THE EMPLOYMENT TRIBUNAL

SITTING AT: **LONDON SOUTH**

BEFORE: **EMPLOYMENT JUDGE TRUSCOTT QC**

BETWEEN:

1. Mrs GV Patyi
2. Mr ZI Patyi **Claimants**

AND

Mrs Kathy Murphy **Respondent**

ON: **19 June 2017 and 18 and 19 January 2018**

Appearances:

For the Claimants: **In person**

For the Respondent: **In person**

JUDGMENT

1. The claimants were employed by Mrs Kathy Murphy. Mr Michael Murphy is dismissed from the proceedings.

2. The respondent was in breach of her duty to the claimants pursuant to section 1(1) and/or(4) of the Employment Rights Act 1996. The claimants, having been successful in their claim of unlawful deduction of wages [para 3], the Tribunal awards compensation to them. The respondent is ordered to pay each claimant an additional four week's pay which is £784.60 pursuant to section 38 of the Employment Act 2002 in respect of a failure to provide a statement of terms and conditions of employment.

3. It is declared that the respondent has made an unlawful deduction from the wages of each claimant pursuant to Part II of the Employment Rights Act 1996. The respondent is ordered to pay £850 to each claimant in respect of the unlawful

deduction in respect of wages for September less £100 in relation to Mrs Patyi who acknowledges that this sum was due to the respondent.

4. It is declared that the respondent has failed to provide the claimants with an itemised pay statement when they were paid. The award is £100.00 being the £50 deduction for accommodation etc which was not disclosed for the two weeks in the 13 weeks immediately preceding the date of presentation of the claim on 18 December 2016.

5. The claims for £6750.40 in respect of underpayment of wages contrary to the National Minimum Wage Act are not established and are dismissed.

6. The claim of unfair dismissal is not well founded and is dismissed.

7. The claim for breach of contract for pay in lieu of notice is not well founded and is dismissed.

8. The total award to Mr Patyi is £1734.60.

9. The total award to Mrs Patyi is £1634.60.

REASONS

PRELIMINARY

1. The respondent gave evidence on her own behalf and also led the evidence of her husband Michael Murphy, Andrew Hackett, Matt Pannell, Deltcho Delchev and relied on the written evidence of Bernard Whitney. Mr Whitney also wrote a letter providing further evidence and explained why he was unable to attend the hearing, his explanation (he attended the Tribunal on two previous occasions and his age) was accepted by the Tribunal. The claimants gave evidence on their own behalf and led the evidence of Andreea Udrica, Catalin Nicolae, Kinga-Krisztina Kadar and Szabolcs Kanabe. Mr Patyi had the assistance of an interpreter.

2. There was a bundle of documents to which additional documents were added during the hearing and to which reference will be made where necessary. Certain of the documents were concerned with an allegation of theft of diamond earrings by Kinga-Krisztina Kadar in December 2013 which was reported to the police.

ISSUES

3. The issues were:

Whether a statement of particulars of employment had been issued.
Whether itemised pay statements had been issued.
Whether there had been an unlawful deduction from wages.
Whether the claimants were entitled to the national minimum wage for the amounts they claimed.
Whether the claimants had been unfairly dismissed.

Whether there had been a failure to pay notice pay

4. The claim of unfair dismissal had been dismissed by Employment Judge Freer on the basis that the claimants did not have two years' service. In order to ensure fairness to the claimants, the Tribunal reinstated the claim because a claim of unfair dismissal for asserting a statutory right or claiming the National Minimum Wage did not require a qualifying period. The respondents disputed that there was a dismissal at all.

5. There was an issue as to who the correct employer was. Mr Murphy was a resident of Dubai from 23 March 2015 to 31 October 2016 and was in the UK for 4 or 5 days in July, 2 days in August and 4 or 5 days in September. Mrs Murphy was resident in the UK and had registered with HMRC as the employer, albeit after the claimants' employment had ended. She never issued a P45 to the claimants. The Tribunal determined that Mrs Murphy was the employer and dismissed Mr Murphy from the proceedings.

FINDINGS OF FACT

6. There was no dispute that a contract of employment had been formed. There was a dispute as to who the employer was and the Tribunal determined that Mrs Murphy was the employer for the reasons set out in paragraph 5 although Mr Murphy was closely involved with the arrangements for employing the claimants, instructing them on work to be done, paying them and altering the terms such that they thought he was their employer. This dispute continued to the date of the hearing and influenced the Tribunal judgment in relation to the statement of terms and conditions and itemised pay statements in that had the claimants received them they would have disputed that Mrs Murphy was their employer.

