



IN THE EMPLOYMENT TRIBUNAL (SCOTLAND)

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Judgment of the Tribunal in Case No: 4101843/2023 Heard at Edinburgh on the Cloud Based Video Platform on 10th of May 2023 with Deliberation on the 7th of June 2023

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Employment Judge J G d'Inverno

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Mr D Patullo

**1st Named Claimant
In Person**

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Mr Stephen Digan

**2nd Named Claimant
In Person**

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Advance Group UK Ltd

**Respondent
Represented by:
Mr David Perry,
Director**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is:-

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(First) That the 1st and 2nd named claimants' having failed to establish entitlement in law to the sums of money sought, their claims are dismissed.

Employment Judge: J d'Inverno

Date of judgment: 15/06/2023

Date sent to parties: 15/06/2023

I confirm that this is my Judgment in the case of Patullo and others v Advance Group UK Ltd and that I have signed the Judgment by electronic signature.

REASONS

- 10 1. This case called for Final Hearing on the Cloud Based Video Platform at
Edinburgh on the 10th of May 2023. The case had been listed for a 2.30 pm
start with an allocation of 2½ hours, which proved to be an inadequate
assessment of the time required. The Tribunal required to hear evidence in
chief and in cross examination from 4 witnesses, that is, each of the
15 claimants, the respondent's Director and an additional witness for the
respondent, and thereafter to hear submissions from all three parties.

2. The Hearing was one which required a full day's allocation and the Tribunal
sat on beyond 5 pm to ensure that the Hearing concluded and to avoid what
20 would have been the disproportionate necessity of adjourning a part heard
Hearing to a subsequent day. Parties were advised in consequence, that the
first available date upon which the Judge would come to deliberation in the
case was 7th June, following his return from a period of annual leave.

- 25 3. Each of the claimants appeared in person. The Respondent Company was
represented by its Director Mr Perry. All 3 parties gave evidence on oath or
on affirmation and answered questions in cross examination and questions
put by the Tribunal. In addition the Tribunal heard evidence, on the same
basis, from a witness for the respondent, Mr John Ryan.

- 30 4. The parties lodged an unnumbered bundle of documents extending to some
44 pages to some of which reference was made in the course of evidence
and or submission.

The Issue

5. The Issue for Determination at Hearing was whether, in the period of their employment with the respondent, that is the period from 27th of September 2022 up to and including 8th of November 2022, the respondent made unauthorised deductions from the wages of the claimants in sums to be specified in the course of evidence, contrary to the provisions of section 13 of the Employment Rights Act 1998 and or, in breach of the contract between the parties by reason of:-

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(a) With the exception of the work carried out by them latterly at the Lockerbie site for which the respondent paid the claimants at an increased rate of £220 per day, by the respondent's paying the claimants at an hourly rate of £17, whereas, in the claimants' assertion, there was agreement between the parties that the claimants would be paid at a rate of £30, per hour; and,

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(b) The respondent failing to pay the claimants for various hours on various dates, to be specified in the course of evidence, assertedly worked by the claimants.

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6. There was only one issue of fact, as opposed to parties' respective interpretations and assumptions, upon which the evidence of the claimants, on the one hand, and that of Mr Perry, on the other hand, was in direct conflict.

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Findings in Fact

7. On the oral and documentary evidence presented, the Tribunal makes the following Findings in Fact, restricted to those relevant and necessary to the Determination of the Issue.

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8. The claimants were formerly subcontracted by the 1st named claimant's father whose business was, from time to time, sub contracted by the respondent to carry out works on various sites.
- 5 9. The respondent's father's business, "Mobile Blasting Services Limited", invoiced the respondent for services provided including from time to time the services of the claimant.
10. When performing blasting work for Mobile Blasting Limited in its capacity as a
10 sub contractor of the respondent, the 1st and 2nd named claimants were paid by Mobile Blasting Limited at a rate of £15 per hour.
11. In the autumn of 2022, the 1st named claimant's father was in the process of winding down his business (Mobile Blasting Limited).
- 15 12. In discussions with Mr Perry, the respondent's Director, which took place at Kinross Service Station on or about the 20th of September 2022 and principally concerned the sale by Mobile Blasting Limited to the respondent of certain equipment, the subject of whether the 1st and 2nd named claimants
20 might provide services "*to assist with projects that Advance Group had upcoming*" came up in the course of conversation.
13. During the conversation, the respondent's Director asked the claimant's father what rates of pay the claimants would require. The claimant's father
25 indicated that as he had not spoken with either of the claimants he could only offer his own thoughts and that Mobile Blasting Services had only ever employed the claimants as contractors on various projects which had included site works for the respondent.
- 30 14. The claimant's father went on to say that he "*thought that they might be happy with the same arrangements that Mobile Blasting Services Limited had with the Advance Group, and I would forward a previous invoice from [issued by] Mobile Blasting Services Limited to the Advance Group, as this detailed*

the rates for skilled labour whilst on site, travel rates, consumables, and materials.”

