EMPLOYMENT TRIBUNALS

Claimant: Mr N Benatar

Respondent: Ream Hills Lake Leisure Park Ltd

FINAL HEARING

Heard at: Manchester (remote hearing in public by video CVP)

On: 5 February 2021

Before: Judge Brian Doyle (sitting alone)

Representatives
For the claimant: In person
For the respondent: Mr C Threlfall, director

RESERVED JUDGMENT

The claimant's claim of an unlawful deduction from or non-payment of wages is well-founded. The respondent is ordered to pay to the claimant the sum of £480.77, being the gross sum unlawfully deducted or unpaid.

REASONS

Introduction

1. This is a claim brought by the claimant (Mr Nick Benatar) against the respondent (Ream Hills Lake Leisure Park Ltd) for the sum of £499.00 said to be owed to him for wages for work done for the respondent company between 22 June 2020 and 26 June 2020 inclusive. The claim is brought under Part 2 of the Employment Rights Act 1996 (Protection of wages) and in particular section 13 (Unlawful deductions from wages).

2. The case has been the subject of a case management hearing conducted by Employment Judge Robinson on 6 November 2020. Judge Robinson's case management summary and case management orders appear at [3-6]. The issues

are identified by Judge Robinson at paragraphs 1-11 of his case management summary [3-4].

The evidence

3. I had before me an electronic bundle of documents comprising 55 pages inclusive of an index and which incorporated the witness statement of the claimant and that of the respondent's majority shareholder/managing director (Mr Chris Threlfall). References to pages in the bundle appear in square brackets [ ] above and below.

4. I heard witness evidence from Mr Benatar [31-34] and Mr Threlfall [48-51] based upon their witness statements, which I took as read. They responded to questions put by me and by each other.

5. I adjourned the hearing for 30 minutes to permit the respondent to produce evidence of Mr Benatar's CV and of the job advert said to have been placed online with "Indeed for employers" in respect of the vacancy that Mr Benatar filled with the respondent. As a result, I accepted into evidence two screenshots of an online chat this morning regarding the online job advert process [now 55-56]; two screen shots of the job advert itself [now 57-58]; and Mr Benatar's online response with his CV [now 59-60].

Assessment of the evidence

6. I found both witnesses to be honest witnesses, who gave their evidence frankly but reasonably. The difference in their evidence is largely one of interpretation and perspective. I am confident that the facts of the matter can be gleaned from their witness evidence and the supporting documentation, such as it is. Ultimately, this case is a matter of the legal inferences to be drawn from the evidential materials.

Findings of fact

7. The claimant is a foreign national who has lived and worked in the UK for a number of years, although he has retained connections in South Africa and Zimbabwe. His CV [59-60] shows that he had some 15 years' experience in hotel general management within the UK and prior to that some 10 years' experience as an independent hospitality management consultant in Europe, the Middle East and Southern Africa. His employment history in the UK since August 2004 had been almost exclusively as a General Manager for various hotels throughout the UK.

8. The evidence suggests (and I accept) that his employment history is that of being an employee rather than being a worker or self-employed. Apart from relatively short periods of unemployment between posts, there is one lengthier period of unemployment between July 2013 and April 2016 in which he relied upon a vehicle of self-employed consultancy: www.hotelmanagementconsult.com. His evidence (which I accept) is that this was not a vehicle for self-employed activity in the UK, but was used as the platform for consultancy in Zimbabwe and South Africa.

9. The respondent company operates a holiday park at Ream Hills Farm at Weeton near Preston in Lancashire. It provides pitches for approximately 18 lodges and 40

touring caravans. Mr Threlfall is the majority shareholder and sole director. He also operates a farm and two other businesses.

10. The holiday park "employed" at the relevant time a core workforce of the Managing Director (Mr Threlfall), a Park Manager (his daughter, Katie Lewin), two Wardens and a General Manager (this latter post being the vacancy filled by the claimant between 22 and 26 June 2020). As is to be expected, the holiday park uses the services of housekeepers/cleaners, gardeners, maintenance personnel, etc, but Mr Threlfall's evidence (which I accept) is that these services are contracted out and are not performed by employees or workers directly employed by the respondent company.

11. It appears that the respondent company treats the positions of General Manager, Park Manager and Wardens as "self-employed" positions. I have not been shown any documentation to evidence the status of these posts for either employment purposes or tax purposes, but I accept that what this means in practice is that the holders of these posts are responsible for paying their own income tax and national insurance contributions and in practice discharge that responsibility, whatever the strict legal position might or might not be. They are paid for each week of work in cash or cheque on the Friday of that week. This appears to be a long-standing situation.

