

(4) are upheld, further compensation for failure to provide written particulars of employment.

2. I added in the course of the hearing the issue of illegality; it seemed to me that there might be a practice of payments in cash not declared to the tax authorities, a practice in which the Claimant might be actively engaged.

The Issues

3. There was a case management discussion before Employment Judge Henry on 27 September 2017. He set out the issues as –

4. Employment status

4.1 Was the claimant an employee, worker or self-employed, for the purposes of the Employment Rights Act 1996, in respect of:

- (i) first respondent;
- (ii) second respondent.

4.2 What complaint is the claimant entitled to bring against:

- (i) first respondent;
- (ii) second respondent.

5. Unlawful deduction from wages

5.1 What was the wage that the claimant was entitled to under his contract of employment/contract of engagement?

5.2 In accordance therewith, has the respondent failed to pay the claimant such wage so as to amount to a deduction?

5.3 Has the claimant signified, in writing, his consent or agreement to the making of the deduction?

5.4 If not, has the claimant suffered an unlawful deduction from wages?

5.5 Has the claimant been paid a wage below the National Minimum Wage?

6. Holiday pay

- 6.1 What were the terms of the employment relationship regarding holiday pay?
- 6.2 What was the claimant's leave year?
- 6.3 How much of the leave year had elapsed at the effective date of termination?
- 6.4 Pursuant to Regulation 13 and 13A WTR, how much leave had accrued for the year?
- 6.5 How much paid leave had the claimant taken in the leave year?
- 6.6 How many days remain unpaid?
- 6.7 What is the relevant net daily rate of pay?
- 6.8 How much pay is outstanding to be paid to the claimant?

7. Automatic unfair dismissal

- 7.1 Has there been a dismissal by the respondent or did the claimant terminate the employment relationship?
- 7.2 If there was a dismissal, what was the reason for the dismissal? Was it a reason coming within s.104 of the Employment Rights Act and therefore automatically unfair (the claimant asserting a statutory right)?
- 7.3 The claimant claims inter alia, that he asserted his rights as to:
 - 7.3.1 To be paid £550 per week as agreed and to be paid back pay for previous months shortfall;
 - 7.3.2 To be paid for holiday;
 - 7.3.3 To be provided with an employment contract and all payslips;
 - 7.3.4 Threat to report Ms Biernat (first respondent) to HMRC.

- 7.4 If the claimant's employment was not terminated pursuant to s.104 of the Employment Rights Act 1996, the claimant is not entitled to bring a complaint for unfair dismissal

8. Breach of contract

- 8.1 On the respondent terminating the claimant's employment, was the claimant entitled to notice on termination?
- 8.2 In breach of contract, has the respondent failed to give the claimant the requisite notice or otherwise make a payment in lieu in respect of notice?

9. Illegality

- 9.1 I have added the issue as to whether the Claimant's contracts were unenforceable for illegality in respect of avoidance of tax obligations.

The Law on illegality

10. The authorities establish that where an employee agrees to be paid according to a scheme which is devised to avoid, or postpone, the proper payment of income tax, the contract of employment is an illegal one which the courts will not enforce. See, for example, Salvesen v Simons [1994] IRLR 54 (EAT).

Findings of Fact on the Issues

11. It is an unusual feature of the case that the Claimant apparently worked for 2 employers as a matter of contract. The Second Respondent is the First Respondent's company. The Claimant worked for the Respondents between 27 April 2016 and 13 April 2017. The agreement was that he would be paid £550 a week. The obligation was said to be 40% the First Respondent (£220) and 60% the Second Respondent (£330). The Claimant accepted in evidence that his work was for two sides of the same business. He said he worked between 6 and 10 am driving a small van collecting rubbish. Between 1030 and 1630 he drove skips.
12. The Claimant alleges that he was paid a weekly shortfall of £245 for 50 weeks and so was underpaid by £12,250 for the period. The Respondents deny this. There is a significant clash of evidence between the parties.
13. There are profound difficulties with the credibility of the Claimant's evidence. He gave evidence on the first day never to return for the remainder of the hearing days. He told me he had an accountant who prepared his tax returns

and he would bring me that documentation the following day. I was informed the following day by his representative that this evidence was in fact inaccurate. There was no accountant and no tax returns. There was no correspondence with HMRC at all. The Claimant did not return to tell me this. Either the information was true or he did not want me to see what was in his tax records. Either way, it is difficult for me to regard the Claimant as a witness of truth.

