



# EMPLOYMENT TRIBUNALS

**Claimant:** Grzegorz Dec

**Respondent:** Titan Recruitment Limited

**Heard at:** Birmingham via CVP      **On:** 21/5/21

**Before:** Employment Judge Beck

**Representation:**

Claimant: Grzegorz Dec (In Person)

Respondent: Christopher Fitzgerald, Regional Manager, Titan Recruitment Limited

## RESERVED JUDGMENT

1. The complaint under **section 23(1) Employment Rights Act (1996)** that the respondent has made unlawful deductions from the claimant's wages is not well founded. Therefore, the complaint is dismissed.

## REASONS

### Introduction

1. By a claim form submitted on the 8/10/20, the claimant brought a claim for unpaid wages under **section 23 (1)(a) Employment Rights Act (1996)**.

2. The respondent returned the ET3 form on the 25/11/20 indicating the claim was opposed.

3. The claimant undertook early conciliation with ACAS, the application being received by ACAS on the 17/8/20, the certificate being issued on the 10/9/20, under certificate number R181135/20/61.

4. The parties have provided a number of documents each, although I did not have a paginated bundle.

5. In summary the claimant submitted copies of the ET1 and ET3 forms, a copy of the ACAS certificate, a statement from himself dated 14/5/21, a schedule of loss dated 14/5/21, a copy of a grievance letter dated 14/8/20, and copies of text messages between the parties from the 10/7/20 and 11/7/20. I confirmed with the respondent that he had copies of all the documents relied on by the claimant.

6. The respondent provided a copy of 'Titan Recruitment Application Form' completed by the claimant electronically and dated 10/7/20. This also included a contract for services which engaged the claimant as a temporary agency worker. A blank 'key information' details sheet, E Mail from Aimee O'Reilly, Transport Clerk at Lineage Logistics to Arron Hillman at Titan Recruitment dated 10/7/20, Text messages between the claimant and Josh Allen at Titan Recruitment on the 11/7/20. A letter from Frances Swift, Branch Manager at Titan Recruitment to the claimant undated, an e mail dated 11/7/20 from James Robinson, Group Transport Compliance Co – Ordinator at Lineage Logistics to Aaron Hillman at Titan Recruitment and a witness statement from Christopher Fitzgerald dated 17/5/21. I confirmed with the claimant that he had copies of all the respondents' documents.

7. The claimant and Christopher Fitzgerald for the respondent gave evidence before the tribunal.

8. The claimant seeks £112.00 which he claims is unpaid wages from the 11/7/20, 8 hours claimed at £14.00 per hour. The claimant in his schedule of loss seeks £223.00 for preparation time in respect of his tribunal application.

### **Agreed Facts**

9. The parties agreed that the claim had been presented within the 3 months statutory time limit.

10. The respondent accepted the claimant had signed a contract for service with his employment business, Titan Recruitment Limited. This was as a temporary agency worker, the terms of the contract including 'work assignments will be offered to you on an ad hoc basis', 'assignments may be offered on hourly, daily, weekly or other basis', 'you are free to accept or decline appointments', 'payment weekly in arrears from the agency'. This is annexed to the 'Titan Recruitment Application Form' signed by the claimant on the 10/7/20.

11. I explained **section 18 and 34 of the National Minimum Wages Act (1988)**, and the parties agreed the claimant as an agency worker fell within the definition of worker for the purposes of being able to make a claim for unlawful deductions from wages.

12. The parties accepted the claimant sought 'wages', within the definition of **section 27 Employment Rights Act (1996)**, the claimant made a claim for £112.00, 8 hours pay at £14.00 per hour.

13. The issue for determination is whether the payment of £112.00 was properly payable, and whether the respondent had made an unauthorised deduction from wages in not paying the £112.00 to the claimant. The claimant's case is he received a text message instructing him to attend for work on the 11/7/20. The respondent's case is that a telephone call was made to the claimant at 16.20 on the 10/7/20 advising him he was not required to work on the 11/7/20, cancelling the previous arrangements.

14. I explained **rules 75 and 76 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013** to the parties in respect of preparation time orders, and they were invited to address whether a preparation time order should be made, at the end of the hearing.

## Law

**Section 13(1) of the Employment Rights Act 1996** provides that an employer shall not make a deduction from wages of a worker employed by him unless 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 the worker has previously signified in writing his agreement or consent to the making of the deduction. An employee has a right to complain to an Employment Tribunal of an unlawful deduction from wages pursuant to Section 23 of the Employment Rights Act 1996.

