EMPLOYMENT TRIBUNALS

Claimant: Mr J R J Scott

Respondent: Ryedale Logistics Ltd (York)

Heard at: Leeds (by CVP)
On: 2 February 2022

Before: Employment Judge Anderson

Representation
Claimant: Mrs J Scott (Claimant's mother)
Respondent: Mr J Simm (Head of Operations)

JUDGMENT having been sent to the parties on 2 February 2022 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, with such request being passed to the Employment Judge on 18 February 2022, the following reasons are provided:

REASONS

Technology

1. The hearing was conducted by CVP (video). The parties did not object. A face-to-face hearing was not held because it was not practicable and all the issues could be dealt with by CVP.

Introduction

2. This was a claim of unauthorised deductions from wages brought by the Claimant, Mr Scott, against his former employer, Ryedale Logistics Ltd (York).

The Claimant was represented by his mother, Mrs Scott. The Respondent was represented by Mr Simm (Operations Manager).

3. The Claimant was previously engaged by the Respondent, which was operating as a franchise to deliver parcels by road.

Evidence

4. There was an agreed bundle of documents running to 57 pages, and separate witness statements from the Claimant and from Mr Simm. I was provided with some further documents, including correspondence between the parties and a letter sent by a solicitor on the Claimant's behalf, to the Respondent.

5. I heard evidence from the Claimant. For the Respondent, I heard from Mr Simm. I heard submissions from both parties.

The Claims and Issues

6. It is the Claimant's case that he is owed wages by the Respondent, who he says withheld them unlawfully. The Respondent says that at all material times, the Claimant was self-employed. The Respondent says that the Tribunal has no jurisdiction to hear the claim. The Respondent accepts it withheld wages, which it says was a partial off-set for damage caused by the Claimant to one of its vehicles, and which it says it was entitled to do under the terms of the Claimant's contract.

7. At the outset of the hearing, I discussed the issues with the parties, which had been agreed and recorded at a case management hearing on 3 December 2021 as follows:

I 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?

If the Tribunal decides that the Claimant was an employee or a worker within the meaning of section 230 of the Employment Rights Act 1996:

II Unauthorised deductions

2.1 Were the wages paid to the Claimant 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?

2.6 How much is the Claimant owed?

III Penalty for Aggravated Features

3.1 If it is found that the Respondent has made an unlawful deduction from the claimant's wages, were there any "aggravated features" within the meaning of s12A of the Employment Tribunals Act 1996.

3.2 If so, should the Respondent be ordered to pay a penalty to the Secretary of State and how much? The amount of penalty shall be at least £100 and no more than £20,000, subject to subsections (4) and (5) of s12A of the Act?

8. It was recorded at the case management hearing that there was no counterclaim by the Respondent in these proceedings. However, there was reference within the Respondent's witness statement to seeking judgement for the cost of damage to a van used by the Claimant. At the start of the hearing, Mr Simm confirmed that this was not sought as part of these proceedings, and reiterated that the Respondent was not seeking to add a counterclaim.

The Facts

9. The Tribunal made the following findings of fact:

10. The Respondent is a franchise, delivering parcels on behalf of the DPD Group.

11. The Claimant was engaged as a delivery driver between 7 June 2021 and 1 July 2021 and worked on four days during that period.

12. The Claimant signed a document called 'Ryedale Logistics (York) Limited Self Employed Services Contract' on 7 June 2021. Mr Simm signed this document on behalf of the Respondent. Within that document, The Claimant is referred to as "the service provider" and the Respondent as "the franchise".

13. Relevant clauses within that contract include as follows:

General:
1) The franchise is not obliged to offer any work to the service provider, nor is the service provider obliged to accept any work offered.
2) The service provider agrees not to make his/her services available to anyone else whilst in contract with the franchise