7. On every other issue, there was a sharp conflict in evidence between the parties. The Tribunal sough to establish the facts of the period of employment from the undisputed material available to it. Very little evidence came into that category. In these circumstances, this section of the reasons somewhat unusually records the conflicting evidence of the parties. The Tribunal did not take into account the evidence of Andreea Udrica, Catalin Nicolae, Kinga-Krisztina Kadar and Szabolcs Kanabe as their evidence related to previous dealings with the respondent and Mr Murphy.

8. The claimants commenced employment as live-in housekeeper/gardener on 26 June 2016 after they responded to an advert on Gumtree placed by the respondent (page 4) where what was sought was "a hard working and diligent couple…for the total upkeep of the house and the estate…each to work for 6 days per week." There was an email exchange before they started but no written detail of the terms of employment so far as pay and hours were concerned. The respondent was to provide accommodation, there would be free use of a car for personal purposes but the petrol for the personal use would be paid by the claimants.

9. The claimants say that the agreement was that they worked 9 hours a day 6 days a week for monthly wages of £750 each for the first 2 months and £950 each thereafter. It was agreed that the claimants would pay £50 each for each week for accommodation and utility bills (para 5 of respondent's statement). The claimants paid £1200 whilst they were in employment (para 5 again). The respondent says

that she had only intended to pay the minimum wage for the hours worked but as the claimants sought a minimum number of hours she specified 20 with the possibility of up to 30 per week. The Tribunal finds that the agreement was as stated by the claimant. The minimum wage deduction for accommodation is £37 50 per week. It was not established whether the utility bills made up the difference.

10. Both parties say they wanted to make and receive payment by cheque but direct payment by cheque was never made. The first payment was made by cheque as is dealt with in paragraph 12.

11. Mrs Patyi had to clean and tidy the house, the horse lorry and the tack room, wash the cars, do the laundry and a variety of other duties. Mr Patyi was to look after two ponies, two dogs and two cats along with gardening and maintenance jobs. In practice, he looked after four horses and transported two of them with the horse trailer, the number of horses increased to seven over the summer.

12. In the first or second week of the employment Mrs Patyi told the respondent that they were going to apply for a National Insurance number as this was a requirement for them. The respondent said the claimants should not worry about it because it can take months to obtain one anyway and others who had worked for her did not even obtain one and were fine. Thereafter the claimants experienced problems booking an interview to get an NI number because of the erratic nature of the work demands of the respondent and the fact that she told them belatedly when their day off would be. The respondent denied that this was the case. The Tribunal accepted the claimants' version of events.

13. The respondent says an envelope containing £600 in cash went missing when the claimants were the only occupants of the house in July. She did not address this matter with them until the final day of their employment in October.

14. The first payment of wages was on 27 July 2016 with each claimant receiving a cheque for £650 drawn on Mr Murphy's account (page 7) and £100 each in cash. The claimants did not have a bank account so they had to be paid in cash. Mr Murphy wanted to pay by cheque in order to have a record of the payment. His cheques for £650 each were cashed by Buzz an employee of the respondent and the cash paid to the claimant.

15. The claimants said they could not open a bank account without a National Insurance number. The respondent told them that opening a bank account was easy. The respondent produced a letter from Barclays bank dated 12 September 2017 which confirmed that they did not require a National Insurance number to open a bank account with that bank.

16. The claimants say that usually they worked from 7am, 8am, or 9am for 9 hours with 1 hour for lunch 6 days a week. The claimants said they might receive their instructions late the day before, as happened on their first day of work at 23.29 (page 6) which caused them difficulty in organising the work and their time off. The respondent says that there was not enough work to keep the claimants occupied for that time. There was more detailed evidence from each party about the amount of work available.

17. In July, Mr Patyi carried out the duties expected of him including painting and fixing the windows at Twineham Grange Manor, the respondent's home. Mrs Patyi also carried out the work expected of her.

