EMPLOYMENT TRIBUNALS

Claimant:		**Respondent:**
Mr D Yordanov	**v**	Danpol Ltd

Heard at: Reading **On:** 17 September 2018

Before: Employment Judge Milner-Moore (sitting alone)

Appearances
For the Claimant: Mr D Woodall (friend)
For the Respondent: No attendance or representation

JUDGMENT

1. The claim for unlawful deduction from wages succeeds. The Claimant is awarded the sum of £1650

REASONS

1. By a claim form dated 27 February 2018, the Claimant brought a claim of unlawful deduction from wages in relation to arrears of pay owed to him by the Respondent, Danpol Ltd (a company run by Daniel Nowakowski). No grounds of resistance were entered by the Respondent and so I dealt with this matter under Rule 21 of the Employment Tribunals Rules of Procedure.

2. The Respondent was placed on notice of the hearing but did not attend or submit any representations for consideration. The Claimant gave evidence in support of his claim and produced a limited number of documents. In light of that evidence I made the following findings.

Findings of fact

3. The Claimant began work for the Respondent in August 2017 as a labourer at a rate of £11.62 an hour. The Claimant produced a few incomplete documents which made reference to temporary workers and one of which referred to an enclosed contract for services. The Claimant did not have a copy of the contract itself but believed that he had signed and returned a contract to the Respondent. The Claimant also produced a

number of documents headed "Confirmation of Verbal Instruction" which had the Respondent's letterhead and which were site instructions setting out the work that the Claimant was expected to complete and the hours of work and break times that he was allowed.

4. He considered himself to be an employee of the Respondent and gave evidence that he had been provided with training by the Respondent in order to gain certificate of electrical competence and that he was then issued with a card recording his qualification. Between August 2017 and mid-January 2018, he worked for the Respondent almost every day, only missing three days due to ill health. The Claimant was not expected to provide a substitute when he was unable to attend work. He worked at weekends and took no holiday. The brother of Daniel Nowakowski (who is the person who ran the Respondent company) supervised his work day to day and directed him about what work he should do and how he should do it. The Respondent provided him with some equipment: a lagging knife and mask and gloves.

5. Between August 2017 and the middle of January 2018 when the Claimant ceased working for the Respondent, he worked exclusively for the Respondent and carried out no work for anyone else. The Claimant was not provided with any payslips during the period. He had no formal records of the work that he did beyond his own recollection of the hours that he worked. The Claimant believes that he worked around 180 hours for which he has not been paid during the period October 2017 to mid-January 2018. Initially, the Claimant was being paid weekly and receiving what he had calculated to be the correct amount of pay by reference to his hours of work after deduction of tax at an appropriate rate. So, for example, on 18 August, the Claimant received £413.67 from Daniel Nowakowski and then on 25 September, £446.21. However, from mid-October onwards, the payments made by Mr Nowakowski became more sporadic and tended to be in round numbers that would not be consistent with proper deductions being made for tax and national insurance. During November and December, the payments were for quite small amounts which fell short of the net wages owed to the Claimant.

6. The Claimant gave evidence that he considered himself to be owed £1,650 in unpaid wages for the period October 2017 to January 2018. His evidence, which I accepted, was that he had given the benefit of the doubt to the Respondent and had perhaps not claimed in full for the hours worked. He had also confined himself to claiming at the Labourer rate when some of the work that he had performed should have attracted a higher rate of pay.

7. The Claimant has also calculated that £1,450 has been deducted from the wages paid to him by the Respondent for PAYE and national insurance contributions. However, having checked his PAYE account, he could see that this money had not been paid on to HMRC by the Respondent.

8. The claim form also included a claim for three weeks' loss of earnings. The Claimant confirmed that this relates not to unpaid wages for services rendered to the Respondent but to the loss of earnings that the Claimant experienced after terminating his engagement the Respondent because his wages were not being paid.