**Section 27 (1) Employment Rights Act (1996)** defines wages in relation to any worker means any sums payable to the worker in connection with his employment including (a) any fee, bonus, commission, holiday pay or other emolument referable to his employment, whether payable under his contract or otherwise. It includes other categories such as statutory sick pay, but excludes any payments within subsection (2). Subsection (2) defines the excluded categories as (a) any payment by way of an advance under an agreement for a loan or by way of an advance of wages (b) any payment in respect of expenses incurred by the worker in carrying out his employment, (c) any payment by way of pension, allowance or gratuity in connection with the workers retirement or as compensation for loss of office, (d) any pay referable to the workers redundancy and (e) any payment to the worker otherwise than in his capacity as a worker.

**Section 34 (1) and (2) National Minimum Wage Act (1998)** provides in

(1) This section applies in any case where an individual ("the agency worker")  
(a) is supplied by a person ("the agent") to do work for another ("the principal") under a contract or other arrangements made between the agent and the principal;  
but

(b) is not as respects that work a worker, because of the absence of a worker's contract between the individual and the agent or the principal, and;

(c) is not a party to a contract under which he undertakes to do the work for another party to the contract whose status is, by virtue of the contract, that of a client or customer of any profession or business undertaking carried on by the individual.

(2) In a case where this section applies, the other provisions of this act shall have effect as if there were a worker's contract for the doing of the work by the agency worker made between the agency worker and

(a) whichever of the agent and the principal is responsible for paying the agency worker in respect of the work; or

(b) if neither the agent nor principal is so responsible, whichever of them pays the agency worker in respect of the work.

**Section 18(1) National Minimum Wage Act (1998) provides**

(1) If the persons who are the worker and the employer for the purposes of section 17 above would not (apart from this section) fall to be regarded as the worker and employer for the purposes of

(a) part II of the Employment Rights Act (1996) (protection of wages)...

They shall be so regarded for the purposes of the application of that part in relation to the entitlement conferred by that section.

**Regulation 75 (2) Employment Tribunals (Constitution and Rules of Procedure) Regulations (2013)**

A preparation time order is an order that a party ("the paying party") make a payment to another party ("the receiving party") in respect of the receiving party's preparation time whilst not legally represented. "Preparation time means time spent by the receiving party (including by employees or advisers) in working on the case, except for time spent at any final hearing.

**Regulation 76 (1) Employment Tribunals (Constitution and Rules of Procedure) Regulations (2013)**

A Tribunal may make a costs order or a preparation time order, and shall consider whether to do so, where it considers that-

(a) a party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of proceedings (or part) or the way that the proceedings (or part) have been conducted; or

(b) any claim or response had no reasonable prospect of success; or

(c) a hearing has been postponed or adjourned on the application of a party made less than 7 days before the date on which the relevant hearing begins.

## **Evidence and findings**

15. The claimant confirmed in evidence he was in the process of registering with the agency on the 10/7/20, and text messages were going back and forth with Aaron and Josh at the agency during the day. There was a role available on the 11/7/20 with Lineage Logistics as an HGV driver.

16. The respondent confirmed in evidence, that every job is confirmed by a key information sheet being sent to the worker, which confirms the details of the place of work, rate of pay, and hours to be worked. The respondent's position was, and the claimant accepted, that a copy of the 'key information details' sheet was not sent to him regarding the assignment on the 11/7/20. In cross examination the claimant accepted the only confirmation he had about the assignment on the 11/7/20 was the text messages from Aaron Hillman and Josh Allen, and phone calls between them on the 10/7/20. In particular the text message sent by Titan Recruitment at 14:50 on the 10/7/20 confirms the address of Lineage Logistics, to attend at 1.30am, take safety boots and report to Amy. The messages ended with the question is that ok? The claimants own text messages show, and he accepted in evidence that the last message he sent was at 16:15 on the 10/7/20 stating his application form was completed and asking how many hours there would be on the shift. The claimant confirms he did not receive a reply to this text message.

17. The respondent has produced an e mail dated 10/7/20 at 16:17 from Aimee O'Reilly, Transport Clerk at Lineage Logisitic's to Aaron Hillman stating they were not able to use the driver on the 11/7/20 due to his lack of HGV driving experience in the UK. Frances Swift, Branch Manager's letter in response to the claimant grievance dated 14/8/20, explains that she heard Arron make the phone call to the claimant at 16:20 on the 10/7/20 advising him not to go to work on the 11/7/20. She was present in the office at the time. The respondent when cross examined explained Frances Swift no longer worked for the company, and therefore had not completed a statement for these proceedings. The respondent stated there was no particular reason why Aaron hadn't been asked to complete a statement, as he still worked for the company.

18. The claimant's statement did not contain details regarding the rate of pay being £14.00 for the role. The respondent's evidence in relation to the rate of pay, was that the company were not clear where the figure of £14.00 per hour had come from, the contract for services document refers to a minimum of £8.72 per hour. The claimant when cross examined stated he had taken the £14.00 per hour rate from 'CV Library', the on-line job search platform via which he initially applied to register with the agency the previous year.