- 5 15. In the course of the meeting, the respondent’s Director asked the 1st named claimant’s father what he thought would be an acceptable rate to pay the claimants, should Advance Group offer them a full time position for future works, such as labouring duties. The claimant’s father responded by saying “*I felt a sum of £17/£17.50 might secure their services*”, but again, emphasised that these were only his thoughts and that the question would
10 have to be directed to each of the claimants as he “*was not in a position to speak on their own behalf.*”
16. In the course of the same conversation, the respondent’s Director asked the
15 1st named claimant’s father what rate he paid the claimants when they were working as contractors for Mobile Blasting Services Limited. In response the 1st named claimant’s father stated that he paid the claimants at a rate of £17 per hour.
- 20 17. The 1st named claimant’s father in fact paid the claimants at a rate of £15 per hour.
- 25 18. The 1st named claimant’s father subsequently sent to the respondent’s Director a copy of an invoice, dated 1st of April 2022, which had previously been issued, by Mobile Blasting Services, to the respondent for sub contracted services. In that invoice Mobile Blasting Services had charged the respondent at a rate of “*£30 per man hour*” for work on site and “*£15 per man hour*” for travel to and from the site.
- 30 19. The £30 per man hour included elements of Mobile Blasting’s cost of plant, equipment, other costs and overheads, and profit. Only £15 per hour, that is one half of the £30 per man hour rate, was reflected in the remuneration paid to the claimants by Mobile Blasting Services Limited.

20. At the meeting which took place at Kinross Service Station on or about the 20th of September and in the communications which followed, the 1st named claimant's father was not acting as agent of the respondent; Nor was he acting as agent of the 1st and or 2nd named claimants, for the purposes of agreeing, amongst other things, an hourly rate at which the 1st and 2nd named claimants might charge for the provision of their contractor services to the respondents, if offered and if accepting work.
21. Neither the 1st or 2nd named claimant on the one hand, nor the respondent on the other hand, held the 1st named claimant's father out as their agent having such authority to contract on their behalves.
22. The 1st named claimant's father did not consider himself to be acting as the agent of either party, but rather as a conduit of information.
23. The 1st named claimant's father relayed to the claimants, his perception of what had been discussed by himself with the respondent's Director Mr Perry.
24. Based upon that report back, the claimants formed the view that the respondent's Director had agreed to pay them the "£30 per man hour rate" at which Mobile Blasting had formerly charged the provision of its services to the respondent.
25. No agreement was reached as a result of the communings which the 1st named claimant's father had respectively with the respondent's Director Mr Perry, on the one hand, and with the 1st and 2nd named claimants, on the other hand, to pay the claimants at a rate of £30 per hour for their contracted services in the event that they were offered work by the respondent and accepted the same.
26. The respondent's Director had work to be carried out on sites at Winchburgh, Airth and Aberlady which he determined to offer to the claimants, his understanding from his discussions with the 1st named claimant's father being that they were willing to undertake such work.

27. He determined to pay the claimants, for their sub contracted work, as sub contractors at a rate of £17 per hour both for blasting and coating work and for general labour work, that being the rate at which Mr Brian Patullo had told him the claimants were paid by Mobile Blasting Services Limited.

28. The respondent's Director Mr Perry also discussed the potential provision of services by the claimants with Stan Hind of Mobile Services Limited.

29. In an email dated 23rd September 2022 and sent to John Ryan, the respondent's Commercial Director and copied to the 1st named claimant's father and to Stan Hind both of Mobile Blasting Services Ltd, Mr Perry stated:-

*"John,
Can you please send Brian Patullo our Sub Contractor Starter Form for his 2 guys that will be starting as contractors with us on projects starting with LTS/Airth and Aberlady.*

Had a chat with Brian this morning and he said that the guys may also be interested in labour work full time to fill in their time between blasting/coating too and their rate would be around £17 per hour. Any thoughts would be appreciated.

*David I Perry
Director"*

30. Mr Perry also copied the email of 23 September 2022 to Mr Stan Hind of the respondent.

31. As at the 23rd of September 2022, the 1st named claimant's father and Mr Stan Hind were aware that the respondents intended to pay the claimants at a rate of around £17 per hour for work offered to them which they accepted and carried out as sub contractors.