Payment for Services:
2) The franchise is not obliged to raise an invoice for services by the service provider. The service provider will as such operate on Self Billing.
3) The service provider will be paid by the franchise at a rate of £80.00 (Eighty Pounds) for stops 1-85. Any stops from 86 to 100 will be paid at a rate of £100.00 (One Hundred Pounds), with any stops above and beyond 100 stops to be paid at £1.00 (One Pound) per each successfully delivered stop, to a limit of 160 stops.
5) Motor insurance for Courier use, Hire and reward, Goods in transit and PL/EL insurance will be inclusive with the vehicle provided by the franchise to the service provider.
6) Vehicles will be fuelled by the franchise to allow the service provider to carry out tasks in accordance with this contract daily.
8) Where the service provider has accepted work, and subsequently fails to arrive to carry out tasks on the day without at least 6 hours' notice, the franchise reserve the right to make a deduction from the service provider for the cost of substituting cover for such tasks.
9) The service provider will be responsible for ALL fines and penalties incurred whilst carrying out tasks in the franchise's vehicle. This will include but is not limited to Parking Fines, Speeding tickets, Bus Lane Tickets and Congestion Charges. The service provider agrees to the franchise recovering such costs and fees by means of deduction from wages
10) The franchise reserves the right to retain and/or offset any sums due under this contract for monies owed to the franchise by the service provider. This can include but is not limited to damages, insurance claims, incidents and/or accidents, fines and penalties.

14. A vehicle, a van, was assigned to the Claimant by the Respondent. This was rented by the Respondent from 'the rental side of the company', which is a separate entity.

15. A vehicle inspection took place in respect of the van issued to the Claimant on 13 June 2021. This was signed by Mr Simm as the receiving individual. The Claimant was not present at the inspection.

16. The Claimant says he was given a uniform (jacket and polo shirt) and asked what sized boots he required (though never received these). This was not challenged by the Respondent.

17. The Claimant says he underwent an induction session with another individual carrying out the same role. This was not challenged by the Respondent.

18. The arrangement was for the Claimant to be paid one week in arrears.

19. Mr Simm says that there was 'nobody in charge', as the Claimant was self-employed. Mr Simm was referred to some text exchanges between the Claimant and an individual named Dan, in which Dan refers to keeping the Claimant 'spare' and within which the Claimant wanted a day off, but Dan could not accommodate, given the short notice involved (the night before). Mr Simm acknowledged that Dan appeared to be controlling the Claimant's hours, but stated that 'as per the contract, there is nothing to oblige the Claimant to accept any work offered'.

20. Mr Simm said that the Claimant had 'advisers' and that 'manager' was probably the wrong word. When it was put to Mr Simm that Dan had been managing the Claimant, Mr Simm responded that he could neither confirm nor deny this, but that Dan was not instructed to manage the Claimant. Mr Simm further stated that Dan did not have any power over the Claimant and that there were no penalties in place or imposed for not attending work.

21. Notwithstanding the evidence of Mr Simm and his reference to the contract terms, the text messages are clear that the Claimant was seeking permission for a day off and he clearly understood that he had to arrange his hours with someone else and could not simply say he would not attend he following day. In addition, Mr Simm's evidence that there were no penalties for not attending work does not entirely accord with paragraph 8 of the 'Payment for Services' section of the contract.

22. In his witness statement, Mr Simm states that the Claimant was the sole authorised user of the van from 13 June to 1 July 2021. In his oral evidence, he clarified that he could not confirm or deny whether anyone else had used the van during that time, but that the Claimant was the only authorised user of the van during that period.

23. The Claimant says that others did use the van and relies on text messages with Dan. Those messages show that on one occasion, the Claimant was requested to leave the van key at the office "to (sic) can use til thursday", and to leave it with one of the 'managers'. On 25 June 2021, Dan sent the Claimant a message asking for the key, because he needed to move the van. The Claimant replied that Mr Simm had already collected the key from his housemate. Mr Simm denied he had collected the key. I have no reason to doubt and so accept that Mr Simm himself did not collect the keys from the Claimant's housemate. However, I am satisfied, based upon the text messages and in the absence of any real challenge, or alternative evidence, that the keys were collected by someone associated with the Respondent.

24. I find that there were periods when the van was in the possession or control of others. The texts are clear that there were periods when the keys were handed over. In addition to the above examples, the Claimant asked (prior to 27 June) where the keys for the van would be (as he no longer had them).

25. I have seen photos of damage to the van, which I am told were taken (and it is not challenged) on 1 July 2021.

26. On 16 July 2021, the Claimant wrote to the Respondent requesting that his wages be paid in full and stating his understanding that it was unlawful for the Respondent to not pay him for damage which he had stated he had nothing to do with.