18. On 8 August, the respondent and Mr Murphy went to Spain. Mrs Patyi was to accompany them but was delayed by a day. She was loaned £100 for her own food. She accepts that this falls to be deducted from any amount due to her. Different hours applied when Mrs Patyi was in Spain She found dealing with the respondent's four children difficult and expressed her frustration to the respondent and indicated that they would not be staying with them long term. In a discussion with Mr Murphy, Mrs Patyi says that she asked for confirmation that the pay would increase to £950 each and Mr Murphy told her it was £850. As she was in Spain and thought she had no choice, she agreed with Mr Murphy.

19. The respondent said that there was very little work for Mrs Patyi to do in Spain. Mrs Patyi says that she felt pressure "as I was sewing hundreds of labels on the children's school clothing in every free hour that I had, then we returned to England, where I continued sewing, then we went to Rochdale". The respondent disputes the extent of the sewing and has produced receipts to show the school outfitters were paid for attaching the labels.

20. The claimants say they received £500 on 5 September and £1000 in mid-September both attributable to August from Buzz who cashed cheques from Mr Murphy's account. Mr Murphy says that the claimants asked him for their September wages early as they had a problem with their daughter. "They asked Buzz to pay £1000." The Tribunal accepted the claimants' account.

21. In September Mr Patyi had painting to do in a flat in Rochdale along with his other work. Mrs Patyi was in Rochdale and also carried out her duties at Twineham Grange Manor.

22. Towards the end of September, Mrs Patyi raised the issue of having a letter of employment in order that they could open a bank account. The respondent replied that she was not a company and did not have a letterhead. Mrs Patyi told the respondent that they were entitled to a written statement of employment terms and that she should have received it within 2 months. Mr and Mrs Murphy told her they were unaware of this. Mr Murphy said that Mrs Murphy was left to find out what to do about the statement of written particulars. A written statement of terms of employment for Mrs Patyi appears at page 25 and the equivalent for Mr Patyi is at 26. Mrs Murphy is shown as the employer. The working hours are stated to be a minimum of 20 up to 30 hours a week. There is no reference to a rate of pay, statutory or otherwise or any deductions. There is no provision about notice which became an issue between the parties. Mr Hackett states that he witnessed the handing over of the hand-written statements to the claimants by the respondent having been told by her that she had misgivings about their work ethic and that Mrs Patyi had said that she was breaking the law and requested an employment letter for them both. Mr Hackett said he was surprised at the reference to 20 hours. He said they did not react badly. The Tribunal found that a statement of terms and conditions was not provided to the claimants during their employment or by the time when proceedings in the Tribunal were commenced

23. On 30 September, Mrs Patyi worked all day and was expecting to start the next day by polishing the children's riding boots.

24. On 1 October, the working day started at 7am and was scheduled to finish at 5pm. The respondent texted Mrs Patyi and asked her to start with a different job which gave rise to an argument. This was resolved but Mrs Patyi said that she agreed with Mrs Murphy that she would finish at 5pm. She started work on clearing out a cupboard in a bedroom and preparing the bedroom. She filled about 10 black bags with old plastic bags and bubble wrap and left them in the hall while she finished ironing and putting on the bedding.

25. There was a dispute involving Mr Patyi, he says he was working outside and got soaked, and came in to the house to change his clothing. The respondent says there was no evidence of a soaking coat. The respondent says she issued a written warning to Mr and Mrs Patyi around lunchtime because of their blatant dishonesty (page 35). This is said to have caused Mrs Patyi to be increasingly hostile over the day. She did not have time to wash the lunch dishes before 5pm.

26. At about 5.30, Mr Murphy asked Mrs Patyi why the dishes had not been washed, Mrs Patyi explained the other work she had done and Mr Murphy required her to wash the dishes and Mrs Patyi refused. On Mrs Patyi's account "… I asked him why he does not fire us if we are so slow, then he said, that's what I am doing now" I said fine we are leaving tonight he said you have to stay 4 weeks' notice period. Mr Murphy said that Mrs Patyi said that they were leaving immediately to which he responded they needed to give 1 weeks' notice but they should go downstairs and sort out a short notice period. Mrs Murphy came upstairs and was shouting at them and said that if they washed the dishes now, they could still stay and work for them. Mrs Patyi responded that Mr Murphy had dismissed them already.