12. In or around April 2020 the position of General Manager became vacant. A job advert was prepared, seemingly by Katie Lewin [54]. It consists largely of a "job description" of some detail. It states: "Candidate will be SELF EMPLOYED" (thus). It also states: "Full-time, Contract". Although there is a reference to "benefits", there is no mention of remuneration, salary, wages or fees.

13. As a result of the evidence obtained and disclosed during the hearing, I can now see that this advert was placed with the online recruitment platform "Indeed for employers". It appears probable that the full advert was placed online and was available to be viewed by any potential candidate. In order to apply for a position such a candidate has to click on a hyperlink [55-56] which takes them to the full advert [57-58]. The claimant did apply and he uploaded his CV to the platform [59-60].

14. Although the claimant said in evidence more than once that he had not seen the full advert, I consider that on the balance of probabilities he must have done so. I draw no adverse inferences against him as to his reliability as a witness because of that, however, because his evidence also more than once was that he would have been interested in, and would have applied for and accepted, any such vacancy regardless of the employment status upon which it was offered. This was in the early stages of the Covid-19 pandemic; he was temporarily unemployed; there were few vacancies in hospitality management; and he would have accepted employment on any basis.

15. In the event, the claimant was interviewed by Mr Threlfall and Ms Lewin by Skype. He was invited at the respondent's expense to 2 days working trial at the holiday park. No doubt that was a trial for the mutual benefit of both parties. Mr Threlfall was anxious that the investment being made in the recruitment of the claimant was

for the long term. He pressed the claimant about other job opportunities. The Tribunal is satisfied that, although he had made other applications, none had reached a stage whereby the claimant had reason to believe that an offer of other employment was likely to be made. He gave no other impression.

16. In early June 2020 he accepted the position of General Manager and he started work on Monday 22 June 2020.

17. What is not clear, and what is at the heart of this dispute, is the terms and status upon which he started work for the respondent. The documentary evidence is sparse to non-existent.

18. There is a "Licence to Occupy Mobile Home" document dated 29 June 2020 [26-28], which was drawn up by solicitors on the instruction of the respondent [30] so as to provide him with accommodation as part of his terms of engagement. Although that document refers to the parties as "contractor" and "contractee", that is not a reference to any employment contractual status. It is a reference to the contract to occupy a mobile home. It takes me no further than that.

19. Ms Lewin emailed the claimant on 10 June 2020 at 13.33 [35-36] as follows: "We are elated to offer you the opportunity to work with us as a member of management here at Ream Hills". It suggested a start date of Monday 22 June 2020. It made reference to the short-term and longer-term arrangements for his accommodation and the terms thereof. His working hours of Monday to Friday 9am to 5pm were described, as were the benefits of daily lunch and tea/coffee arrangements. There is no mention of salary or of employment status or of the tax and national insurance position.

20. It appears that at 13.43 Ms Lewin attempted to recall that email [37], with what intention and with what effect is not clear. I have not heard any evidence from Ms Lewin, who has not been called as a witness by either party.

21. The claimant replied to Ms Lewin by email at 18.06 [37]. He expressed uncertainty at what the 13.43 email recall had been about. He asked Ms Lewin to refer to his salary in the original email. He said that he would be travelling to the park on Saturday 20 June 2020 and that he would start work on Monday 22 June 2020.

22. The claimant commenced work on Monday 22 June 2020. The site was not at that time open to guests due to the Covid-19 restrictions. He worked alongside Ms Lewin familiarising himself with the work and with the respondent's systems.

23. On Wednesday 24 June 2020 the claimant met with Mr Threlfall. Arrangements for making payment of sums due to him against an invoice to be submitted weekly were discussed. If it was not clear before, it was now clear that he would be paid at the end of each week the gross sum of £499.00 from which it was expected that he would be responsible for his own tax and national insurance contributions. It is not certain how that sum related to an agreed annual salary of £25,0000. It is probable that there has been a calculation error. It seems likely that there was some initial delay in setting up arrangements for payment, whether in cash, by cheque or by bank transfer – but those concerns were overtaken by events later that week (see

below) and in the event no payment at all was made to the claimant or has been since.

24. On Thursday 25 June 2020 the claimant was offered another job with another employer. He had applied for that job and had been interviewed for it before he had accepted employment with the respondent. It is not necessary for me to explore why he now wished to leave the respondent's employment or why he wished to take up the later offer of employment with another employer. Suffice it to say, he gave a short oral notice of termination of employment with the respondent, confirmed by email, and he began work with the second employer on Monday 29 June 2020. The circumstances of his new employment are described in an exchange of emails between the parties on 24 and 25 November 2020 [52-53].