27. By letter of 21 July 2021, the Respondent replied to that email stating:

> *As per your contract that was signed at commencement of your working period with us on 07/06/2021 you will note that clause 10 of your self-employed services contract states as below:*
>
> *"the franchise reserves the right to retain and/or offset any sums due under this contract for monies owed to the franchise by the service provider. This can include but is not limited to damages, insurance claims, incidents and/or accidents, fines and penalties."*
>
> *We can confirm that we currently hold the sum of £340.00 in wages for services provided by you to which we will offset against the damage invoice attached. The total invoice cost less the monies held is £3947.67 which is now overdue*.

28. There is no dispute that the Claimant was not paid any wages by the Respondent

29. The Claimant said he did not agree to the deduction in writing before it was made. The Respondent does not assert that he did. No evidence was presented that such a written document existed. I therefore find that the Claimant did not agree in writing to the deduction before it was made.

Legal Principles

Employment Status

30. Section 230 of the Employment Rights Act 1996 provides:

> (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.'

31. In Autoclenz Ltd v Belcher and ors 2011 ICR 1157, SC, Lord Clarke held that, in cases with an employment context, 'the relative bargaining power of the parties must be taken into account in deciding whether the terms of any written agreement in truth represent what was agreed and the true agreement will often have to be gleaned from all the circumstances of the case, of which the written agreement is only a part'.

32. Therefore, there must be:

a) a contract (between the worker and the alleged employer);

b) an obligation on the worker to provide work personally;

c) mutuality of obligation, and

d) an element of control over the work by the employer.

33. In the recent decision of Uber BV v. Aslam and Ors [2021] UKSC 5 it was held that the Tribunal was entitled to look at the reality of the working arrangements. In doing so, the focus was on the degree of control exercised by the putative employer over the work or services performed by the individual concerned. The greater the extent of such control, the stronger the case for classifying the individual as a *"worker"* who is employed under a *"worker's contract"*. Lord Leggatt observed that, *"the primary question was one of statutory interpretation, not contractual interpretation".* That interpretation should give effect to the purpose of the legislation, which is to give protection to vulnerable individuals who have little or no say over their pay and working conditions because they are in a subordinate and dependent position in relation to a person or organisation who exercises control over their work. In other words, whilst the written contract is relevant, it is important to look at the relationship in practice.

34. Section 13 of the Employment Rights Act provides as follows:

13.— Right not to suffer unauthorised deductions.

(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.

…

(6) For the purposes of this section an agreement or consent signified by a worker does not operate to authorise the making of a deduction on account of any conduct of the worker, or any other event occurring, before the agreement or consent was signified.

…

Application of the Law to the Facts

35. There is no dispute that there was a written contract between the Claimant and the Respondent. The dispute is firstly about the nature of the relationship between the parties. Whilst the contract is described as one of 'self employed' status, the Tribunal looks at the reality of the working arrangements and I give particular account to the principles enunciated in the case of Uber (above).

36. In this case, the rate of pay was dictated by the Respondent and set out within the contract. In fact, the entirety of the terms of the arrangement were imposed upon the Claimant by the Respondent.

37. The Respondent provided the Claimant with uniform, fuel, training and equipment.

38. There is nothing within the contract that indicates the Claimant could nominate another person to carry out the tasks and there was no evidence before the Tribunal for such a term to be implied.

39. Notwithstanding Mr Simm's repeated references to the contract and that the Claimant was not obliged to carry out any tasks, the text messages between the Claimant and Dan clearly show an element of control over when the Claimant needed to work and that he could not withdraw his availability at a late stage. I also note that there were penalties within the contract in the event the Claimant withdrew his agreement to work. The text messages I have seen show that the Claimant indicated more than six hours prior to his shift starting that he did not wish to work, but was told that he was needed.

40. The reality of the arrangement is that the Claimant was in a position of subordination to the Respondent; being required to work on occasion, moving the vehicle and passing keys as requested, wearing a uniform provided by the Respondent, going through an induction, being provided with equipment and fuel, and having terms and rates of pay imposed upon him.

41. I am satisfied that there was a contract, that there was an obligation upon the Claimant to provide the work personally, that there was a mutuality of obligation and that there was a sufficient element of control over the Claimant by the respondent to conclude that the Claimant was, notwithstanding the title of the contract, a worker within the mearing of the ERA.

