EMPLOYMENT TRIBUNALS

Claimant: Mr W D Lowther

Respondent: Safety 2 Business Ltd

HELD AT: Manchester **ON:** 5 December 2017
In chambers: 11 January 2018

BEFORE: Employment Judge Rice-Birchall

REPRESENTATION:

Claimant: Mr D Bunting, Counsel
Respondent: Mr S Birch, Director

JUDGMENT

The judgment of the Tribunal is as follows:

1. The claimant was a worker within the meaning of section 230 of the Employment Rights Act 1996 and Regulation 2 of the Working Time Regulations 1998 during the period between 3 January 2017 and 6 April 2017.

2. Accordingly, any holiday pay which was outstanding on the termination of the claimant's employment with the respondent is to be calculated to include any holiday entitlement for the period 3 January 2017 to 21 July 2017 (less any holiday taken).

3. The respondent has made an unauthorised deduction from the claimant's wages in the sum of £481.00 (gross).

4. The claimant's claims in respect of the respondent's failure to provide written particulars of employment and failure to provide itemised payslips are dismissed upon withdrawal by the claimant.

5. If the parties require a remedy hearing to ascertain what payment is due to the Claimant in respect of accrued holiday outstanding on termination of employment, then they must write to the Tribunal within 14 days of receipt of this Judgment to request such a hearing.

REASONS

Issues to be Determined

1. Was the claimant a worker from the period between the commencement of his period employment in January 2017 until 6 April 2017 when he became an employee?

2. If so, was the claimant entitled to holiday pay on termination of his employment in addition to that which he was paid?

3. Did the respondent make an unlawful deduction from the claimant's wages by withholding the sums of £1500 and £1481? The respondent states that the deduction was in respect of a commission advance of £3000 and was therefore owed to the respondent by the claimant. The claimant submits the Respondent paid him a fixed fee to encompass mileage and that it was never agreed that there was an element of commission advance, but acknowledges that an amount (but a reduced amount of £666.67 per month in respect of January to March 2017 to take into account his car allowance) would be repayable if there was found by the Tribunal to be a commission advance rather than a fixed fee.

4. Was the deduction authorised by a statutory provision or relevant written contractual provision or agreed to in writing by the claimant before the even giving rise to the deduction? It was accepted by the claimant that the contract of employment contained a relevant deductions clause which authorised deductions from his wages.

The Claim

5. At the outset of the hearing it was identified that the deduction of £1,481 had been made post the claimant's claim being brought. In the interests of ensuring that all outstanding matters were resolved, both parties consented to an amendment to the claim to include an allegation that the respondent had made an unlawful deduction in the sum of £1,481 from commission owing to the claimant.

Background

6. Although all parties agreed to continue with the hearing, and in fact were very keen to do so, the circumstances were less than satisfactory. There was no agreed bundle of documents from which the Tribunal and the parties could work which led to some difficulties in identifying documents; the claimant's representative had not seen the bundle until the morning of the hearing (though he had had access to most if not all of the documents); and the claimant changed the basis for his claim and indeed the amounts claimed at the very last minute before the hearing.

Evidence

7. The Tribunal did have reference to a bundle of documents but, as stated above, the parties were not working from the same bundle and sometimes documents were difficult to find, the documents not having been numbered in the usual way.

8. The Tribunal heard from the claimant who gave evidence on his own behalf, and from Mr Simon D Birch and Mr Richard Bolton, both of whom were directors of the respondent, and from Ms Katherine Hallows who supervises the accounting processes for the respondent.

9. The respondent's witnesses gave compelling and credible evidence. Mr Richard Bolton in particular gave compelling, indeed passionate, evidence about his involvement with the claimant and his dealings with him. The claimant's evidence was contradictory and less credible. He acknowledged that the respondent, in his claim form, had given him a salary advance ("I do not for one second dispute that there is an advance balance to pay back to the respondent of £2013") but then in oral evidence before the Tribunal sought to claim that in fact what was being paid for the first three months was a fixed fee and no deduction could lawfully be made at all. As late as the night before the hearing, his schedule of loss was changed to one which sought £5157.42, rather than the £12833.05 he had been claiming up to that point. The claimant's position on his employment contract was similarly not credible (see below), he having insisted that he had never received a statement of terms and conditions of employment in his claim form, but then admitting that, in fact he had deleted all his emails during a certain time period and so couldn't have known whether he had received such a statement or not.

