tribunal must decide, on ordinary contractual and common law principles, the total amount of wages that was properly payable to the worker at the relevant time.
16. In determining the terms of the contract in question, it is necessary to take into account all the relevant terms of the contract, including implied terms – **Camden Primary Care Trust v Atchoe 2007 EWCA Civ 714, CA.**

FINDINGS OF FACT

Commencement of the Respondent

17. I restrict my findings of fact to those necessary and relevant to the above list of issues. Where I have not mentioned a point in dispute between the parties, it is because that point cannot assist me in reaching conclusions on the issues.
18. The Claimant and Mr UI-Abideen have known each other for some years. In 2017, they set up the Respondent company. The Respondent was owned by Claymont Group Ltd, the shares of which were evenly split three ways, between the Claimant, Mr UI-Abideen, and MBU Capital.
19. The Claimant and Mr UI-Abideen were the two directors of the Respondent, as well as being employees.
20. The Respondent initially started trading on eBay in June 2018 – see p111. In August 2018, the two directors decided to lease a property at 814 Finchley Road, London, NW11 6XL, which took some time to refurbish – see pp36-55. At around this time, the Claimant and Mr UI-Abideen discussed their role as employees. It was agreed that, as employees, they would receive a salary of £2,500 per calendar month, as long as the Respondent could afford to pay that money. Mr UI-Abideen told me that initially this was to be £2,500 net, but in around March 2019, it was decided that this should be £2,500 gross. I will return to this point later. No further terms of employment were discussed at any time, and nothing was put in writing about this agreement.
21. The opening of the shop took place on 23 October 2018. There is no dispute that between October 2018 and January 2019 inclusive, the Claimant worked and was paid his salary. His salary was however paid in a drip feed fashion over several months, as was Mr UI-Abideen's, as can be seen from the Respondent's bank statements at pp14-35. Taking for example the bank statement for January 2019, there are various entries for "Zain UI-Abideen

Remuneration 01” and for “Azhar Hussain Remuneration Nov” for several hundred pounds. It therefore appears that the two men were paid piece-meal and in arrears.

22. The shop opened from roughly 0900hrs to 1900hrs; there were some minor variations in the opening and closing times. The Claimant and Mr UI-Abideen covered all the work initially, then took on a couple of other employees as 2019 moved on.
23. It is agreed that it was the Claimant who had primary responsibility for the bank account, and so had access to the Respondent’s bank account. I note that the bank balance ranged from a few thousand pounds to a few hundred pounds generally, but did reach lows of tens of pounds, even dropping into negative funds for a day in November 2019.
24. In January 2019, the Claimant was away in Pakistan for a family wedding, from 7 January to 26 January. I note that it is agreed that the Claimant received his full pay for the month of January 2019.
25. The period in dispute is February 2019 through to when the Claimant handed in his resignation without notice on 27 January, at which point he ceased both to be an employee and a director of the Respondent.
26. It was in March 2019 that the Respondent engaged accountants to set up a payroll system.
27. On 27 April 2019, the Claimant went to Pakistan for his health: I can see the relevant documents at pp61 & 62. These documents show me that on 23 April 2019 the Claimant was seen at the King George Surgery. That is the only medical evidence I have regarding this period of time. I have no documents regarding the Claimant’s medical treatment or care whilst he was in Pakistan.
28. The Claimant kept Mr UI-Abideen updated as to his progress during his time away, and returned to the UK and to work on 18 June 2019.

Periods when the Claimant’s work level/commitment is disputed

29. For the periods of 1 February 2019 to 26 April 2019, and 18 June 2019 to 2 September 2019, there is a dispute between the parties as to how much commitment the Claimant showed to his work at the Respondent. When I asked Mr UI-Abideen what the issue was with the Claimant’s work, he gave me one specific example, that the Claimant was responsible for paying the electricity bill, but that this was not paid, hence why bailiffs arrived. I have the bailiff’s “Controlled Goods Agreements” for the following dates:

- 29.1 15 March 2019;
- 29.2 21 August 2019;
- 29.3 12 November 2019;
- 29.4 24 January 2020.