27. The claimants were called downstairs and the conversation was recorded both by Mrs Patyi and Mr Delchev and an agreed account appears as pages 14-20. The dispute about washing dishes after 5pm continues. The discussion moves on to the obtaining of the National Insurance Number where Mrs Patyi says that she has been wanting to get the NI number for a long time. Mrs Patyi says there are delays in payments which is disputed (page 15). Mrs Patyi talks about not receiving an employment letter (page 16). The end of the employment relationship is then discussed (page 17) and what is said is "so the end of it was that you said ok, we wanna leave tonight, I came downstairs, Kathy went to see you and said ok, you can leave tonight, so are you packing your bags?" Mrs Patyi says "We are waiting for our cheques as well." The argument continues with Mrs Patyi insistent that wages are always late and this is disputed by the respondent (page 19). The number of hours to be worked remains that Mrs Patyi says 9 hours a day 6 days a week and the respondent disputes this (page 20). The claimants wanted to be paid what they were due and the respondent said she did not have a cheque book. Mr Delchev said that Mrs Murphy had said that she was going to be difficult "If they are leaving me, I am not going to make it easy."

28. There was a later discussion which was not recorded where the respondent accused the claimants of stealing an envelope with £600 in July. Mrs Patyi was asked to look for it in the respondent's bedroom which she did.

29. The respondent says that she gave the claimants £300 in cash for the week's work but did not give them wage slips at this time as their departure had been unexpected" (para 37 of the additional statement). In Mr Whitney's statement (para 5) he states that the respondent gave Mrs Patyi two pieces of paper which she had written out "They were wage slips which she gave to Gabriella." Mr Pannell was present during the later discussion and confirms there was an agreement to pay the claimants £300. This was paid in cash so he did not get paid that day. He said there was no mention of other monies being due. Mr Delchev who also witnessed the agreement was not paid that day either. Mr Delchev said that the claimants did not ask for more money. In the email (page 23) the respondent accepts that the claimants worked 6 days a week but disputes the number of hours worked.

30. The claimants say they did not receive the itemised pay statements and that they were paid the agreed £750 for July and August but not September. The respondent says that she paid each month and for the final week in cash except for the initial cheques which were cashed by Buzz. The amounts paid were the amounts stated in the hand written itemised pay statements which were produced. These pay statements show the NMW rate per hour and make no reference to deductions. The payslips for Mrs Patyi (pages 27-29) show Mrs Murphy as the employer and £698.40 being paid for June/July, £712.80 for July/August and £691.20 for August/September and £151.20 for September / October. Mrs Murphy is also shown as the employer of Mr Patyi who is said to have been paid £748.80 for June/July, £811.20 for July/August, £871.20 for August/September and £129.60 for September/ October. Mr Whitney speaks to pay slips being handed over at the beginning of September. Mr Murphy said that the claimants had been paid up to the previous week. A cash payment was made to the claimants when they left but that was for the week they had just worked. The Tribunal accepted the evidence of the claimants that they never received itemised pay statements. The Tribunal also accepted the evidence of the claimants that they had not been paid for September.

31. The respondent said that she kept track of the hours worked (para 12 of her additional statement) by noting them in her diary. The noted hours would be agreed with the claimants. It was kept in the bottom drawer in the kitchen. This is disputed by the claimants. The respondent says that the diary went missing shortly after the claimants left the house, with the implication that they took it. Mr Pannell confirmed that she could not find her book that day.

32. The respondent did not register as an employer until after the end of the claimants' employment. She made the required return to HMRC for the amounts said to have been paid on the payslips and due to an incorrect date of birth having been used for Mr Patyi incurred a liability for National Insurance of £182.47.

33. Mrs Patyi said that the advice she received from the CAB was that in order to claim for her unpaid September wages she had to make her claim under the National Minimum Wage provisions. The CAB helped her draft a letter claiming underpaid NMW for June, July and August and non-payment for September and pay in lieu of notice. This letter is signed by the claimants and dated 24 January 2017 Brighton. In evidence, Mrs Murphy commented on the claim by saying that Gabriella says she got no pay for September-she got expenses for September.

SUBMISSIONS

34. The Tribunal heard brief oral submissions from both parties and received more detailed written submissions from both parties. Each party said that they would not have entered into the arrangement described by the other party.

LAW

Contract of employment

35. The employer's obligation to pay wages is generally regarded as a fundamental ingredient of a contract of employment. Assuming there is a binding contract then the rate, frequency and method of payment are in principle matters for agreement between the parties. However, the freedom of the parties to reach agreement on these matters is constrained by a number of statutory provisions, including the National Minimum Wage Act.