14. Further, Mr Sebastian Nowak was due to give evidence on behalf of the Claimant. A witness statement was served from him. He did not attend the Tribunal at all. Given that Mr Biernat was claiming Mr Nowak had stolen the drivers' work diaries from the Respondents' portacabin office with details of customers so as to furnish a client base to set up in competition, and that the Claimant was in on this, I was not assisted by the fact that Mr Nowak did not attend. I chose, therefore, to disregard his statement.
15. Mr Biernat was adamant that all sums had been paid. His evidence was that he paid the Claimant when he first started working £100 a day and thereafter £120 a day by a combination of the monthly standing order of £800 from the Second Respondent and the rest in cash.
16. It was potentially instructive to look at bank accounts. At the hearing there were bank statements available for a joint account the Claimant held with his wife Ms Bozena Gienko. The period of employment with the Respondents that was covered by the then available evidence was only 3 March 2017 to 13 April 2017. Cash receipts representing cash deposits at Barclay's Bank in Mitcham, near the Claimant's home, totaled £790 over that period. The approach agreed was that I would order production of other bank statements before giving Reserved Judgment. I made the following order on 7 June 2018:
 1. By 4pm on 14 June 2018 the Claimant must disclose to the Respondent all statements of bank, building society or savings accounts held in his name, either with another or others or on his own, which were in operation between 1 April 2016 and 1 May 2017. The statements to be disclosed are all those that cover that period, whether issued monthly or otherwise. They are to include all those over that period in respect of account no. 33733351 sort code 20-21-78, a Barclays account he holds together with Ms B Gienko.
 2. By 4 pm on 21 June 2018 the parties are to exchange and file with the Tribunal their submissions on whether the contracts in this case are unenforceable because tainted with illegality and on the implications for the case as a whole of the disclosure ordered at 1 above. The Respondent is to file with the Tribunal the disclosure served on it under 1 above by 4pm on 22 June 2018
13. In purported compliance with the Order, the online bank statements from the joint account for the complete period of the employment were submitted by the Claimant. They show cash deposits at Barclay's Mitcham as follows during the course of the Claimant's engagement with the Respondents:

Date	Amount £
5.5.16	145
13.5.16	200
31.5.16	100
6.6.16	40
13.6.16	200
4.7.16	100
9.8.16	200
22.8.16	180
31.8.16	50
5.9.16	500
5.9.16	200
12.9.16	500
19.9.16	300
3.10.16	500
10.10.16	300
17.10.16	100
18.10.16	400
14.11.16	300
16.11.16	100
21.11.16	400
28.11.16	240
5.12.16	460
16.1.17	600
13.2.17	120
27.2.17	100
27.2.17	60
6.3.17	30
17.3.17	110
20.3.17	650

14. The handwritten notes on the disclosure for the payments of £400 and above say they are rent payments from Karel G. Nearly all of the other payments are handwritten to indicate that they come from Ms Gienko. The total of all cash deposits is £7,185.
15. In addition, the following substantial amounts come in from an account no. 209689 90111910, said by handwritten entry to be an account owned by his wife. Smaller amounts also come in from this account, and payments go out to it.

Date	Amount £
5.7.16	150
5.7.16	500
11.7.16	250
19.7.16	100
17.8.16	50
2.11.16	200
3.1.17	100
6.2.17	137
6.2.17	150
10.2.17	50
21.2.17	120
28.3.17	90
31.3.17	180
4.4.17	200

16. That totals £2,277. The point regarding the Claimant's wife is that the Claimant stated at one point in his evidence that she did not work. Under cross-examination, when it was being pointed out to him that on his account of the earnings paid to him the family would not manage, and so his account could not be right, he changed his evidence and said she did some cleaning jobs. There are 2 difficulties, then, in respect of the wife as an income source. If she was not working, then the cash would not be coming from her. Further, it is difficult for the Claimant to attribute the cash deposits in the joint account to his wife if she was also transferring money from her own account. Disclosure has not been made of the bank statements of 209689 90111910. It may be that the account is in his wife's name only and so outside the disclosure order. But then voluntary disclosure was not made of it.
17. Karel G is, as I understand it, a 28 year old son of the Claimant's wife from a previous marriage. The Claimant suggested they all live in a studio flat in Mitcham. He did say in evidence that this person contributes to the rent, but did not say in what amounts.
18. The difficulty I have is that the cash deposits do correspond to the idea that the Claimant was paid extensively in cash in addition to the £800 monthly paid by standing order by the Second Respondent. The First Respondent's evidence was that he paid the Claimant at first £100 a day and thereafter £120 a day by a combination of the standing order and cash. The extensive presence of cash deposits in the joint back account supports that.
19. Mr Grzegorz Skorupa gave evidence on behalf of the Respondents. I found him to be a credible witness. He told me straight that the Claimant was lying about the shortfall of payments received. He said he had began working for Mr Biernat because the claimant had recommended Mr Biernat to him. He said that Mr Biernat always paid on time and that he received £120 per day. He said

that he was there the day the claimant resigned. The claimant told him he was paid everything due and he saw the claimant sign declarations that he had received all the money owing. Copies of what purport to be those declarations were before the Tribunal. This was 13 April 2017. Mr Skorupa also confirmed that Mr Biernat stated to his workers in April 2017 that he thought Sebastian and Pawel Nowak were stealing from him along with the claimant.