30. These documents all state that they are produced under the “authority of” Metropolitan Props Real Ltd, and it appears that the Respondent owed money for rent.
31. Other than that specific example, Mr Ul-Abideen told me that the Claimant was not putting in the effort and that he was distracted by personal issues, including his divorce. Mr Ul-Abideen told me that he spoke to the Claimant on one occasion, saying “we can’t be spending time on our personal issues, let us focus on the business”. The Claimant explained that his divorce had ended in August 2018. I note at p58 I have a letter from the Home Office to the Claimant dated 15 September 2018, which responds the Claimant’s letter at p57 reporting the change in his marital status.
32. There is no evidence in the bundle to show that the issue of the Claimant’s lack of commitment was raised with him, other than in the one conversation I have recorded above.
33. Mr Saeed and Mr Merazga gave some limited evidence regarding the Claimant’s work life over the summer of 2019. Mr Merazga told me that in June, July, August 2019, on occasions when he was in London, he would get a lift back to Luton from the Claimant after the Respondent’s shop had closed, at around 7pm. He said that this happened a “few” times, which he then stated meant between 3 and 9 times over that 3 month period.
34. Mr Saeed told me that he was a level three technician and both the Claimant and Mr Ul-Abideen would sometimes deliver items to him from the Respondent’s shop that they could not fix in-house. He said that, after September 2019, he did not see the Claimant. He remembered the Claimant asking him to do some specific jobs for him in April, June and July 2019.

September 2019 onwards

35. The Claimant was signed off as unfit to work from 3 September 2019 for a month, and then again on 30 September for 14 days – pp64 & 65. He was therefore signed off as unfit to work up to and including 14 October 2019. After this time, the Claimant did not obtain any fit notes. Mr Ul-Abideen told me that he never received the fit note, although the Claimant said he sent it to a work email address at the beginning of September 2019.
36. The Claimant’s access to his work emails ceased at the end of September 2019. Mr Ul-Abideen told me that this was because he had to change the password on the work accounts on around 25 September, and had no way of communicating the new password to the Claimant.
37. During the Claimant’s period of absence, Mr Ul-Abideen attempted to call the Claimant, but the Claimant did not answer his telephone. Mr Ul-Abideen tried to get hold of the Claimant on three occasions: on the first occasion, he saw the Claimant and sat with him at the Claimant’s brother’s house. On the second occasion, the Claimant’s brother would not let Mr Ul-Abideen in the

property. The third occasion, Mr UI-Abideen told me he could not get hold of anyone. Mr UI-Abideen did not know the Claimant's address that now appears on the ET1, and had tried to call the Claimant's brother, to no avail. Mr Ahmed, the Respondent's witness, supports Mr UI-Abideen's evidence that he had made efforts to contact the Claimant to sort out "any business related misunderstanding"; Mr Ahmed also recalls that the Claimant's mobile phone was turned off for several weeks. This evidence was not challenged.

38. Come October 2019, Mr UI-Abideen removed the Claimant from the Respondent's payroll, as leaving him on the payroll meant that the Respondent's liabilities were building. I have in the bundle payslips that cover the pay periods of November 2018 to October 2019. They all state that the Claimant was due to be paid £2,500 gross per month. These payslips do not therefore reflect Mr UI-Abideen's account that initially the sum intended to be paid to both individuals was £2,500 net. It also appears that the payslips from November 2018 to February 2019 must have been printed retrospectively, given the payroll system only commenced in March 2019. I also note that these pay slips bear no resemblance to what the Claimant was actually paid, or the dates on which he was paid. It appears that the payroll/payslip system did not reflect at all the reality of the payment situation at the Respondent. Mr UI-Abideen told me that these pay slips were sent to a work email address that both he and the Claimant could access.

39. The Claimant was unfit to work throughout the period until his resignation on 27 January 2020; he says his lack of fitness was due to his working relationship with Mr UI-Abideen.

CONCLUSIONS

What were the terms of the Claimant's employment contract?

40. There is no written record of any discussion around the contractual terms, and both the Claimant and Mr UI-Abideen agree that the only thing that was agreed upon was that both (as employees) would be paid a salary of £2,500 a month. I note Mr UI-Abideen's evidence that this figure was initially going to be a net payment that latterly instead became a gross payment. This is not what is said in the Particulars of Defence. I also note that the ET1 states that the Claimant's wages were £2,500 pcm before tax and that, at box 5.2 of the ET3, the Respondent agreed with that figure. This is also reflected in the pay slips.

41. I also note that the salary was said to be payable only when it could be afforded by the Respondent. This cannot be a term with contractual business efficacy. Once a company cannot pay its debts, it becomes insolvent. As I understand it, the Respondent is still trading. I also note that the Claimant's payslips were produced every month of the period we are dealing with, for the fixed amount of £2,500, which implies that, in fact, it was accepted that the Claimant's pay did not alter with the bank account balance of the Respondent.

