Case No: 1309244/2020V

EMPLOYMENT TRIBUNALS

Claimant: Mr K Hudson

Respondent: Bantu Enterprises Ltd

Heard at: Birmingham (by CVP) **On:** 15 January 2021

Before: Employment Judge Edmonds

Representation
Claimant: In person
Respondent: Mr S A Mankulu, Director

This has been a remote hearing which has been consented to by the parties. The form of remote hearing was V (CVP). A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing.

RESERVED JUDGMENT

1. The name of the Respondent is amended to Bantu Enterprises Limited.

2. The Respondent has made an unlawful deduction from the Claimant's wages and is ordered to pay the Claimant the gross sum of £2,750.03. The Respondent shall be free to deduct such sums in respect of tax and national insurance as may be appropriate.

3. The claim for failure to provide an itemised pay statement does not succeed.

REASONS

Introduction

1. The Claimant was a Head Chef at the Respondent. The Respondent is a restaurant specialising in African cuisine. The Claimant claims that he has not been paid for work he did for the Respondent between 3 July 2020 and 4 August 2020, nor holiday accrued during that time, nor received a pay statement. ACAS was notified under the early conciliation period on

13 August 2020 and the certificate was issued on 13 September 2020. The ET1 was presented on 21 September 2020 and the ET3 was presented on 10 November 2020.

Claims and Issues

2. The Claimant has brought claims for unlawful deductions from wages and for failure to provide an itemised pay statement.

3. The issues were discussed at the start of the hearing and identified as follows:

Unlawful deductions from wages

a) Was the Claimant a worker within the meaning of section 230(3) of the Employment Rights Act 1996?

b) Is the claim in respect of wages?

c) Has the Respondent made a deduction from wages (in respect of salary and/or holiday pay)?

d) If so, was that deduction entitled to be made?

e) If a sum is due to the Claimant, how much?

Itemised pay statement

a) Was the Claimant a worker within the meaning of section 230(3) of the Employment Rights Act 1996?

b) Was the Claimant entitled to an itemised pay statement?

c) If so, did the Respondent fail to provide him with one?

d) If so, is the Claimant entitled to any compensation in respect of this failure?

Procedure

4. The hearing took place remotely via CVP. There were some technical difficulties at the start of the hearing, but ultimately all parties were able to attend and give their evidence.

5. I heard evidence from the Claimant, and on the Respondent's behalf from Mr Sadrac Antonio Mankulu (Director) and Mr Paille Panghoud (Sous-chef). In addition, the Respondent produced an emailed statement from Luis Hadji, a chef at the Respondent, although he did not attend to give evidence. I explained to the parties that I would read that email but that as Mr Hadji was not present, I would need to consider how much weight, if any, to attach to it. Mr Mankulu could not give any explanation for why Mr Hadji was not able to attend the hearing. Having given the matter due consideration, given the absence of a reason for non-attendance and the fact that the Claimant has been therefore prevented from questioning Mr Hadji about his evidence, I have concluded that I do not attach any weight

to it. In any event, I do not believe that his evidence would not have changed the outcome of this case.

6. There was no agreed Bundle. The Claimant had provided a number of documents to the Tribunal by email in advance of the hearing, although it transpired that the Respondent had not been sent a copy. The Respondent was therefore sent a copy during the hearing and there was a short break for the Respondent to consider the contents. The Respondent provided three pages of documents, which had been sent to both the Tribunal and the Claimant in advance. I informed the parties that unless I was taken to a document I would not read it.

7. At the outset of the hearing, I discussed the identity of the Respondent with the parties, noting that the Respondent had used a different name on the ET3 to the one listed at the Tribunal. The Respondent confirmed that the correct legal name for the Respondent was Bantu Enterprises Limited. The Claimant confirmed that he had no objection to this, and therefore it was ordered that the Respondent's name be amended accordingly.

8. During the hearing, Mr Mankulu referred to some discussions the parties had had the previous week. On exploring further, it was identified that these discussions were of a without prejudice nature: I asked the parties to refrain from discussing them further and did not take anything into account that was said about those discussions.

Fact findings

9. The Respondent is a restaurant located in Birmingham, specialising in African cuisine, known as Bantu Bar and Grill. The Claimant was Head Chef, although his employment status and the dates on which he performed that role are disputed. It is agreed that, at most, the Claimant had the role for approximately one month. The Claimant was not provided with any written contract.