36. Details of the rate of remuneration, the calculation method and the intervals at which remuneration is paid should be included in the written statement of employment particulars provided to the employee under section 1 of the Employment Rights Act 1996. Every employee is entitled to receive from his employer not later than two months after the beginning of the employee's employment a written statement of the major terms upon which he is employed by section 1 of the Employment Rights Act 1996. The statement must contain particulars of, among other things, the names of the employer and employee, the scale or rate of remuneration or the method of calculating it, any terms and conditions relating to hours at work and length of notice.

37. The Employment Act 2002 provides for compensation to an employee where in connection with proceedings before an employment tribunal in relation to other matters, the employment tribunal finds in favour of the employee and at the time the proceedings were begun, the employer was in breach of section 1(1) or 4(1) of the Employment Rights Act 1996. The proceedings before the employment tribunal in conjunction with which they can make an award of compensation for a failure to comply with sections 1(1) or 4(1) are those stipulated in Schedule 5 of the Employment Act 2002 and include deductions from wages, unfair dismissal, detriment in relation to the national minimum wage and contract claims in tribunals.

38. If no statement has been provided at the stage when proceedings have begun, in circumstances where the employment tribunal finds in favour of the employee in relation to one of these claims but makes no award to him but the employer is in breach of section 1(1) or 4(1) of the Employment Rights Act 1996 the tribunal must make an award of two weeks' pay and may increase this up to four weeks' pay. In circumstances where the claim is successful and the employment tribunal makes an award, the tribunal must increase the award by the minimum amount of two weeks' pay and may increase the award up to the 'higher' amount of four weeks' pay (section 38(3), (4) and (6)).

Itemised pay statement

39. Section 8(1) of the Employment Rights Act 1996 gives the right to an employee every time he is paid his wages or salary, to receive a written statement giving the breakdown of the amount paid to him. The right to receive an itemised

pay statement is an absolute one and is not conditional upon an employee requesting such a statement (**Coales v. John Wood & Co (Solicitors**) [1986] ICR 71, EA*T*). As HHJ David Richardson put it in **Ridge v. HM Land Registry** UKEAT/0098/10 (23 September 2014, unreported):

> 'The purpose of an itemised pay statement is, I think, clear enough. It is to enable an employee receiving a payment of wages or salary to see, at a glance and in broad outline, how that payment is made up. In order to do so, deductions must be identified and explained. Hidden and unexplained deductions are not permitted.'

40. If the statement is provided any later than pay day, the employer will be in breach. This is illustrated by **Cambiero v. Aldo Zilli & Sheenwark Ltd** EAT/273/96 (9 July 1997, unreported), where the employer failed to provide any pay slips during the claimant's employment but then supplied most of them some six weeks after the employment terminated. Although the pay slips were late it was not disputed that they set out accurately the claimant's gross pay, appropriate deductions for income tax and National Insurance contributions and net pay. Nonetheless, there was still a breach of section 8. As Judge Peter Clark put it: 'The breach lies in not notifying the employee of the deductions when they are made' (emphasis added). As a consequence, an employer will contravene section 8 if, for example, he pays his employees weekly but only provides an itemised pay statement at the end of the month.

41. Where the employer fails to give a pay statement or gives one that does not provide the required information, an aggrieved employee can refer the question to an employment tribunal to determine what the statement should have contained (ERA 1996 s 11(1)). However, it is important to note that the right to an itemised pay statement is concerned only with whether deductions have been properly notified.

42. The remedies available on a reference under section 11 are set out in sections 12(3)–(5) ERA 1996. Firstly, if the employer has failed to provide a pay statement or if the pay statement or standing statement does not contain the required information, then the tribunal must make a declaration to that effect (s 12(3)). This is the case even if the breach is purely technical, such as where the claimant has been given all the prescribed information orally rather than on their pay slip: see **Coales v. John Wood & Co**. Secondly, the tribunal may (but is not obliged to) make a financial award to the employee if any un-notified deductions have been made from his or her pay in the 13 weeks immediately preceding presentation of the claim (section 12(4).