25. Something of his reasoning might be gleaned from the claimant's email of 28 June 2020 at 10.32 to Ms Lewin [38-39]. It is not necessary for present purposes to explore that further. What is obvious, however, is that he had not received his pay for that week (and, for reasons that have not been made an issue in these proceedings, appeared to be unconcerned by that, at least at that time – it is also not essential to explore that further). Ms Lewin replied at 22.00 on 30 June 2020 [40-42]. There is no reference there to the claimant's pay.

26. On 15 July 2020 at 20.37 the claimant emailed Mr Threlfall (with a copy to Ms Lewin) requesting that he be paid for the week that he had worked [45]. He intimated a possible claim to the Employment Tribunal. He attached an invoice for payment for £499.00 [29 and 46]. The invoice is dated 26 June 2020, but that does not appear to be the date it was actually sent. It appears more probable that this is the invoice attached to the email of 15 July 2020. It is described as for "Management week ending 26th June 2020".

27. Mr Threlfall replied at 21.56 (as originally written): "Please carry on. I will be counter claiming train fairs legal fees For accommodation waisted time with your lies. Send this to him" [47].

28. It appears that Mr Threlfall has withheld payment of any sums due to the claimant for the week commencing 22 June 2020 because (he now says) he was dissatisfied with the claimant's performance and/or because of the trouble and expense to which the respondent had gone in recruiting him and arranging accommodation for him and/or because the claimant gave short notice of termination.

Relevant legal principles

29. While I have kept in mind the whole of the statutory provisions in Part 2 of the Employment Rights Act 1996 and of section 13 in particular, section 13(1) is especially relevant to this case. It provides that an employer shall not make a deduction from the wages of a "worker" employed by it 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.

30. The key issue before me is whether the claimant, Mr Benatar, was a “worker” employed by the respondent company.

31. The definition of a “worker” is found in section 230(3) of the Employment Rights Act 1996. It provides that a “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. Any reference to a worker's contract shall be construed accordingly.

32. There is a large body of case law interpreting these provisions. No case law has been cited to me. I do not consider that that was necessary. This is a matter that can be decided by reference to the statutory definition and without the assistance of the case law, although I have had its thrust in mind.

Submissions

33. The claimant made a short submission to the effect that he had worked for the respondent for a week and that he wished to be paid his wages for that week. While he understood that the respondent had incurred costs in employing him for what turned out to be a relatively short period, that was “the nature of the beast” (in his words) and he was due his pay.

34. The respondent simply submitted (as it was entitled to do so) that it relied upon its response to the claim and Mr Threlfall’s evidence.

Discussion and conclusion

35. The Tribunal is satisfied that the claimant was a “worker” for the purposes of section 13 of the Employment Rights Act 1996.

36. It appears possible that he was employed under a contract of employment. If not a contract of employment, then it was probable that he was employed under some other express contract, the terms of which were partly oral and partly evidenced in writing. That was a contract whereby the claimant undertook to do or to perform personally the work of General Manager or the provision of management services for the respondent company, which was the other party to that contract. The respondent’s status was not by virtue of that contract that of a client or customer of any profession or business undertaking carried on by the claimant. The fact that the claimant had in the past trade as a management consultant had no bearing on the matter here.

37. The Tribunal’s reasoning is that a contractual relationship was clearly formed between the claimant and the respondent when he applied for the General Manager vacancy; when he was interviewed by Mr Threlfall and Ms Lewin via Skype; when he undertook 2 days trial working; when he accepted an offer of work made on behalf of the respondent by Ms Lewin; and when he commenced work on

22 June 2020. It seems likely that the respondent intended that relationship to be based upon a tax status whereby the claimant was responsible for his own tax and national insurance affairs. It appears equally likely that the claimant understood that and was willing to contract with the respondent on that basis.

38. The offer of employment was not based on any degree of sophistication or in how that was evidenced in writing. Much of the terms on which the offer was made and accepted must be gleaned from the email exchanges and from oral expression made during the initial interview and the trial working. Not surprisingly, there is no letter of appointment, no statutory statement of employment particulars, no documented contract of employment and no documented contract for services. In the Tribunal's experience, employers who wish to avoid the employment or tax consequences of engaging staff do so with at the very least rudimentary documentation drafted to achieve that effect. That is not the position here.

39. The evidence and the Tribunal's findings point very strongly towards a contractual relationship. Whether this was a contract of employment in which the claimant was under the direction and control of the respondent company and/or had been integrated into its structure and/or which reflected the economic reality of the relationship matters less if the Tribunal considers the claimant to be a worker rather than an employee, which it does. The description of him as being "self-employed"; the expectation that he would discharge his own tax and national insurance liabilities; and the coincidence that he had in the past offered hospitality management consultancy for work abroad are all red herrings.