10. During 2020, the Respondent advertised for a new Head Chef. The advertisement for the role stated that a Head Chef was urgently needed, that the position was a permanent one, and that the salary range would be £28,000 to £32,000 per annum. The expected start date for the position was listed as 3 July 2020. It included a job description and further stated that the Head Chef "should also be available to work within opening hours, including weekends and holidays" and set out the responsibilities of the position.

11. The Claimant attended an interview for the position on 1 July 2020 with Mr Mankulu. There is dispute between the parties about what happened at, and following, that interview in several respects.

12. Both parties agree that the Claimant was appointed as Head Chef, however Mr Mankulu submitted on behalf of the Respondent that this was a trial arrangement, on a self employed basis, to see if the Claimant was suited to the role. Mr Mankulu submitted that this was his normal practice due to the delicate nature of the African cuisine. He said that, if things did work out, then there would have been a subsequent discussion with the Claimant about whether he should become an employee of the Respondent. Mr Mankulu submitted that other individuals within the

Respondent understood their positions to be self-employed, and I heard from Mr Panghoud to this effect, however Mr Mankulu did accept under cross examination that there were other individuals who were employed by the Respondent.

13. The Claimant however submitted that he was offered the role as an employee, and that he would not otherwise have taken the role. He explained that in his career he had always wanted to be an employee rather than self-employed and that, in line with the job description for the role, he understood it to be an employed position and that he would be paid following deductions for tax. I accept what the Claimant said.

14. The rate of pay for the position is also in dispute. The Claimant's position is that there was an agreed annual salary of £27,500: the Claimant commented that this was lower than the salary band set out in the job advertisement but explained that he had inadvertently suggested this lower figure by mistake during the interview process, after getting confused between this position and others that he had applied for. The Respondent says that in actual fact an hourly rate was agreed at a rate of £9.50 per hour, and that the Claimant would have been told that he could earn "up to" £27,500 depending on the hours put in. The Claimant submits that this cannot be the case as, based on a 40 hour week, the annual salary would be considerably less than that envisaged in the job description. Mr Mankulu argued that this figure was correct, and that the assumption was that the pay band could be achieved if sufficient hours were worked. He said that his expectations, given that this was a new business, would be for everyone to be working 60 to 70 hours per week (in which case the salary banding could be achieved). He also pointed me to a rota which showed that the Claimant's hours of work had been reduced alongside the self-employed members of staff due to COVID-19: he submitted that, had the Claimant been salaried, he would have maintained the Claimant's hours but further reduced the hours of the non-salaried members of the team, to save costs. However, having considered all the arguments raised, I accept the evidence given by the Claimant, particularly given his clear memory of having inadvertently offered a lower pay rate than the advertisement set out. Were he being dishonest, I would have expected him to put forward an amount within the salary band from the advertisement. The Claimant also accepted in evidence that he was the only salaried member of staff in the kitchen, but as Head Chef he was in a unique role and it was entirely plausible that his pay structure would be different to others.

15. The Claimant started his position at the Respondent on Friday 3 July 2020, in preparation for the restaurant opening on Saturday 4 July 2020. The Claimant says that he recalls that there was a COVID spray being done on the Friday. The Respondent had argued that it was a later date, namely 8 July, but there was no evidence of this. Whilst the Claimant did not join the restaurant's WhatsApp group for kitchen chefs until 8 July, I do not believe that this is determinative: this simply shows the point in time when he was added to the group. It further appears from the print outs from the group that the group itself may only have been set up on that date in any event. The Claimant explained that he had gone to the restaurant (which was still closed) on Thursday 2 July to demonstrate his cooking, so that the Respondent could make sure that he had the skills

necessary for the position, and then started the following day so that he could do the necessary tasks to prepare for opening. This also aligns with the job description which listed an expected start date of 3 July 2020, and the fact that he has a specific recollection regarding the COVID spray on 3 July 2020.

16. The hours that the Claimant was required to carry out were also disputed. In evidence, the Claimant was challenged on his position that he was offered an annual salary but with no specific agreement as to the number of hours to be worked, the Respondent's position being that it would be absurd for the Respondent to have agreed to an annual salary without having set expectations regarding hours. The Claimant said that the agreement was simply that the role was "full time" and he had interpreted that to mean around 40 hours. He said that he had spoken with his general manager about his hours and had been told by him that he needed to be in every day that the restaurant was open, which was five days per week. He said the restaurant was open from 5pm to 11pm Wednesday to Friday, and 3pm to 11pm on Saturdays and Sundays: he expected to attend work around an hour before the restaurant opened each day and stay until it closed, which would often be significantly later than the closing time as customers may still be eating. The Claimant explained that this suited him well as he could not start until 4pm each weekday due to childcare. I find that these were the hours agreed with the Claimant and that these were full time hours. Whilst the Respondent suggested that the 4pm restriction was only for the first week and that he would not have offered the position had he known about the 4pm issue, I prefer the Claimant's explanation: I have seen no evidence to show that the Head Chef required attendance at the restaurant more than one hour prior to opening.

