EMPLOYMENT TRIBUNALS

Claimant	Mr D Barry
Represented by	in person
Respondents	D Clink Limited
Represented by	Mr M Foster (solicitor)
Before:	**Employment Judge Cheetham QC**

Preliminary Hearing held on 21 September 2020 at London South Employment Tribunal by Cloud Video Platform

JUDGMENT

1. The Claimant was not a worker within the meaning of the Employment Rights Act 1996 s.230(3) and the employment tribunal therefore does not have jurisdiction to hear the claim for unauthorised deductions of wages, which is dismissed.

2. The Claimant will pay the Respondent's costs in the sum of £250.

REASONS

1. *This has been a remote hearing on the papers, which the parties have not objected to. The form of remote hearing was: V - video. A face to face hearing was not held because it was not practicable and the issue of the future determination of the claim could be resolved from the papers. The documents that I was referred to are those contained in the agreed bundle.*

2. This is a claim for unauthorised deduction of wages. At a previous hearing on 24 April 2020, EJ Tsamados listed today's hearing to determine, firstly, whether the Claimant was a worker and secondly, if so, what pay and commission he should have received in respect of annual leave.

3. I heard evidence from the Claimant and, for the Respondent, from Mr Michael Hutson (Managing Director) and Ms Hilary Manning (director). There was an agreed bundle of documents. Through no fault of the parties, I did not have a copy of this bundle at the start of the hearing, but was supplied one during the morning.

The law

4. Under the Employment Rights Act 1996 s.230(3):

> *In this Act "worker" (except in the phrases "shop worker" and "betting 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;*
>
> *and any reference to a worker's contract shall be construed accordingly.*

5. Although I was not referred to any case law by the parties, I reminded myself of the relevant tests, including that it is important to have regard to the reality of the mutual obligations and the reality of the situation: ***Autoclenz v Belcher*** [2011] ICR 1157. As Lord Clarke said in that case (at §29), "*The question in every case is … what was the true agreement between the parties*".

Findings of fact

6. When the Claimant began working for the Respondent in March 2018, there was no written contract. There was only a verbal agreement that the Claimant would undertake research and resource work for the Respondent company. The arrangement for payment was that the Claimant would render invoices. He did this using a trading name, having registered with HMRC as self-employed. He was responsible for his own tax and National Insurance.

7. The Claimant told me that he was not happy with this arrangement but he accepted it. He said in cross-examination, "*I had no choice but to accept this (arrangement) as being self-employed*" and I find that, at the start of this working relationship, both parties considered that the Claimant was self-employed. It may be the case that the Claimant had no choice but to accept this arrangement if he wished to work for the Respondent, but nevertheless that was understood to be the arrangement.

8. I have not found any evidence of an express agreement to pay the Claimant commission. I accept, as the Claimant says, that there are occasional references to "commission" in the papers, but there is nothing that I was

taken to that sets out a scheme of paying commission on sales at the rate of 0.25% as he maintains. In addition, I would have expected the Claimant to have been demanding payments of commission in that amount from the start, had he truly believed there was such an agreement.

9. The Claimant's work was done between Monday and Friday and between 9 a.m. and 5 p.m. The Claimant said in evidence that on most of the occasions that he was unavailable to work, Mr Hutson would say "*see you tomorrow then*". Sometimes Mr Hudson would complain if the Claimant's non-availability caused problems with clients and so on. That is not surprising, but there was never any suggestion of disciplinary sanctions if the Claimant was not available to work. I was taken to various texts between Mr Hudson and the Claimant, but they did seem to me to be more than fairly routine exchanges about how the work was being managed.

10. The invoices were for "services rendered" and in differing amounts, although mostly divisible by an hourly rate of £9 and later £10. As far as I can see, they were paid without query or qualification. There was also included a small amount for expenses, which I was told the Claimant set off against tax. The Claimant told me that the hourly rate was agreed, whereas the Respondent's evidence is that it was what the Claimant charged. I find that, whoever suggested that sum, it nevertheless became the agreed rate of pay.

11. The Claimant did not take holidays before Christmas 2018 and nor did he ask for any. There was no agreement about taking annual leave. That Christmas, there was an 11 day holiday for everyone, reflecting the general closures at that time of year. If the Claimant was absent through sickness, he did not request or receive sick pay.

