



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4102587/2023

Held in Edinburgh on 9 January 2024

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Employment Judge M Sutherland

Nicolas Oldham

**Claimant
In person**

Airobot Dynamics Limited

**First Respondent
No appearance**

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Air Cam Pro UK Limited

**Second Respondent
No appearance**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Tribunal is that –

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- a. The Second Respondent has made an unlawful deduction from wages and is ordered to pay the Claimant net wages in sum of £5,624
- b. the complaint of deduction of wages against the First Respondent does not succeed and is dismissed.

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REASONS

Introduction

2. A final hearing was listed to determine the Claimant's complaint of unlawful deduction from wages which were resisted by ABD, the First Respondent. No response was received from ACP, the Second Respondent.
3. The Claimant appeared on his own behalf. The Respondents did not appear and there was no answer to calls made and emails sent by the Clerk. The Claimant expressed concern that Paul Kirk, who had previously appeared on behalf of ABD, the First Respondent and was a Director of ACP, the Second Respondent might be unfit to attend.
4. A Case Management Preliminary Hearing ('CMPH') had been held on 23 June 2023 which PK attended on behalf of ABD but which was not attended by the Claimant. A further CMPH was held on 11 August 2023 which was attended by the Claimant but not by ABD. At that hearing ACP was added as a Second Respondent at the Claimant's request.
5. The Claimant asserts that he was employed by ACP from 30 September 2019 to date, that he is entitled to a salary of £20,000 a year, that during the period of the joint venture starting 16 August 2021 he was employed under 2 year fixed term "sub-contract" with ABD but whilst remaining in employment of ACP as "parent employer", and that the sub-contract amounted to a 2 year fixed term which terminated on 15 August 2023.
6. In light of observations noted at a prior Case Management Preliminary Hearing regarding the Claimant's health, the scope for adjustments was discussed at the start of this hearing. During the course of the hearing, and despite his best efforts, the Claimant became overcome with significant anger and agitation on a number of occasions during the hearing but on each occasion he ultimately regained his composure and the hearing was able to continue.
7. The Claimant lodged an electronic bundle of documents and gave evidence on his own behalf during which he also made points of legal submission.
8. The issues to be determined in this case were as follows –

Unlawful deduction from wages

- a. Was the Claimant employed by the First or the Second Respondent at the relevant time?
- b. Was the Claimant's employment terminated by the relevant Respondent on 24 November 2022 or did it continue?
- 5 c. Was the total amount of any wages paid on any occasion by the relevant Respondent less than the total amount of the wages properly payable by them to the Claimant on that occasion?
- d. Was the complaint made within 3 months of the date of the deduction (or the last in a series) or if that was not reasonably practicable, within
- 10 such further reasonable period?
- e. Was the deduction made within the period of 2 years ending with the date of the complaint?
9. The following initials are used in this judgment by way of abbreviation (being the same initials used by the Claimant in evidence):

Initial	Name	Title
ABD	Airobot Dynamics Limited	First Respondent and joint venture company
ACS	Anya Consultancy Services Limited	Co-owner of ABD
ACP	Air Cam Pro UK Limited	Second Respondent and co-owner of ABD
PK	Paul Kirk	Director of ACP and of ABD

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Findings in fact

10. The Tribunal makes the following findings in fact:
11. The Second Respondent ('ACP') was incorporated in 2013 and is engaged in the business of unmanned aerial services known colloquially as drones for
- 20 farming and forestry work. Paul Kirk ('PK') is a Director and the significant shareholder. In August 2019 the Claimant met with PK and provided software services to ACP on a consultancy basis. The Claimant was then employed by ACP as a full time as a software engineer from 30 September 2019 under a contract of employment with a stated salary of £20,000 paid monthly in

arrears. This was a permanent contract which either party could terminate on notice. There were around 3 other staff. Throughout his contract the Claimant worked either from ACP premises in Peeblesshire or from his home.

- 5 12. Shortly after his appointment ACP reached an agreement with the Claimant that he would only be paid the full salary of £20,000 if the business secured a paying client and that in the meantime he would receive monies in respect of certain living expenses whilst undertaking work for ACP (comprising his rent of £350 now £375, internet of £20 and mobile phone of £11) ('the living expenses monies'). The Claimant received the living expenses monies in
10 respect of the period from 30 September 2019 to 15 August 2021 with the exception of the period of the covid restrictions in 2020 when he received no monies at all.
13. In or around April 2021 a business opportunity arose and ACP entered into a joint venture agreement with Anya Consultancy Services Limited ('ACS')
15 which resulted in the incorporation of the First Respondent, Airobot Dynamics Limited ('ABD'). ACS and ACP were shareholders with significant control of ABD. It was anticipated that the joint venture company ABD would operate for a period of 2 years. The Claimant was seconded (temporarily assigned) by his employer ACP to undertake work for the joint venture company ABD and
20 the Claimant entered into an agreement with ABD to that effect. The Claimant continued to undertake broadly the same type of work in the same location but for the benefit of the joint venture. The joint venture was not as successful as had been hoped and it ceased to operate in November 2022. One of the joint venture partners, ACS offered the Claimant alternative work which he
25 declined as unsuitable. The secondment was ended on 24 November 2022 and the Claimant returned back to undertaking work for the benefit of his employer, ACP who were the other joint venture partner.
14. In respect of the period of the secondment to the joint venture company, the Claimant was paid the net amount of his full wages of £20,000 one month in
30 arrears with the exception of first month (when bank transfers were attempted and rejected by his bank but cash payments were made including the living expenses monies) and the last two months when no payment was made