17. Whilst Head Chef, the Claimant submits that he worked the hours necessary to perform his role, in line with the expectations set out above, which were in excess of 40 hours per week. The Respondent on the other hand suggests that the Claimant worked significantly fewer hours than this, at around 25 hours per week. I have seen no evidence of time sheets or sign in sheets to identify exactly what hours the Claimant spent at the restaurant: the Respondent has said that this was in fact part of the problem, in that the Claimant should have recorded his hours but failed to do so. The Claimant however submits that he did not think he needed to do this given his annual salary. I can see from the limited documentation I do have that in one example rota the Claimant was scheduled to work for 35 hours. The Claimant explained to me that the rota and hours actually worked are different things: for example the rota would only show hours up to the point of last service, but in reality the shift would usually finish later than this, to allow for customers to complete their meals and for the restaurant to be tidied and cleaned. I accept that explanation.

18. The Claimant gave evidence that he was personally expected to attend work as Head Chef, and could not send someone else in his place. The Respondent said that he could and referred to specific individuals who used to work for the Respondent but could be contacted and asked to come back to work a shift if necessary. Whilst this does indicate that was some scope for arranging cover, I am not convinced that the Claimant truly had the ability to choose on any particular day whether or not to attend

work or to send someone else in his place. His name was on the rota, his clear expectation was that he should be the one to perform his role, and if he was able to arrange cover this was only from a very limited pool of people chosen by the Respondent.

19. It is clear that the relationship was not a happy one between Mr Mankulu and the Claimant: Mr Mankulu was not satisfied with the Claimant's performance, the hours that he was working or the Claimant's adherence to administrative procedures (notably the requirement to sign in/out). Whether or not this issues were well founded is not relevant to the issues in this case, but it is relevant to note that Mr Mankulu clearly believed that he should have some control over the Claimant in this regard.

20. The Claimant was expecting to be paid at the end of July but was not. The Respondent accepts this, and explained that as a small business this can happen from time to time, and gave examples of other members of staff who had been paid late. The Respondent further alleges that the Claimant had not worked the hours that he was seeking to be paid for. Whatever the reason, it is clear that the Claimant was not paid at the end of July, when he expected to be paid.

21. There is further dispute about how the Claimant's position came to an end, and when. The Respondent submitted that this was on 25 July 2020, on the basis that he did not actually do any work after this point, although no evidence was provided to me to support this. The Claimant, on the other hand, says that he worked his last shift on 4 August, following which he refused to work due to the lack of pay. I have been referred to the record of a WhatsApp conversation from 4 August: in this the Claimant is asked by the commis chef "*Hi, can u defrost the meats when u get in 2day so that 2mrrow I can prep them when I get in"*. The Claimant replied "*Will do*" followed by "*Have you been paid yet?"*. This clearly shows me that the Claimant was still working up to that date. I therefore find that the Claimant was Head Chef between 3 July 2020 and 4 August 2020 inclusive.

22. Mr Mankulu submitted in evidence that the Claimant would have been required to serve a one week notice period. The Claimant said that he had never been told this. In any event, I find that it does not matter whether or not the Claimant would have had a notice period as both parties agree that he did not serve one, and the Claimant does not seek to be paid for one.

23. The Respondent accepts that, to the date of this hearing, it has not paid the Claimant any sums whatsoever in respect of his time as Head Chef, nor has it provided him with any itemised pay statement. Mr Mankulu said that the Respondent accepts that it does owe the Claimant money, but disputes the amount and nature of the payment.

Law

Worker Status

24. There are three categories of individual in UK employment law: employee, worker and self-employed. All employees are workers, but not all workers are employees. Workers are entitled to certain protections, including both the right to bring a claim for unlawful deductions from wages, and the right to an itemised pay statement. Therefore, for the purposes of this claim it is

only necessary to consider whether or not the Claimant was a worker or self-employed, not whether he was also an employee.