12. The Claimant always undertook the work himself and there was never a time that he sent or attempted to send a substitute. It does not appear to have been in the contemplation of the parties that this might happen, because there was no discussion or agreement about this happening and obviously there was no written agreement. I am therefore unable to make a finding about substitution, because the situation never arose.

13. When the Claimant worked in the Respondent's office, he was able to use the facilities there. However these were no more the usual facilities, such as a desk, access to a computer and so on. He did not have to work in the office, so these were simply resources available if he chose to do so.

14. It was a good working relationship and obviously one that worked for both sides and it is a shame it deteriorated at the end. However that also suggests that the parties were content with the status quo for most of the time the Claimant was working for the Respondent.

Submissions

15. Mr Foster went through the various features of the working relationship, all of which pointed in the direction of self-employment, save for the issue of substitution. He said that it is clear that, at the outset, the Claimant was self-employed, so the question was whether that changed and, in his submission, it never did. For his part, the Claimant emphasised how integral he was to the Respondent's business, the fact that there was an agreed rate of pay and that in reality he was under the Respondent's control.

Conclusions

16. Whether or not the Claimant was happy with the arrangement, it is clear that at the start of the working relationship, both parties considered that his status was that of being self-employed. That in itself would not necessarily be determinative, but most of the above findings of fact point in that direction.

17. The Claimant was registered with HMRC as self-employed, he invoiced the company through his trading name, he set off his expenses and he was responsible for his own tax and National Insurance. He invoiced for services rendered and in various amounts based on the hourly rate, which was an amount agreeable to both parties. This suggests that the Claimant was running his own business undertaking. There was no agreement regarding the payment of commission.

18. The fact that the work was carried out within a regular pattern of hours reflects the administrative necessities of running the Respondent's business, rather than any control over the Claimant's work. Equally, I do not attach significance to the availability of the Respondent's office resources, should the Claimant wish to avail himself of them.

19. The issue of substitution did not arise and may never have been discussed. The Claimant always provided the work himself and that is a factor in favour of his argument that he was really a worker. However, it is more telling that he could choose whether or not to make himself available for work. If he did not do so, there was no sanction and the work simply did not get done.

20. Overall I agree with Mr Foster that the above factors taken as a whole suggest that the Claimant was self-employed from the start of the working relationship and that this never changed. It follows that he was not a worker and his claim for an unauthorised deduction of wages cannot succeed.

Costs

21. After I had given judgement, Mr Foster made an application for costs. He did so on the basis that an offer was made on 24 August 2020 to pay the Claimant £2,500 in settlement of his claim. That letter contained a costs warning. The settlement offer gave almost full credit for that part of the claim relating to payments in respect of annual leave, which the Claimant valued at £2800. It was a commercial offer reflecting the fact that the Claimant had arguments that he could raise regarding worker status. The offer gave no

credit for the claim in respect of commission (£1,600) because the Respondent was confident that there was never an agreement that should be paid. The Respondent's total legal costs have come to £3,000 and Mr Foster told me that, had the offer been accepted, £1,000 could have been saved.

22. The Claimant said in response that he considered this was a derisory offer. He expected to receive full value of his claim, namely £4,400. He did not take any legal advice at the time and did not recognise any weaknesses in his claim.

23. In my view, even allowing for the strength of the Claimant's feelings about his case, it was unreasonable to refuse an offer that would give him about 60% of his total claim. I can understand why he felt there were arguments around annual leave, because, as set out above, he was never happy with the self-employed arrangement. However, the offer would have given him about 90% of what he was seeking to recover in respect of annual leave. On the other hand, I struggle to see how he could have been so sure that he could establish there was an agreement to pay him commission in the sum of £1,600 in the absence of anything in writing to show that.

24. I appreciate the argument that the Claimant did not have legal advice. It is appropriate for a litigant in person to be judged less harshly in terms of his or her conduct than a litigant who is professionally represented. However, someone representing themselves is still able to look at an offer, look at their case and realise that there are arguments for and against and take into account the warning of an application for costs, particularly where that litigant is someone who operates in a commercial environment.

25. It therefore seems to me, applying Rule 76, that he acted unreasonably by continuing to this final hearing, when a reasonable offer had been made to settle his claim. As noted above, that offer had also warned him that this application would be made if his claim was unsuccessful. I took into account the Claimant's means. He currently works for the DWP. He takes home about £350 a week and, after outgoings, is left with about £65 week. In those circumstances, I make an order of costs in the sum of £250.

Employment Judge S Cheetham QC
Dated 30 September 2020