except the living expenses monies. The total amount of the net shortfall was £4,000.

15. After the joint venture ended ACP reverted to the agreed arrangement that the Claimant would only be paid the full salary of £20,000 if the business secured a paying client and that in the meantime he would receive the living expenses monies. The Claimant received the living expenses monies in respect of the period from 24 November 2022 until 30 January 2023.
16. The Claimant engaged in ACAS Early Conciliation in the period from 6 to 21 March 2023.
17. In March 2023 his remote internet connection into the ACP computer server ceased to work.
18. The Claimant lodged his claim against “acp air cam pro...airobot dynamics” with the Employment Tribunal on 6 April 2023. The Claimant advised at the second preliminary hearing that the claim should proceed against both the First and Second Respondents.
19. The Claimant last spoke to PK, Director of ACP in May 2023. He has had no communication from PK or ACP since then. The other 3 employees ceased to work around May 2023. Whilst the Claimant advising having continued to undertake work for the benefit of ACP this has not been under either the direction or control of ACP. He visited their premises at Christmas time and noted that the premises were now empty.

Observations on the evidence

20. The standard of proof is on balance of probabilities, which means that if the Tribunal considers that, on the evidence, the occurrence of an event was more likely than not, then the Tribunal is satisfied that the event did occur. Facts may be proven by direct evidence (primary facts) or by reasonable inference drawn from primary facts (secondary facts).
21. The Claimant came across as mainly but not wholly credible and reliable in his testimony in that he failed to give a clear and candid picture of his arrangements with ACP and ABD which were obscure.
22. The Claimant produced a copy of his contract of employment with the Second Respondent ACP which was unsigned. It stated that the Claimant was employed by ACP as a full time as a software engineer from 30 September

2019 on a salary of £20,000 under a contract of employment. This was a permanent contract which either party could terminate on notice. The Claimant was insistent that neither party had terminated this contract (by resignation, dismissal or mutual agreement) and that it continued to date.

5 23. The Claimant produced a copy of his contract with ABD which was described as an appointment letter (together with an annex) and which the Claimant referred to as a “sub-contract” and which was not signed. The appointment letter referred to a start date of 16 August 2021 and a salary of £20,000 paid monthly but did not expressly refer to it being a contract of employment. The
10 annex to the letter was not written in plain English and appeared to have been drafted using incompatible and incomplete excerpts from different historic contracts. It provided: “10. Notice period: if you want to resign from the services, you will have to give a 3 months’ notice in writing; 11. Contract / bond with previous employers: our organisation policy for returning to your
15 native location after your visa period. Your placement is agreed in the basis of 2 years contract; there will be penalty in case employee would like to leave the contract early than two years of the confirmation. 12. On termination: On termination of this contract, you will immediately give up the company all correspondence [etc]...13. General: the above terms and conditions...are
20 subject to amendments and adjustments from time to time”. The intellectual property clause in the annex referred to “your employment with the company”, stated “upon the termination of your employment hereunder howsoever arising”, made references to the “Termination Date” (which was not defined), and to “the Employee is suspended in accordance with our termination clause
25 immediately prior to the Termination Date” (but the termination clause was not provided).

24. The Claimant produced a copy of his bank statement from 12 August 2019 to 7 August 2023 which showed that no wages had been paid into his bank account expect for the period of the joint venture with ABD (which ran from
30 about 16 August 2021 to 24 November 2022) during which over £10k was paid into his account. The Claimant advised he had on occasions been given pay slips but he did not produce them despite having previously advised to do so.