Findings of Fact relevant to the Issues

10. Mr Birch and Mr Bolton are directors of a small but successful business.

11. Mr Birch had known the claimant for some time and had some experience of working with him. As he seemed good at generating sales leads and enquiries, and that was an area of business with which the respondent was having difficulty, Mr Birch approached the claimant with a view to them working together. The claimant, at this stage, had been made redundant and was keen to engage in a new business activity.

12. After some conversations, the claimant started working for the respondent on 3 January 2017. As the claimant had indicated that he needed to clear £4,000 net per month, conversations took place between Mr Bolton and the claimant to achieve that aim. The amount was higher than Mr Bolton was prepared to pay as basic salary but he was committed to trying to make the relationship between the respondent and the claimant work and so sought to accommodate the claimant's request.

13. An email was sent to the claimant on 13 January 2017 which states, inter alia: " I have given some thought to our discussions and the need to support you in this early period in anticipation of commission based earnings from your activity." He then sets out figures which indicate that £36 000 plus a gross car allowance of £4000 would give take home pay of approximately £2900.11 per month.

14. The email goes on to state: "I think the easiest solution for January is to invite you to invoice the business £4000 and we will pay you as if you were an independent consultant for the month. An invoice from Lowthie RM Consultants ..will do the trick. …We can deal with this retrospectively at a later date once we have an established earnings profile with sales activity."

15. The claimant replied to state: Yes this works and sounds spot on thank you." He then asked "We did discuss a form of guarantee to be dealt with retrospectively once we established earnings profile over the first 3 months would this also apply to February and March?"

16. The claimant's oral evidence before the Tribunal confirms that he requested a commission guarantee for the first three months in which he worked for the Respondent.

17. The respondent says that the £4000 payment was the £3000 per month (which was roughly the equivalent of the net payment of basic salary and car allowance) with an advanced commission payment of £1000. This was how it was accounted for in the respondent's accounts. Ms Hallows, the respondent's accountant, was instructed to repay the commission advances to the respondent at the half year, by which time it was envisaged that the claimant would be earning sufficient commission himself. As the claimant was paid this extra £1000 from January to March, the respondent believed that the claimant owed it £3000 in respect of this commission advance.

18. During those first months of employment, and before he commenced work under a contract of employment, the claimant reported to and worked closely with Mr Birch on the development of sales and business opportunities. He was provided with a mobile phone by the respondent. He did not however work from the respondent's offices and was mainly mobile or working from home. Mr Birch attended many meetings with the claimant and the claimant's prices and quotes were signed off by him. There was no evidence before the Tribunal to suggest, as the respondent alleged, that the claimant was involved on other business activities during this time.

19. The claimant invoiced the respondent for the three months January –March 2017 with an invoice from Lowthie RM Consultants. .Although there was some dispute as to whether, during this period, the claimant was pursuing other business interests, the invoices were numbered 1-3 which suggests at least that there was no other business activity from the claimant under the guise of Lowthie RM Consultants. The only other evidence before the Tribunal to suggest that the claimant was in business on his own account was evidence of company entitled Achilles Employment Services Limited which named the claimant as its sole director. The claimant confirmed that this business had never traded and there was no evidence before the Tribunal that it had done so.

20. In January 2017, the claimant requested mileage declaration forms from Mr Birch, which were provided to him.

21. On 17 February 2017, the claimant wrote again to the respondent to try to clarify his pay. The respondent replied as follows, and also referred to the claimant's mileage claim, which had by then been submitted: "We are paying you in January

and February a fixed fee to support you whilst the sales results gather momentum and we can then revert to the agreed remuneration and package in the business plan. Effectively we are subsidising your income to levels inclusive of commission not yet earned (or paid) so it seems to me to be inappropriate at this time to bring in a mileage claim which would be payable and inclusive in a conventional salary, commission and benefits arrangement that we know is not right just now."