20. Mr Biernat appeared to be a relatively straight-forward witness. He did not hide shortcomings in his business records. He accepted that his business has not been compliant with legal requirements. In employment terms, he accepts that he has not issued written statements of particulars. He accepted that no PAYE tax had been paid in respect of the Claimant's employment. The First Respondent's evidence was that he paid the Claimant at first £100 a day and thereafter £120 a day by a combination of the standing order and cash.
21. He tells me that when he first recruited the claimant, the claimant was very keen to have an employment arrangement and also to be treated as self-employed and paid part in cash. Apparently, he had an accountant who was carrying out tax returns for him and he wanted to remain free to do other work. He later was told by the claimant that he or his wife also claim state benefits and that if all wages were transferred to his bank account, he would have lost entitlement to benefits. He was adamant that he paid £120 per day. Under cross-examination he claimed that because the workers claim benefits, they wanted to be paid a minimum amount through the bank and the rest they wanted in cash. He suggested they wanted the minimum wage plus cash supplements. He suggested this was not breaking the law. As self-employed people (he maintained), they were paying their own tax. When he started the claimant was paid £100 a day. In January 2017 there was a pay rise to £110 a day. In April 2017 there was a rise to £120 a day.
22. Mr Biernat maintained that he paid the claimant holidays in January 2017.
23. Mr Biernat said that the claimant had worked for him for months without complaint. It was only when Mr Biernat suspected Sebastian Nowak of having stolen record books so as to set up in competition, and that the claimant was suspected of being involved, that any difficulty in the relationship occurred. It was then that the claimant resigned. On 13 April 2017 the claimant was paid £1080. That amount was to cover the most recent wages being four days at £120 per day making £480 together with £600 which represented six £100 deductions that have been taken from the claimant's wages in respect of any damage the claimant might cause whilst driving, by way of deposit. A declaration that he had been paid in full was signed by the claimant as witnessed by Mr Skorupa. A text asking for a full set of payslips was received but sent on 12 April 2017, the day before the Claimant left.
24. Mr Biernat claimed a handwritten letter apparently dated 17 January 2017 in which the Claimant said he was owed £10,000 for work done in 2016 and asking for a contract and pay slips and holiday pay was a forgery and was never sent or received. The same was true of a handwritten letter dated 6 April

2017. He suggested that the Claimant would not have continued working if he was underpaid to that degree.

25. A text sent by him dated 17 January 2017 stating his then manager 'Zigi would pay for everything and take it on his chest I'll make sure he does' related to traffic fines that the Claimant had to pay because in selling a car for him the manager had not sorted the V5 registration document meaning the Claimant was traced as liable for the fines.
26. Mr Biernat maintained that Sebastian Nowak had taken four drivers diaries and a rota so as to set up in competition. He claimed that Mr Nowak had also stolen £4500 in cash. As noted above, Mr Nowak did not attend the tribunal. CCTV was played purportedly showing Mr Nowak taking something from the portacabin. Precisely what was unclear.
27. The claimant resigned, claimed Mr Biernat, when it became clear that there would be a fall out over Mr Nowak's actions. Mr Biernat maintained that the Claimant then concocted an elaborate scheme to claim as not paid most of the sums that he had been paid in cash, and fabricated documents in support.

Conclusions

28. I have come to the view that the contract or contracts between the Claimant and the Respondents were tainted with illegality. This means that none of the claims the Claimant brings can be pursued by him. The division into two contracts is entirely bogus and is designed to under-declare income so as to mislead the inland revenue and the benefits system. The functions were two sides of the same business. Part payment by standing order and payment in cash for the remainder was likewise designed to mislead the authorities. The Respondents benefit because they think they do not have to operate a PAYE system. The Claimant benefitted because he did not pay tax and could make misleading benefits applications. I have not seen the latter, but I believe Mr Biernat when he told me that this was the Claimant's position. The Claimant participated in this scheme culpably. Part employment and part self-employment did not work either. Plainly, the Claimant was an employee of the Respondents. He worked for no one else. It is the Claimant's case that he was an employee only.
29. Aside from the illegality, I also believe Mr Biernat and Mr Skorupa that the Claimant was paid £120 a day. The Respondents prove this on the balance of probability. The prevalence of cash deposits in his joint bank account with his wife, coupled with the Claimant's original assertion that his wife does not work, are entirely consistent with that.
30. The whole case is unsatisfactory. I cannot however treat the Claimant as a witness of truth. Having told me that he would bring his tax returns, HMRC letters and accountant's details, and then never being seen again in the course of the hearing without producing those documents, leads me to conclude that I cannot trust his evidence and I reject it entirely. The prevalence of cash

deposits in his joint account which are unexplained by him in evidence, also leads me to conclude his evidence about non-payment is unreliable.

31. I did form the view that Mr Biernat straight-forwardly acknowledged the shortcomings in the way he operates his business. He did not disagree when I suggested his business operates in the black market. It is now time he takes it out of the black market and runs it legally.

Employment Judge Smail
11 September 2018
South East Region

Order sent to the parties on