25. The Claimant produced a schedule of payments which is it understood was prepared in conjunction with PK who was a Director of ACP and latterly ABD. It appeared to show that during the period of the joint venture the Claimant had been paid his wages in part via bank transfer by ABD in sum of around £10k and in part by payment of the living expenses monies paid by ACP in sum of around £6k. Accordingly the total sum paid for the period of the joint venture was around £16k. No such schedule was provided in respect of the period prior to the joint venture. The schedule also indicated that ACP had continued to pay the living expenses monies after the joint venture had ended until end January 2023.
26. The Claimant produced a copy of the front page only of his self-assessment tax returns which declared that he was paid only £27 in 2019/20; £3,950 in 2020/21 and £4,400 in 2021/22.
27. It was apparent that the Claimant regarded himself as working in partnership with PK/ ACP: “we initially worked for a company ABP and had to wait for their payment to get paid, during covid they pulled out from the deal...ACP had no further funds and [I] was adamant I was not losing what we had all spent so much time working on. An Asian business man came to help us Mr Sash Kang and he supplied some funding which allowed us to continue developing that solution...Mr SK sadly died of covid and Mr Balaji Perumal inherited his share, he approach us with new proposition of business”; “we were all along hoping for a full payment for our work from ABP the client, therefore PK could only part pay me my wages, Mr Sash Kang came into ACP to help with finance as partner”.
28. It was also apparent that the Claimant had a friendship and good working relationship with PK: “Once again I will indemnify PK from responsibility as the working director and the problem occurred either from the bank or finance of ABD...Mr Kirk should not be made responsible”... “PK cried to me about the dissolution of ABD and I agreed with him we have not gone down as we are still our own intelligence and we are still ACP”.
29. The Claimant explained did not want his employment with ACP to be terminated (either by dismissal, resignation or mutual agreement) because of his material concern that the intellectual property he had created whilst

working as a software engineer would belong to ACP as his employer and not to him as employee and that he would lose the opportunity to benefit from that software if a paying client was found by ACP.

- 5 30. In their Response to the claim, ABD asserted that their contract with the Claimant had terminated on 24 November 2022 and all staff were to be transferred to the parent company ACS. It asserted that the Claimant had erupted into a violent rage and had been summarily dismissed. PK at the preliminary hearing accepted that he is due to be paid around £4k from the period of the joint venture.
- 10 31. For the first period of nearly 2 years (from 30 September 2019 to 15 August 2021) the Claimant's wages fell very significantly short of his agreed salary. Despite this the Claimant neither resigned nor lodged any complaint. Although the Claimant disputed this, it was considered likely that the Claimant had the same arrangement with ACP both before and after the joint venture with ABD.
- 15 The agreed arrangement was that he would only be paid the full amount of his wages if the business secured payment for its work from a client and that in the meantime he would be paid in respect of certain living expenses whilst undertaking work for ACP (which were not specified but understood from the papers to comprise his rent of £350 now £375, internet of £20 and his mobile
- 20 phone of £11). He was paid those living expense monies except during the Covid lockdown of 2020. He estimated he received around £900 a year. He was paid those living expense monies whether he worked from the office or from his home and these were understood to be remuneration rather than recompense of a business expenses.
- 25 32. The Claimant accepted that he had been paid the net wages due under his contract for the period of the joint venture with ABD (from 16 August 2021 to 24 November 2022) with the exception of Autumn 2021 when bank transfers were attempted and rejected by his bank but cash payments were made, and in respect of November 2022 when no payment was made except the living
- 30 expenses monies. The Claimant did not offer any quantification of those figures and in these circumstances the Respondent's quantification of £4,000 is accepted as accurate.

33. Following the loss of the joint venture work, the Claimant's wages for the period from November 2022 onwards fell very significantly short of his agreed salary. The Claimant accepted that he had come to an agreed arrangement with ACP that he would only be paid the full amount of his wages if the business secured payment for its work from a client and that in the meantime he would be paid in respect of certain living expenses whilst undertaking work for ACP (including his rent and internet): "it (ACP) has no funds to further pay me. I have been continuing with the development [work] that has been discussed with PK throughout and I am hoping that he will come up with some sales again and get me my wages...I have also been trying to get contract work for myself to go through ACP as the business has no income."

Relevant Law

Unlawful deduction from wages

34. Section 13 ERA 1996 provides that an employer shall not make a deduction from wages of a worker so employed unless the deduction is required or authorised by statute, or by a provision in the workers contract advised in writing, or by the worker's prior written consent. Certain deductions are excluded from protection by virtue of s14 or s23(5) of the ERA.
35. Under Section 13(3) ERA 1996 there is a deduction from wages where the total amount of any wages paid on any occasion by an employer is less than the total amount of the wages properly payable by him to the worker on that occasion.
36. Under Section 23 a complaint for unlawful deduction from wages must be made within 3 months of the date of the payment of wages from which the deduction was made or, if it was not reasonably practicable to do so, within such further reasonable period. Where there is a series of deductions the time limit applies to the last deduction in the series. Nevertheless, a complaint must relate to a deduction made within the period of 2 years ending with the date of the complaint.
37. Under Section 27 wages means any sums payable to the worker in connection with employment but excludes any payment in respect of expenses.