22. The respondent's response to the claimant's request for mileage appears to be the basis for the claimant's position that, for January to March 2017, he was paid £4000 per month was a fixed fee which included his basic salary, car allowance and mileage, and that in the event, he was never paid a commission advance.

23. The claimant acknowledged in oral evidence that, up until this point, he envisaged that the commission advance would be repaid.

24. It was acknowledged by both parties that the arrangement in place was a short term fix which was put in place to "get the show on the road".

25. On 10 March 2017, the claimant took a day's holiday which was authorised by the Respondent.

26. A formal "employed" role was agreed towards the end of March, and the claimant became formally employed by the Respondent on April 6 2017.

27. At this stage the claimant was found an office and worked more from the respondent's premises.

28. In April, the respondent wrote to the claimant to request his expenses and mileage for March. The respondent subsequently confirmed, by email, as follows: "So we are all clear the payments due in April now we are reverting to a conventional basis will be: ..basic monthly salary £3000 each month; car allowance £333.33 each month; mileage; expenses; commission. The email goes on to state: "We clearly need to re address the payments on account later in the year once the sales figures are back and levelled out .." The claimant did not challenge this statement.

29. The claimant was sent a contract of employment on 28 June 2017 by Ms Hallows and, subsequently, a reminder on 5 July 2017. In his claim for the claimant alleges that he had never received employment particulars. In oral evidence the claimant acknowledged that hat he probably did receive it but deleted it along with all other work related emails as he knew he was leaving.

30. The contract contains, at clause 4, the following clause: "We shall be entitled to deduct from your salary or other payments due to you any money which you may owe to the Company at any time including, without limitation, any overpayments, loans or losses sustained as a result of negligence or breach of contract or breach of Company policies or rules."

31. At clause 6, it provides that the claimant was entitled to 5.6 weeks' holiday during each holiday year.

32. On 28 June, the claimant requested holiday for 10 July 2017 until 21 July 2017. He submitted a holiday request form which detailed that he had a holiday

entitlement of 25 days but that he had already taken holiday on 10 March, 11 – 13 April and 22 May 2017.

33. The claimant was absent from 7-21 July 2017 as per his holiday request. The Respondent understood the reason for his absence to be holiday.

34. Unhappily, the relationship was not to last, for, on 21 July 2017, the claimant resigned from his employment. This followed Mr Birch and Mr Bolton raising concerns over his lack of successful sales and the Claimant being confronted about alleged false entries in his diary and claiming mileage and expenses for meetings which did not take place, for which the claimant apologised. The Claimant alleges that he left because he was being bullied but there was no evidence before the Tribunal to suggest that this was the case.

35. With the resignation letter of 21 July 2017, the claimant enclosed a sick note effective from 7 July 2017 to 4 August 2018. The claimant asked for his holiday to be converted to sickness absence. The categorisation of his absence could have an impact on the claimant's entitlement to payment in lieu of accrued holiday on termination of his employment. According to the terms of his contact, the claimant is only entitled to statutory sick pay for any absence.

The Law

Employment status

36. Regulation 2(1) of the Working Time Regulations 1998 (WTR) defines a "worker" as "an individual who has entered into or works 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."

37. This is a broader definition than that of "employee" and covers individuals who work under a contract to do or perform personally any work or services for another party to the contract (so long as the status of that other party is not that of a client or customer of a profession or business undertaking carried on by the individual).

38. Thus, self-employed people working under contracts for personal services count as workers, provided they are not, for example, genuinely running their own businesses.

Holiday pay

39. According to the WTR, workers are entitled to a payment in lieu of any annual leave accrued on termination of employment (Regulation 13(9)(b)).

Deductions from wages

40. Section 13 ERA provides that: " 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 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."

Conclusions

Employment status

41. The Tribunal has no difficulty in concluding that the claimant was a worker during the period between 3 January 2017 and 6 April 2017.

42. Very little changed in April 2017 when the claimant became an employee of the respondent.

43. There were mutual obligations between the parties at the relevant time. The respondent was under an obligation to provide work and remuneration, albeit that the remuneration was payable by invoices. There was an obligation on the claimant to work and to keep the respondent informed of his whereabouts, what he was doing and so on.