Deduction from Wages

42. It was not disputed that there has been a deduction, in that the Respondent did not pay the Claimant at all. The Respondent provided its reasoning for making that deduction/withholding that pay. However, the Tribunal must apply the relevant legal provisions.

43. It is not suggested that the deduction was required or authorised by statute. The second point of dispute is whether, as relied upon by the Respondent, paragraph 10 of the 'Payment for Services' section of the contract authorises the deduction.

44. There is no dispute that the Claimant signed the contract.

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

45. The Respondent relies on paragraph 10, as set out above. However, it is for the Tribunal to scrutinise the contractual term carefully to make sure that it authorises the deduction in question. Where contractual provisions and written agreements authorising deductions are being relied on, these should be drafted as precisely as possible. I also remind myself of the so-called 'contra proferentem' rule — a well-established rule of construction in contract law to the effect that ambiguity will be resolved against the party who seeks to rely on

it to avoid obligations under the contract (i.e. any ambiguity is likely to be construed against the employer).

46. In my judgment, the contract does not clearly, precisely and unambiguously set out that any damage caused to a vehicle will be considered the sole responsibility of the driver whilst in his possession, regardless of the circumstances. Paragraph 10 is, in my judgment, drawn very widely; it essentially provides that the Respondent can retain sums due under the contract 'owed to the franchise by the service provider', which can include damages. There are no specific references that this applies whether there is carelessness, negligence, failure to observe rules, procedures or standards, or the Claimant being found at fault. In addition, there is no reference to how the costs involved shall be calculated.

47. There is no detail set out within the contract as to how it will be determined whether monies are due, or how much is due or owed to the Respondent under the contract. There is no provision for any arrangements/process where there is a dispute as to liability for such monies. Nor is it made clear, or even referred to (as accepted by the Respondent) that the insurance process will not be used unless there is a third party identified; the consequences of which are a £5000 excess.

48. For the avoidance of doubt, I reject any notion that such significant terms should be read as implied into the contract.

49. In addition, whilst paragraph 9 provides that the Claimant agrees to the Respondent recovering such costs and fees, by means of deduction from wages, incurred by way of fines and penalties incurred by the Claimant whilst carrying out tasks in the franchise's vehicle, this provision is not replicated in respect of those matters included within paragraph 10. There is no express reference in paragraph 10 to these sums being a 'deduction from wages' or the 'service provider' expressly agreeing to the same.

<u>Did the Claimant agree in writing to the deduction before it was made?</u>

50. As set out above, there is no evidence that the Claimant agreed in writing to the deduction before it was made.

<u>How much is the Claimant owed?</u>

51. Two figures had been referred wo within the papers. The Respondent confirmed that the slightly higher figure of £340 would be honoured.

52. I have considered the claim made by the Claimant for the sum of £600, incurred in the instructing of a solicitor. However, having reviewed this aspect of the claim, I note that the letter drafted by that solicitor on the Claimant's behalf refers almost entirely to the enforcement by the Respondent in seeking what it says is owed to them. There is one line that refers to the Claimant also intending on making a claim to the Tribunal for unlawful deductions from wages. I am not satisfied that the cost of the solicitor is a loss attributable to the deduction.

Conclusion

53. There is a separate dispute between the parties as to whether the Claimant is liable for the costs of the damage. That question is not for me to determine; the Tribunal is concerned with whether the Claimant can bring a claim for unlawful deductions from wages and if so, whether that claim ought to succeed.

54. For the reasons set out above, I have concluded that notwithstanding the title of the Claimant's contract, he was a worker within the meaning of the ERA and as such, the Tribunal has jurisdiction to hear this claim.

55. There is no dispute that a deduction was made. I am not satisfied that the clause relied upon (paragraph 10) by the Respondent authorises the deduction, as it is too vague and too widely drafted, for the reasons I have set out. In addition, it does not expressly refer to this being dealt with by way of a deduction from wages, or the Claimant agreeing to this.

56. The Respondent has therefore made an unauthorised deduction from wages and shall pay the Claimant £340.

57. The claim for £600 for solicitor's costs is not directly attributable to the claim and I do not direct that this be paid by the Respondent.

58. There are no "aggravated features" within the meaning of s 12A of the Employment Tribunals Act 1996 and no order is made for any penalty to be paid to the Secretary of State.

Employment Judge Anderson

12 April 2022