40. The bottom line is that the claimant worked as General Manager for the respondent at its Weeton site. He did so on the basis of agreed fixed working hours on fixed working days. He did so in return for consideration said to be an agreed salary of £25,000 per annum, together with accommodation at an agreed rent, and certain other benefits. He was part of the respondent's management team on the park. He did not work for the respondent on a consultancy basis or via a service company or some other such arrangement that might point to him being genuinely self-employed and an independent contractor offering services to a customer or client.

41. The Tribunal concludes, therefore, that the claimant was a "worker" within the meaning of section 230(3)(a) and/or (b) of the 1996 Act and for the purposes of section 13 of that Act.

42. By not paying the claimant his wages for the week commencing 22 June 2020, the respondent made a deduction from wages (that is, a non-payment of wages) of a "worker" employed by it. That deduction or non-payment was not a lawful one. It was not required or authorised to be made by virtue of a statutory provision or a relevant provision of the claimant's contract. The claimant had not previously signified in writing his agreement or consent to the making of the deduction or non-payment. The wages were otherwise properly due to be paid.

43. The respondent is not permitted to refuse the payment of wages earned for the reasons it now advances and which the Tribunal has recorded above, unless it may do so under Part 2 of the 1996 Act.

44. Accordingly, the claim is well-founded. The respondent is ordered to pay to the claimant the sum of £480.77 gross (being £25,000.00 per annum divided by 52 weeks in order to calculate one week's pay).

Judge Brian Doyle
DATE: 5 February 2021

JUDGMENT SENT TO THE PARTIES ON
11 February 2021

FOR THE TRIBUNAL OFFICE

NOTICE

THE EMPLOYMENT TRIBUNALS (INTEREST) ORDER 1990

Tribunal case number: 2413527/20
Mr N Benatar v Ream Hills Lake Leisure Park Ltd

The Employment Tribunals (Interest) Order 1990 provides that sums of money payable as a result of a judgment of an Employment Tribunal (excluding sums representing costs or expenses), shall carry interest where the full amount is not paid within 14 days after the day that the document containing the tribunal's written judgment is recorded as having been sent to parties. That day is known as "*the relevant decision day*". The date from which interest starts to accrue is called "*the calculation day*" and is the day immediately following the relevant decision day.

The rate of interest payable is that specified in section 17 of the Judgments Act 1838 on the relevant decision day. This is known as "the stipulated rate of interest" and the rate applicable in your case is set out below.

The following information in respect of this case is provided by the Secretary of the Tribunals in accordance with the requirements of Article 12 of the Order:-

"the relevant decision day" is: 11 February 2021

"the calculation day" is: 12 February 2021

"the stipulated rate of interest" is: **8%**

MR S ARTINGSTALL
For the Employment Tribunal Office

INTEREST ON TRIBUNAL AWARDS

GUIDANCE NOTE

1. This guidance note should be read in conjunction with the booklet, 'The Judgment' which can be found on our website at www.gov.uk/government/collections/employment-tribunal-forms

If you do not have access to the internet, paper copies can be obtained by telephoning the tribunal office dealing with the claim.

2. The Employment Tribunals (Interest) Order 1990 provides for interest to be paid on employment tribunal awards (excluding sums representing costs or expenses) if they remain wholly or partly unpaid more than 14 days after the date on which the Tribunal's judgment is recorded as having been sent to the parties, which is known as "the relevant decision day".

3. The date from which interest starts to accrue is the day immediately following the relevant decision day and is called "the calculation day". The dates of both the relevant decision day and the calculation day that apply in your case are recorded on the Notice attached to the judgment. If you have received a judgment and subsequently request reasons (see 'The Judgment' booklet) the date of the relevant judgment day will remain unchanged.

4. "Interest" means simple interest accruing from day to day on such part of the sum of money awarded by the tribunal for the time being remaining unpaid. Interest does not accrue on deductions such as Tax and/or National Insurance Contributions that are to be paid to the appropriate authorities. Neither does interest accrue on any sums which the Secretary of State has claimed in a recoupment notice (see 'The Judgment' booklet).

5. Where the sum awarded is varied upon a review of the judgment by the Employment Tribunal or upon appeal to the Employment Appeal Tribunal or a higher appellate court, then interest will accrue in the same way (from "the calculation day"), but on the award as varied by the higher court and not on the sum originally awarded by the Tribunal.

6. 'The Judgment' booklet explains how employment tribunal awards are enforced. The interest element of an award is enforced in the same way.