Submissions

38. Throughout his evidence the Claimant made brief legal submissions which were in summary as follows –

- 5 a. An employment contract and any variation of it or notice under it must be made in writing.
- b. His contract with ACP had continued throughout and has never been terminated. ACP entered a joint venture with ACS for 2 years. This resulted in the joint venture company ABD. His contract with ABD was a sub-contract. ACP is his parent employer. He had two employers.
- 10 c. The joint venture with was for 2 years and he was therefore guaranteed 2 years of wages from 16 August 2021 to 15 August 2023 under Clause 11 of the annex to the appointment letter. He was returned to the parent company prematurely.

15 Discussion and decision*Unlawful deduction from wages*

39. The Claimant asserts that he was employed by ACP from 30 September 2019 to date, that he is entitled to a salary of £20,000 a year, that during the period of the joint venture starting 15 August 2021 he was employed under a “sub-
20 contract” with ABD but whilst remaining in employment of ACP as “parent employer”, and that the sub-contract amounted to a 2 year fixed term which terminated on 16 August 2023.

40. The Claimant was employed under a permanent contract with ACP from 30 September 2019. Contracts of employment and any variation do not require
25 to be agreed in writing. The agreed arrangement was that he would only be paid the full salary of £20,000 if the business secured a paying client and that in the meantime he would receive monies in respect of certain living expenses. The tribunal claim was lodged on 6 April 2023 and accordingly the Claimant cannot make a claim for any deduction of wages arising prior to 6
30 April 2021. The Claimant received the amount properly payable in the period from 6 April 2021 to the start of the joint venture on 16 August 2021.

41. The Claimant asserts that he was employed by both ACP and ABD during the period of the joint venture. It is an established principle of employment law

that one employee cannot have two employers in respect of the same work. Accordingly it falls to be determined whether the Claimant was employed by ACP or ABD for the period of the joint venture.

- 5 42. ACP entered into a joint venture agreement with ACS which resulted in the incorporation of ABD as the joint venture company. The appointment letter between the Claimant and ABD (including the annex) required to be objectively constructed in its context. That context was the Claimant was employed by ACP under a permanent contract terminable by either party on notice and that contract was not terminated by either party. Instead the
- 10 Claimant was temporarily assigned (i.e seconded) such that he would undertake broadly the same type of work in the same location but for the benefit of ABD for the period of the joint venture. The appointment letter reflected the parties' intention that ABD would meet his salary directly during the temporary assignment (i.e. secondment), that the intellectual property
- 15 created would belong to ABD, and that he would return to working for the benefit of ACP at the end of the secondment ("your placement"). As was his preference, the Claimant remained an employee of ACP during the secondment.
- 20 43. Whilst the Claimant entered into a contract with ABD it was not in these circumstances a contract of employment with them and any failure to pay by ABD under that contract is not a failure to pay wages by them. In any event, whilst the parties may have anticipated that the joint venture would operate for a period of 2 years, the Claimant's contract with ABD did not state that the contract was a fixed term contract of 2 years duration which ABD could not
- 25 terminate on notice. Given multiple references to "termination" and "termination howsoever arising", and no references to expiry of a fixed term, it is objectively constructed that parties' intention was that the "sub-contract" could like the "parent contract" also be terminated by either party on notice and it was terminated with effect from 24 November 2022.
- 30 44. The Claimant's agreed arrangement with his employer ACP was that he would be paid the full amount of his wages if the business secured a paying client and he would otherwise receive the living expenses monies. The Claimant was therefore entitled to be paid the net amount of his full wages of £20,000

during the period of the secondment. The wages paid to the Claimant during the course of the secondment fell short by £4,000. The last payment attributable to the secondment was due to be paid end December 2022 but no payment was made except the living expenses monies. Accordingly during the course of the secondment there was a series of deductions from his wages ending 30 December 2022. The Claimant engaged in ACAS Early Conciliation in the period from 6 to 21 March 2023. His claim for unlawful deduction from wages was therefore lodged within the time limit on 6 April 2023.

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10 45. The Claimant was paid the living expense monies by ACP until end January 2023. The Claimant has not undertaken work under the direction or control of ACP since May 2023. He is therefore due the living expenses monies in respect of the 4 month period ending May 2023 in sum of £1,624. The living expense monies were considered an emolument rather than a business expense and accordingly was not excluded under Section 27.

15 46. The Second Respondent is therefore due to pay the Claimant net wages in sum of £5,624 and the complaint of deduction of wages against the First Respondent is dismissed.

20 47. For completion it is noted that it was discussed with the Claimant the possibility of claiming payment of his outstanding wages and redundancy pay from the Insolvency Service if the Second Respondent is insolvent and if his employment terminates by reason of redundancy.

M Sutherland

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Employment Judge

16 January 2024

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Date

Date sent to parties

17/01/2024