32. Mr Hind made contact with the claimants and sent to them the site address where the offered work was to be carried out.
- 5 33. The claimants attended at the site on the 27th of September 2022 and commenced work on or about the 28th of September.
34. When on the site the claimants had a conversation with Mr Perry, the respondent's Director.
- 10 35. The claimants asserted in evidence that in the course of that conversation, when Mr Perry was telling them about 9½ days work which would be available at the Airth site from 3rd October to 18th October and offering that work to them, that the 1st named claimant said to Mr Perry "*It will be £30 per*
15 *hour, £15 per hour travel time and 40 pence per mile*" and further asserted that Mr Perry responded "Yes".
36. Mr Perry denied in evidence that the claimant had made any such statement to him, about £30 per hour, and further denied that he had responded to any
20 such statement in the affirmative.
37. The claimants duly attended at the Airth site where they carried out work between the 3rd and the 18th of October.
- 25 38. The respondent's Commercial Director Mr John Ryan subsequently contacted the claimants by telephone offering them further work for a period of 7 days between 31st and 7th of November 22 at a Lockerbie site for which he offered to pay them at a daily rate of £220. That daily rate was calculated by Mr Ryan by multiplying an hourly rate of £22 (an increase of £5 per hour to
30 reflect the fact that they required to stay away from home) by an assumed 10 hours on site per day. £220 per day was also viewed by Mr Ryan as £17 per hour plus £50 per day to take account of the fact that the claimants, on the one hand, required to stay away from home when working at Lockerbie and,

on the other hand, were not being paid any food or accommodation expenses.

- 5 39. The 1st and the 2nd named claimants agreed to provide their services at Lockerbie at the daily rate of £220 per day.
40. The respondents paid the 1st and 2nd named claimant at the rate of £17 per hour for the work carried out by them at Winchburgh, Airth and for all work carried out by them with the exception of Lockerbie.
- 10 41. The respondents paid the 1st and the 2nd named claimants at a rate of £220 per day for the work carried out by them at Lockerbie.
42. Work on the Lockerbie site ceased after 6 days and the respondent paid the 15 1st and 2nd named claimants for 6 days worked by them only at Lockerbie.
43. The respondents further accepted claims from the claimants in respect of, and paid the claimants for travel time at the rate of £15 per hour plus a mileage rate of 40 pence per mile.
- 20 44. The respondent's "Sub Contractor Forms" for the respective sites and "Supplier Activity (Detailed) Sheets", itemise and vouch the payments made by the respondents for services provided by the claimants, and record also the Construction Industry Scheme tax deductions at 20%, which is the rate 25 which the scheme requires be applied for a sub contractor who is registered for CIS.
45. Those records vouch that the claimants were paid for a presumed 10 hours 30 per day spent on site, notwithstanding the fact that some of the site records produced show, and the claimants for their part accept, that on some occasions their hours spent on site were less than 10 per day.
46. The documents placed before the Tribunal included a written statement, bearing in its terms, to be from the 1st named claimant's father, Mr Brian

Patullo, about the conversations which he had on the one hand with the respondent's Director Mr Perry and on the other hand with the 1st and 2nd named claimants. The typewritten statement was neither signed nor dated, nor did it attach any Certificate of Veracity. No Order permitting the taking of evidence by witness statement had been made in the case, and the claimant's father Mr Brian Patullo did not attend to give evidence or be cross examined. In those circumstances little or no evidential weight could be attached to the contents of the statement. No objection however was taken to its being referred to and relied upon by the claimants. In so far as any evidential value could be attributed to the statement, its content did not support the proposition that agreement had been reached between the claimants on the one hand and the respondent on the other in the course of Mr Brian Patullo's communings with each, as to the paying of the claimants at a rate of £30 per hour.

Summary of Submissions for the Claimant

47. The 1st named claimant submitted, on behalf of both, that they each had overheads and equipments to fund and that the dispute appeared to have arisen out of a communication breakdown. That the 1st named claimant had undertaken the work as a favour and would need to have been paid a fair price for it. He believed, based on the communications he had with his father that an offer to do the work at a rate of £30 per hour had been communicated by him to his father whom he regarded as acting as an agent of the respondent and, since no-one had got back to either him or the 2nd named claimant to say otherwise, he had assumed that that offer had been accepted when the claimants were subsequently offered work. The claimants also founded upon the conversation which they had stated in evidence took place between the 1st named claimant and the respondent's Director on the 28th of September 2022 as amounting to an agreement that they would be paid at £30 per hour for the work at the other sites which was being discussed on the 28th of September and, as a retrospective acknowledgement of the fact that there had been agreement, to pay them at £30 per hour for the initial work undertaken by them.