44. It is notable that the tax treatment of payments is not indicative of employment status, and that a person can be treated as self-employed for tax purposes and still be a worker.

45. The claimant was required to perform the work personally and could not, and did not, ever send a substitute. Indeed the respondent wanted him to work for them because of his connections.

46. The respondent exercised control over the claimant. During the period from 3mJanuary – 6 April 2017, although the claimant did not have an office base, he was closely supervised by Mr Birch who attended many meeting and appointments with the claimant. He also had to request holiday if he wanted to take it, as demonstrated by a holiday request for 10 March 2017.

47. There was no evidence before the Tribunal, despite the belief of the respondent, that the claimant was in business on his own account during the period January- April 2017. Although the claimant invoiced the respondent, those invoices were invoices numbers 1-3, which did not indicate any additional business activity.

48. There was no evidence to suggest that the Claimant, during this time, was actively involved in Achilles, referred to above.

Holiday pay

49. It follows, from the conclusions above, that the claimant was entitled, on termination of his employment, to any holiday accrued between 3 January 2017 and the termination of his employment, but which remained untaken at that point.

50. No submissions were heard from either party on the period of 7-21 July and whether that should be treated as holiday or as sickness absence. Accordingly, the Tribunal has invited the parties to request a remedy hearing to deal with this issue and the amount of holiday pay owing to the claimant on termination of his employment should they wish to do so.

Deduction from wages

51. The Tribunal concludes that it was agreed between the parties that there would be a commission advance and that that advance would be repayable by the claimant once he was earning regular commission. In this regard, the Tribunal relies on the emails of 13 January and the claimant's response (paragraphs 13-16 above) and the respondent's April email (paragraph 29 above) which remained unchallenged by the claimant. Further, the Tribunal relies on the claimant's own evidence that this was his understanding at the time.

52. The Tribunal further finds that the respondent genuinely believed that the split should be £3000 pay and £1000 commission advance because of the figures set out in the email of 13 January 2017.

53. However, the Tribunal does not accept the respondent's position that the advance made was £1000 per month. If it was, there would be no account made for the car allowance which is specifically detailed in the emails as being paid. Further, there is no mention in the emails that the advance is £1000, but rather it is clear that the advance is made up of the difference between the other elements of pay in the email of 13 January (basic and car allowance), which are paid gross to the claimant who is being treated as self-employed, and the £4000.

54. It is not accepted that the claimant was being paid an inclusive fee which meant that there was no obligation on the claimant to repay the commission advance. It was the clear intention of the parties in the emails referred to above that a commission advance would be paid by the respondent and repaid by the claimant in due course.

55. Whilst the claimant relies on expenses and mileage as evidence of fixed fee agreement, there is no evidence to suggest this was the arrangement agreed between the parties, other than one comment in an email from the respondent to the claimant which loosely referred to there being a fixed fee being paid to the claimant (paragraph 23). This falls short of an agreement between the claimant and the respondent that there would not be a commission advance and repayment.

56. As the respondent failed to take into account the payment of the car allowance, the maximum sum which could be deducted by the respondent over the three month period was £2000 rather than the £3000 alleged. This is calculated by deducting from the £4000 monthly payment the gross monthly figure paid to the claimant in respect of the £36000 basic salary (£3000 monthly) and the £4000 per annum car allowance (£333.33 monthly).

57. It was accepted by the claimant that the respondent could make deductions by virtue of the contract.

58. Accordingly, the respondent unlawfully deducted from the claimant the sum of £481.00.

Employment Judge Rice-Birchall

Date 11 January 2018
JUDGMENT AND REASONS SENT TO THE PARTIES ON
18 January 2018

FOR THE TRIBUNAL OFFICE

NOTICE

THE EMPLOYMENT TRIBUNALS (INTEREST) ORDER 1990

Tribunal case number: 2403465/2017

Name of case: Mr WD Lowther v Safety 2 Business 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: 16 January 2018

"the calculation day" is: 17 January 2018

"the stipulated rate of interest" is: 8%

For the Employment Tribunal Office