19. The claimant accepted having 2 mobile phones at the time and was swapping one sim card between them, he stated he did not have all the messages on his phone. He accepted in cross examination, receiving the text message produced by the respondent from Josh Allen on 11/7/20 at 8.16, 'you shouldn't have gone into work today after you said you had no experience, they told us they couldn't use you'.

In reply the claimant said 'I only said that I haven't got experience from the UK, but I was driving back in the day in Poland. I told exactly the same to you yesterday before I been sent out for a job as I was pretty sure that they will accept new drivers.'

20. It is not disputed by the parties that the claimant attended Lineage Logistics at 1.30am on the 11/7/20, and was present until 5.45am, the claimant confirming in evidence he did not undertake any work during this time.

21. I find on the balance of probabilities that a phone call was made by Aaron Hillman on the 10/7/20 at 16:20 cancelling the claimant's attendance on the 11/7/20, at Lineage Logistics.

## **Conclusions**

22. I conclude that £112.00 was not properly payable, as the HGV role on the 11/7/20 had been cancelled on the 10/7/20, due to claimant's lack of experience driving HGVs in the UK. An E Mail from Aimee O'Reilly, Transport Clerk at Lineage Logistics on the 10/7/20 at 16.17 confirms the claimant in light of his lack of experience was not going to be used as a driver on the 11/7/20. The claimant accepted he did not receive any further messages from Titan Recruitment after 16:15. This supports the fact that a phone call was subsequently made cancelling the assignment, as there was no other contact made by the agency. In light of the time of day the instruction came in from Lineage Logistics to cancel the claimant, it would seem reasonable for Titan Recruitment to respond by phoning the claimant immediately to advise him of the position. Frances Swifts letter in response to the claimant's grievance on the 14/8/20 confirms she overheard this phone call being made in the office by Arron Hillman, which supports the fact the phone call was actually made.

23. A further e mail from Aimee O'Reilly the following day at 05:54 confirms the assignment had been cancelled previously, 'after cancelling this last night, your driver still turned up at 01:30am?'. Josh Allan's text message to the claimant at 8.16 on the 11/7/20 also support this, 'you shouldn't have gone into work today'. I find these text messages and e mails corroborative of the cancellation of the assignment on the 10/7/20 by Arron Hillman by telephone.

24. I have also taken into account that it was accepted by the claimant that the 'key information' sheet had not been sent to him in relation to this assignment. On the claimant's own evidence, he did not know the hours he was required to work at 16:15 on the 10/7/20, as he asked this in his text message, and was not able to confirm in evidence what his hourly rate of pay was to be on the 11/7/20.

25. After cross examination on how the figure of £14.00 in the claimant's schedule of loss was arrived at, the claimant indicated the job when initially advertised on the on-line platform 'CV Library' was advertised at between £11 - £14 an hour. The claimant indicated this is where he got the figure of £14.00 per hour from. There is no evidence before the tribunal that the claimant was offered the role at £14.00 an hour by anyone, on the 10/7/20. I find it a significant point that at 16:15 on the 10/7/20 the claimant did not know the hourly rate for the assignment, or the number of hours to be worked.

I conclude this shows the arrangements for the assignment had not been finalised, and then subsequently the assignment had been cancelled at 16:20 by phone.

26. On the basis that the £112.00 was not properly payable, the claim for unlawful deductions from wages is dismissed.

27. In relation to the Preparation Time Order, the claimant said he felt victimised by how Titan Recruitment had dealt with him. In particular when he made the grievance in August 2020, he alleges Titan Recruitment tried to persuade him not to pursue his grievance. The claimant stated he felt that Titan Recruitment had been disruptive of his claim, but didn't give further details.

28. Mr Fitzgerald on behalf of the respondent stated that the company had tried to deal with the grievance in a clear and concise way, and had provided what documentation it could to the tribunal to assist dealing with the claim. He also pointed out that they had chased the claimants schedule of loss which had been submitted late, and submitted all their documents as soon as they were able after receipt of the delayed schedule of loss.

29. I do not find that the respondents in this case have acted vexatiously, abusively, disruptively or otherwise unreasonably in the conduct of the proceedings. They have acted appropriately and provided documents and statements as soon as they were able after later receipt of documents from the claimant. The respondents conduct during the hearing was appropriate, and I can find no evidence of the respondents being disruptive of the claim.

30. Therefore I dismiss the claimant's application for a Preparation Time Order.

**I can confirm this judgement has been electronically signed.**

Employment Judge **Beck**

Date 26/5/2021