42. Holiday pay and sick pay were not discussed between the two directors at any stage. However, I am assisted by the respective statutes that provide for certain rights for workers such as the Claimant and Mr U-Abideen.
43. As a worker, under the **Working Time Regulations 1998**, the Claimant would be entitled to 5.6 weeks holiday a year, to be paid at the rate of a week's pay in respect to each week of leave (Reg 13, 13A & 16).
44. Similarly, some workers are entitled to statutory sick pay ("SSP"). The statutory right for an employee to receive sick pay from his or her employer is set out in the **Social Security Contributions and Benefits Act 1992**. It is also governed by the **Statutory Sick Pay (General) Regulations 1982 SI 1982/894 ("the SSP Regulations")**. SSP is the minimum level of sick pay that employers are obliged to pay to most employees who have been off sick for four days or more consecutively. SSP is paid weekly, and, as at September 2019, the SSP rate was £94.25 per week. This figure remains subject to tax and national insurance contributions.
45. SSP is payable in certain scenarios. These are defined in Reg 5(2) of the **SSP Regulations**, and explained by the EAT in **Moxon v IPSOS-RSL Ltd EAT 634/01** as follows:
- 45.1 Qualifying days are the days that employer and employee have agreed shall be qualifying days;
 - 45.2 If there is no such agreement, qualifying days are the days on which employer and employee have agreed that the employee is required to work;
 - 45.3 If there is no such agreement, but employer and employee have agreed that there are no days on which the employee is required to work, then Wednesdays are deemed to be the qualifying day; and,
 - 45.4 If none of the above agreements exists, then every day is deemed to be a qualifying day, save for days on which it is agreed that none of the employer's employees is required to work.
46. SSP is then paid from the fourth qualifying day. To qualify for SSP the employee must notify the employer of their incapacity for work in accordance with Reg 7 of the **SSP Regulations**. If the employer has not set any rules as to the timing and manner of notification, the employee must notify the employer within seven days of becoming unfit for work. Notification must be given in writing unless otherwise agreed between the employer and the employee.
47. In light of the above, and inferring the relevant statutory rights of workers into the Claimant's contract, I find that the following were the fundamental terms of his contract of employment:

- 47.1 The Claimant would be paid £2,500 gross per month to work for the Respondent company full time;
- 47.2 He was entitled to 5.6 weeks leave each leave year;
- 47.3 He was entitled to SSP, should he fulfil the notification requirement.

What was the Claimant entitled to be paid for the relevant period in dispute?

48. The period for which the Claimant claims is 1 February 2019 to 27 January 2020. Breaking that period down, it is agreed that:

- 48.1 Period 1 (1 February to 26 April 2019): the Claimant was at work (although the standard of work is disputed);
- 48.2 Period 2 (27 April to 17 June 2019): the Claimant was in Pakistan for health reasons;
- 48.3 Period 3 (18 June to 2 September 2019): the Claimant was at work (although the standard of work is disputed);
- 48.4 Period 4 (3 September to 27 January 2020): the Claimant did not work again.

49. I will take each period in turn and consider what the Claimant was entitled to be paid for each period.

Period 1 and Period 3

50. The dispute here is how much commitment the Claimant showed to the Respondent. I find that the Claimant was working sufficiently in those periods to be entitled to his monthly salary of £2,500. I say that for the following reasons:

- 50.1 The Respondent has kept no records of hours worked by the Claimant, neither has the claimant. There is limited contemporaneous evidence and I am engaging in an imprecise science;
- 50.2 I have seen an email at p59 that shows the Claimant was in contact with the Respondent's bank in March 2019;
- 50.3 I have seen an email at p60 that demonstrates that the Claimant was communicating with suppliers in February 2019;
- 50.4 Two of the bailiff's agreements, from 15 March 2019 and 21 August 2019, were signed by the Claimant at the Respondent's premises;
- 50.5 I have evidence from witnesses to suggest that the Claimant was at work to some degree in June, July and August 2019. That evidence was not particularly challenged;

50.6 When given the opportunity to tell me of the Claimant's faults at work, Mr UI-Abideen gave me one specific example about paying the electricity bill (which appears to me to be more of a director's responsibility), and a general indication that, to paraphrase, the Claimant's heart was not in it;

50.7 However, it appears that Mr UI-Abideen did nothing other than have one brief conversation with the Claimant to communicate his concerns throughout the entirety of these two periods;

50.8 The Claimant remained on the payroll until October 2019.

51. I find that, had Mr UI-Abideen had serious concerns about the Claimant's work ethic, he would have either had more frequent, more serious and more lengthy conversations with the Claimant about his work ethic and put something in writing to this effect, or would have removed him from the payroll earlier than October 2019, or both.