25. Section 230(3) of the Employment Rights Act 1996 ("ERA") defines a "worker" as:

"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."*

26. Contracts can therefore be written or verbal and can be through express agreement or implied through conduct. It is a lower threshold than that required for employee status (*Bryne Brothers (Formwork) Ltd v Baird and others [2002] IRLR 96)*, and it is the reality of the situation which is relevant, not simply what the contract says (*Autoclenz Ltd v Belcher and others [2011] IRLR 820*).

27. In broad terms, to constitute a worker, three conditions must apply:

a) There must be a contract;

b) That contract must require personal performance; and

c) The individual must not be a client of a profession or undertaking carried on by the Claimant. In short, it must not be a business / client relationship.

In addition, whether or not there is mutuality of obligation (i.e. an obligation for one party to provide work and the other to do the work) can also be relevant (*Windle v Secretary of State for Justice [2016] EWCA Civ* 459). However, if someone is a self employed person doing a business activity which is genuinely on their own account, they will not be a worker.

28. In looking at whether personal performance is required, a key consideration will be whether there is a right of substitution. It does not matter whether the right was ever exercised.

29. There may still be an obligation of personal service where there is a right of substitution, if the ability to appoint substitutes is limited (see, for example, *Bryne Brothers* above, *Pimlico Plumbers Ltd v Smith [2017] EWCA Civ 51* and *Dewhurst v CitySprint UK Ltd ET Case No.2202512/16*).

30. In relation to limb (c) of the test set out above, in *Byrne Brothers* (above), it was held that relevant factors would include matters such as the degree of control exercised by the organisation, the exclusivity of the arrangement, the typical duration, method of payment, supplier of equipment, level of

risk undertaken by the individual and tax status. In short, the question is whether the relationship is sufficiently arm's-length and independent that the individual is being treated as being able to "look after themselves".

31. Integration may be a relevant factor, as may be the question as to whether the dominant feature of the relationship is the obligation to do work personally *Hospital Medical Group Ltd v Westwood [2012] EWCA Civ 1005*.

Wages

General

32. Section 13(1) of the 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."*

There is no qualifying period for this type of claim: it can be made from the first day of employment or appointment.

33. Section 27 of the ERA details what amounts to wages: this includes both salary and holiday pay.

34. Section 13(3) of the ERA provides that:

> "*Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion."*

35. A deduction will be authorised if it is made under a statutory provision, under a "relevant provision" of the worker's contract, or the worker has consented in advance to the deduction in writing (section 13(1) of the ERA).

Holiday pay

36. Workers are entitled to a minimum of 5.6 weeks' leave in each leave year under Regulations 13 and 13A of the Working Time Regulations 1998 ("WTR"). During the first year of employment, this accrues on a pro rata basis (Regulation 15A, WTR).

37. Where a worker's employment ends during the leave year, a payment in lieu of any accrued but untaken statutory leave must be made (Regulation 14, WTR).

Itemised pay statement

38. Under section 8(1) of the ERA all workers are entitled to itemised pay statements. There is no qualifying period. The pay statement must be:

    a) Written;

    b) Given;

    c) At or before any payment is made.

39. Where there is an accompanying claim for unlawful deductions from wages, section 26 of the ERA makes clear that the total sum awarded across both claims must not exceed the total amount of the deduction, i.e. it prevents a worker from recovering twice.

Conclusions

Employment Status

40. In assessing whether the Claimant was a worker, it is necessary to look at the reality of the situation, not just what the parties agreed (or did not agree).

41. The first point to assess is whether there was a contract between the Claimant and Respondent. There was no written contract of employment, but that does not mean that there was no contract. There was a clear agreement between the parties that the Claimant would take the position of Head Chef and be paid for that position. I have found that there was an agreed salary, there was a job description for the role which referred to various responsibilities, and the Claimant went through an interview process to be appointed to the role. There were no fixed hours as such, but there was an expectation of full time hours and a rota prepared in advance. One of the Respondent's concerns about the Claimant was that they did not believe he did the hours he should have done: this highlights that the Respondent believed some form of binding contract was in place. I conclude that there was a clear contract between the Claimant and Respondent.

42. Next I must assess whether or not the contract required personal performance. Although there may have been some ability to contact other former members of staff to request that they do a shift instead of the Claimant, this was very restricted in nature and does not in my view constitute a true right of substitution: it does not appear to have been open to the Claimant to substitute someone of his own choosing. In other words, personal performance was still required.