Summary of Submissions for the Respondent

5 48. For the respondent, Mr Perry submitted that the respondent (he) had never agreed to pay the claimants at a rate of £30 an hour. He categorically denied that the 1st named claimant had made such a statement to him on the 28th of September and further denied that he had made any affirmative response to any such statement. He pointed out that the parties had had no direct contact prior to the claimants starting work on the first of the sites. While he 10 acknowledged that in the past Mobile Blasting Services had invoiced the respondent for sub contracted work at a nominal man hour rate of £30 per hour, that rate had included charges in respect of their equipment and other overheads and a profit element. While the Company Mobile Blasting Services Limited had charged out its services to the respondent at the rate of 15 “£30 per man hour” they had simultaneously been being invoiced by the claimants and were paying the claimants at a nominal rate of £15 per hour.

49. His understanding, from his discussions with Stan Hind and Brian Patullo, had been that the claimants were willing to undertake work, if offered to them, 20 at the rate of £17 per hour and he, for his part, was prepared to pay them at that rate. That was in fact the rate at which the respondent had made payment to the claimants while also paying them at a rate of £15 per hour for travel time plus 40p per mile.

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Discussion and Disposal

30 50. Neither party made any submission to the Tribunal as to the nature of their relationship. Both parties appeared to be in agreement that the relationship was one of contractor and sub contractor. The payments made to the claimants under invoice were made under deduction of Construction Industry Scheme tax at the rate required under the Scheme for persons who are

registered for CIS of 20%. Beyond that however the evidence presented by parties did not go to any issue of whether the claimants were self employed, or alternatively were employees or workers of the respondent, such as to afford them the section 13 Employment Rights Act 1996 protection against unauthorised deduction from wages. While such a claim is also capable of being framed and pursued as one of breach of obligation in contract, the Employment Tribunal's concurrent contractual jurisdiction arises only upon termination of a Contract of Employment. The termination of a contract between a main contractor and sub contractor would not awaken that contractual jurisdiction and thus, although such a claim could be pursued in contract, it would require to be pursued in the Sheriff Court.

51. Although the issue was not focused by either party it appears on such evidence as was presented to the Tribunal that a real question might arise as to whether the Tribunal had jurisdiction to consider the claimants' claims. While it is the case that the Tribunal should take account of issues of jurisdiction even where neither party puts them in dispute, as the matter becomes focused in this case only after the hearing of evidence it will not be necessary to determine the issue as one of jurisdiction unless on the evidence, let it be assumed that the Tribunal had jurisdiction, the claimants can be seen to have established their claims on the facts.

52. In order to establish that the non payment of sums of money constitutes an unauthorised deduction from wages for the purposes of section 13 of the Employment Rights Act 1996, a party must first establish some entitlement in law, whether in contract or otherwise, to receive the payment in question. On the evidence presented I hold that the claimants have failed to discharge their burden of proof and have been unable to show, on the balance of probabilities, that agreement was reached between them, on the one hand, and the respondent on the other hand that they be paid for their services at a rate of £30 per hour. Their claim for the balance of payments at that rate accordingly fails and is dismissed.

53. The second element of the claimants' claim related to their assertion that they had not been paid, at all, for certain hours worked by them. In this regard the onus of proof sits with the claimants to show, on the balance of probabilities, that they worked specific hours on specific days in respect of which the respondents had not made payment to them. While the claimants had lodged and sought to rely upon various written schedules, these schedules were prepared by them after the event and in contemplation of their litigation were in conflict with the respondent's records, and source documentary evidence vouching the figures contained in them was not placed before the Tribunal. The oral evidence of the claimants in this regard was given in general terms and was insufficient to support Findings in Fact that the claimants had not been paid in respect of any specific hours worked by them. The Tribunal was unable to hold, on the evidence presented, that the claimants had discharged their onus of proof in that regard and accordingly their claim in respect of non payment for hours worked fails and is dismissed.

54. The claimants' claims being claims which have not succeeded on the facts, let it be assumed that the Tribunal had jurisdiction, it is not necessary for them to be dismissed for want of jurisdiction.

Employment Judge: J d'Inverno

Date of judgment: 15/06/2023

Date sent to parties: 15/06/2023

I confirm that this is my Judgment in the case of Patullo and others v Advance Group UK Ltd and that I have signed the Judgment by electronic signature.