Period 2

52. This is the period during which the Claimant was in Pakistan for health reasons. This was therefore said to be a period of sickness absence. I have however seen no evidence in the bundle to show that the Respondent was given the required written notification of the Claimant's ill health so as to enable him to qualify for SSP.

53. I therefore find that, as the Claimant did not qualify for SSP during this period, he is entitled to zero pay for this period.

Period 4

54. This was another period of sickness absence. As I have mentioned, the only fit notes I have mark the Claimant as unfit to work from 3 September 2019 to 14 October 2019 inclusive.

55. Again, I have to consider whether the Claimant therefore qualified for SSP during this period. The only fit note that the Claimant says he sent to the Respondent is the one on p64, covering 3 September 2019 to 2 October 2019. Mr UI-Abideen gave evidence that this was never received on email.

56. I conclude that the fit note was not sent to the Respondent, for the following reasons:

56.1 I have not seen any email evidence that proves this fit note was sent;

56.2 I understand the Claimant says he was locked out of his work account on 25 September 2019, however he had that period of time from the beginning of September to save any emails he felt he needed to;

56.3 I take on face-value that the Respondent has complied with its duty to disclose all relevant documents to the ET, whether they help or hinder

the Respondent's case. Therefore, I accept that the Respondent is not in possession of an email from the Claimant sending in his fit note.

57. In light of this finding, it follows that again the Claimant failed to provide written notification to the Respondent of his incapacity to work for the period covered by the fit note, and therefore did not qualify for sick pay during that period.
58. The Claimant's evidence is that he was unfit to work from 3 September through to the date of his resignation. I find, as above, that throughout that period, no written notification was given to the Respondent of the Claimant's incapability to work. Therefore, throughout Period 4, the claimant was entitled to zero pay.
59. To conclude therefore, I find that the Claimant is entitled to be paid at a rate of £2,500 gross per month for:
- 59.1 1 February to 26 April 2019
 - 59.2 18 June to 2 September 2019.

Were deductions authorised?

60. Under s13(1) of the **Employment Rights Act 1996**, there are two circumstances in which an employer may make deductions from an employee's wages:
- 60.1 If the deductions are permitted under statute; or,
 - 60.2 The employee agreed in writing to the deduction in advance of the deduction being made.

61. Neither of those scenarios apply here, therefore the deductions were unauthorised.

If there was a deduction, was it an exempt deduction?

62. S14 of the **Employment Rights Act 1996** sets out certain scenarios in which s13 does not apply to deductions. None of those exemptions are argued to apply to this case, and I find that none of the exceptions do apply here.

Time limits

63. Under s23 of the **Employment Rights Act 1996**, a claim for deduction from wages must be brought within 3 months of the date on which the last payment was made from which there was a deduction. This means that an employee has to commence the ACAS Early Conciliation process within 3 months of the date on which he says he received incorrect pay (or no pay).
64. I have found that the Claimant simply was not paid for Periods 1 and 3. The pattern of payment however was that the Claimant was never paid regularly monthly, but was paid several months in arrears, with his pay for January 2019 only being completed on 13 August 2019 – p7. I therefore find that the

Claimant should have expected to receive his pay for the last period of payment ending on 2 September 2019 sometime in spring 2020.

65. This means that the Claimant's claim was brought in time, given he entered the ACAS EC process on 11 February 2020.

REMEDY

66. The parties agreed that, if I found that the Claimant was entitled to any award under ss13/23 **Employment Rights Act 1996**, the correct rate of pay was £2,500 gross per month. This equates to (30,000/52) £576.92 per week.

67. The periods of pay for which I have found that the Claimant was entitled to be paid at this rate are:

67.1 1 February to 26 April 2019 = 12.2 weeks

67.2 18 June to 2 September 2019 = 11 weeks

68. The Claimant is therefore entitled to 23.2 weeks' pay at a rate of £576.92 (gross) = £13,384.54. This figure is a gross figure. The Respondent may pay this figure as a gross figure, and the Claimant will be liable for the tax and national insurance contributions on that amount.

Employment Judge Shastri-Hurst

Date: 3 March 21

Sent to the parties on: 19 March 21

For the Tribunal Office