43. As to whether this was a business / client relationship and therefore outside the scope of a worker relationship, I conclude that it was not. I believe that the Claimant was in a subordinate position to the Respondent and do not believe that this was an arm's length relationship in which the Claimant could "look after himself". He was under the Respondent's control: for example his hours were set by the rota that was prepared by

the Respondent, and it was clear to me that the Respondent felt at least entitled to comment on the Claimant's performance and adherence to procedures. The Claimant expected to be taxed on his salary. The Claimant was also integrated into the Respondent's business. He was the Head Chef, clearly acting as an integral part of the Respondent's operations with the dominant purpose of his role being to personally take responsibility for the meals being provided to the Respondent's customers.

44. I also conclude that there was mutuality of obligation between the Claimant and Respondent. Whilst the number of hours in any given week was variable according to the rota system, there was still in my view an underlying expectation between the parties that the Claimant would be on the rota and that he would then turn up to do those shifts: i.e. the Respondent was expected to give him work to do and the Claimant was expected to do it.

45. The Respondent submitted that the intention was to have a self-employed relationship initially which would then be converted to an employment relationship once the Claimant had shown he was capable of doing the role. That does not change my view. As far as the Claimant was concerned he was employed by the Respondent in line with the job advertisement he had seen. The fact that the Respondent wanted to assess performance initially does not prevent worker status: plenty of workers have probationary or trial periods.

46. I also take on board that others within the Respondent were engaged on a self employed basis. However, that again does not change the position for two reasons: (a) the Claimant was in a unique role and therefore could easily have had a different arrangement, and (b) I heard evidence only that others were stated to be self employed, not what their actual employment status was. I therefore can make no finding as to whether other individuals were in fact self employed or workers. Therefore, whether or not the Respondent intended the Claimant to be self employed, and whether or not the Respondent ever communicated that to the Claimant, I find that he was in fact a worker.

Unlawful Deductions from Wages

47. Having determined that the Claimant was a worker, the next stage is to identify whether there has been an unlawful deduction from wages. Holiday pay and salary both constitute wages. Given that the Respondent accepts that it has not paid the Claimant any sums whatsoever in relation to his position as Head Chef, and also accepts that the Claimant did indeed act as Head Chef for a period of time (albeit the period is disputed), it is clear to me that there must have been some payment properly payable to the Claimant which has not been made to him, and therefore that there has been a deduction from his wages. I have seen nothing to suggest that any deduction from wages made was authorised, nor that it was exempt in any way from being paid, and consequently have no hesitation in finding that there has been an unlawful deduction from wages.

48. To identify the amount of wages unlawfully deducted, it is necessary to identify the period during which the Claimant was engaged to provide

services, the rate of pay and the hours of work (if relevant). The Claimant worked from 3 July 2020 to 4 August 2020 inclusive. His rate of pay was an annual salary of £27,500pa. His hours of work were not clearly defined, but are not relevant because he was engaged on an annual salary, not dependent on the number of hours worked in any particular month. He is therefore entitled to 4.7 weeks' pay. His gross weekly rate of pay was £528.85 and therefore he is owed £528.85 x 4.7 which equals £2,485.60 by way of salary.

49. As a worker, the Claimant was also entitled to holiday pay. In the absence of any contractual documentation showing holiday entitlement or evidence suggesting otherwise, I conclude that the Claimant would have been entitled to statutory holiday of 5.6 weeks' holiday in each holiday year. It has not been suggested to me that the Claimant took any holiday. Over a working period of 4.7 weeks he would have accrued 9% of his annual holiday entitlement, equating to 2.5 days' holiday. Based on a five day week, there would be 260 working days in each year, and therefore this equates to a gross day rate of £105.77. The Claimant is therefore entitled to be paid £105.77 x 2.5 which equals £264.43 in respect of holiday pay.

50. Therefore, in summary I find that the Respondent made an unauthorised deduction from wages in the sum of £2,485.60 plus £264.43 which equals **£2,750.03** in total, and I order the Respondent to repay this sum to the Claimant. I have calculated this amount on a gross basis but the Respondent is entitled to make any deductions due for tax and national insurance contributions before payment is made to the Claimant.

Itemised pay statement

51. The Claimant received no pay for the hours that he worked. In those circumstances, there has been no breach of section 8 of the ERA, as the requirement to issue a pay statement arises at the point when payment is made.

52. In any event, having concluded that the Claimant is entitled to full recovery under his unlawful deductions from wages claim, it would not have been open to me to offer any additional compensation for any failure to provide an itemised pay statement in accordance with section 26 of the ERA.

Employment Judge Edmonds

1 February 2021