Law

9. Section 13 of the Employment Rights Act provides that

   "*(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…"

10. A worker is defined at section 230(3) of the Employment Rights Act 1996 as someone who

    "has entered in to or works under (or, where 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"

11. In assessing whether an individual is an employee (working under a contract of employment) or a worker (providing services under a contract for services), it will be relevant to begin by examining any written contract between the parties. Any contractual document is likely to determine the matter unless it is being alleged by one of the parties that the document does not represent the true relationship between the parties. In such a case it will be necessary to consider whether the terms of the document reflected the actual legal obligations of the parties in practice (**Autoclenz v Belcher [**2011] I.C.R 1157). Looking beyond the terms of the written document, it is established law that certain factors represent the "irreducible minimum" which is invariably required for a contract of employment to exist (**Ready Mixed Concrete v the Minister of Pensions and National Insurance** [1968 2 QB 497). Those factors are: a requirement to provide personal service on the part of the employee, the exercise of control by the employer over the work performed, and mutuality of obligation (an obligation or the employer to offer work and for the employee personally to perform such work). Other factors which may assist in determining whether the relationship is one of employment: whether the individual bears any financial risk (e.g. because he receives a rate for the job rather), whether he provides his own equipment, whether the individual is free to provide and/or does provide services to others and whether the individual is free to set their own hours and working

arrangements and whether the individual has an unrestricted right to send a substitute to perform the services on his behalf if he wishes to do so.

12. In **Byrne Brothers v Baird** [2002] I.C.R 667, the EAT considered the statutory definition of worker and concluded that workers represented an intermediate class of persons who, whilst not employees, had a degree of dependence on the employing organization which was similar to that of employee, and who could be distinguished from those who were wholly independent contractors running their own businesses.

“Thus the essence of the intended distinction must be between, on the one hand, workers whose degree of dependence is essentially the same as that of employees and, on the other, contractors who have a sufficiently arm's-length and independent position to be treated as being able to look after themselves in the relevant respects.

Drawing that distinction in any particular case will involve all or most of the same considerations as arise in drawing the distinction between a contract of service and a contract for services—but with the boundary pushed further in the putative worker's favour. It may, for example, be relevant to assess the degree of control exercised by the putative employer, the exclusivity of the engagement and its typical duration, the method of payment, what equipment the putative worker supplies, the level of risk undertaken, etc. The basic effect of limb (b) is, so to speak, to lower the passmark, so that cases which failed to reach the mark necessary to qualify for protection as employees might nevertheless do so as workers.”

Conclusions.

13. I have concluded that the Claimant was an employee of the Respondent for the following reasons.

    13.1. Although the excerpt from the written agreement that I had seen described the claimant as engaged under a contract for services, and so a “worker”, I considered that this did not determine the question of the claimant’s employment status. It was apparent that the Claimant himself did not appreciate the significance of the use of the term “contract for services”. and so his signing terms of engagement on that basis should not be taken as his agreement to operate as a “worker” as opposed to as an employee.

    13.2. The evidence as to the true relationship between the parties is consistent with a relationship of employment. The claimant had understood himself to be an employee of the Respondent’s. The documents show that the Claimant was instructed by the Respondent as to where he should work, what work he should perform and what his hours of work should be. Whilst on site he was under the control and direction of the Respondent about how the work was performed. His rate of pay was an hourly rate which was set by the Respondent rather than a rate for the job negotiated by the Claimant. The Claimant worked exclusively for the Respondent and it was not open to him to provide a

substitute when he was unable to attend. He was provided with training and equipment by the Respondent. I therefore consider that the use of a contract for services did not reflect the reality of the relationship and is not determinative as to the status of that relationship.

14. However, even if I am incorrect about this, it is clear that the Claimant was a worker within the meaning of section 230(3) Employment Rights Act on the grounds that he was obliged personally to perform work for the Respondent and that the Respondent's status was not that of a client or customer of a business being operated by the Respondent.

15. I accept the Claimant's evidence that he is owed the sum of £1650 in unpaid wages for work performed in the period Mid October 2017 to mid-January 2018 and I find that the Respondent made an unlawful deduction from wages in the sum of £1650.

16. I have concluded that the sum of £1450 withheld by the Respondent for payment of tax and national insurance does not represent an unlawful deduction from wages within the meaning of section 13 of the Employment Rights Act 1996, as the deduction which was required by statute. The fact that, having made that deduction from the Claimant's wages, the Respondent then failed to make payment to HMRC is a matter for HMRC to pursue with the Respondent.

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Employment Judge Milner-Moore

Date: …07.11.18……………………..

Judgment and Reasons

Sent to the parties on: .07.11.18........

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For the Tribunal Office

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