43. The Tribunal's power to make a financial award under section 12(4) ERA 1996 is unaffected by the fact that the un-notified deductions have been properly made. So even where deductions are made in accordance with the employee's contract or with the employer's statutory obligations, if they have not been notified in accordance section 8 ERA 1996, the tribunal may nonetheless make an award.

44. The statutory provisions do not provide any guidance on the exercise of the tribunal's discretion to make a financial award under s 12(4). No doubt relevant factors will include whether the breach was due to a genuine oversight in respect of a particular deduction or whether there has been a wholesale disregard of the employer's obligations under ERA 1996 s 8. Case law provides some assistance.

In **Paterson and Paterson v. Dewar** EAT/0294/85, where the employer had provided no pay slips for several months, a tribunal's award was overturned by the EAT on the basis that the employer's failure had actually led to the employee receiving a small overpayment. Similarly, in **Ridge v. HM Land Registry**, where insufficient information was provided on the pay slips, the EAT considered that an order under section 12(4) would be entirely disproportionate where: (i) the amount of the deductions were apparent from the pay slip; (ii) the employee was therefore alert to them; and (iii) the purpose of the deductions had been explained to the employee orally before he commenced proceedings.

Declaration of deductions from wages

45. Complaints that there has been an underpayment of wages or a complete failure to pay can in most cases be brought in the employment tribunal under section 23 of the Employment Rights Act 1996 as unauthorised deductions from wages. However, disputes in relation to payments in lieu of notice do not fall within these provisions. Claims that an employer has made an unauthorised deduction from wages or received an unauthorised payment contrary to these provisions can only be brought before the employment tribunal, section 205(2) of the Employment Rights Act. There is no qualifying period of service for the exercise of these provisions.

46. One important issue, which for a time caused some uncertainty, was whether a ‘deduction’ only covered an underpayment by the employer or whether it could also cover a complete failure to pay. The Court of Appeal confirmed in **Delaney v. Staples** [1991] ICR 331 that a complete failure to pay wages due on any occasion would qualify as a deduction for the purposes of what is now section 13(3) of the 1996 Act.

National Minimum Wage

47. The National Minimum Wage Act 1998 contains the basic structure of the statutory scheme.

48. Regulation 59(1) of the NMWR SI 2015/621 Part 7 places the general obligation on the employer is to keep records that are ‘sufficient to establish that he is remunerating the worker at a rate at least equal to the national minimum wage’. There is no statutory definition of ‘sufficient’ records although if an employer is keeping full payroll records then those will probably suffice. It would be sensible to ensure that the records include details of the gross pay paid to, and the hours worked by, the worker; overtime/shift premia; any deduction or payment for accommodation and any absences of the worker.

49. Section 28 of the Act places the burden of proof upon the employer in any dispute as to whether the national minimum wage has been paid. (This point is illustrated by the case of **Ajayi v. Abu** [2017] EWHC 1946 (QB) where the failure to keep adequate records was a factor in the employer's failure to discharge the burden of proof).

50. If the employer fails to produce relevant records under section 10 of NMWA 1998, the worker can make a complaint to an employment tribunal under section 11(1). If the employment tribunal finds the complaint well founded it shall make a

declaration to that effect and shall make an award that the employer pay to the worker a sum equal to 80 times the hourly amount of the national minimum wage in force when the award is made (section 11(2)). This award appears to have a penal element as it is not described as ‘compensation’ and is not subject to any ‘just and equitable’ test. As a result, it is submitted that it should be awarded gross, being in the nature of a punishment or fine.

51. The complaint will be well founded even if the employer provides access to all the records which he has kept if those records are deemed to be insufficient by the employment tribunal. This is because ‘records’ are defined as the records ‘which the worker's employer is required to keep and preserve’ (section 10(10) NMWA 1998).

52. The complaint must be presented to the tribunal within three months from the end of the 14-day period allowed for production of the records (or from such later date for production as agreed by the parties): section 11(3) NMWA 1998. There is the usual extension for a reasonable period if it is shown that it was not reasonably practicable to present the complaint within the initial three months. In addition, time can be extended to facilitate ACAS early conciliation: see section 11A NMWA 1998.

53. Section 17(1) NMWA 1998 provides that if a worker who qualifies for the national minimum wage is paid at a rate which is less than the national minimum wage, the worker shall be entitled under his contract to be paid, as additional remuneration in respect of the relevant period, the greater of:
— the shortfall between the amount paid and the amount that should have been paid under the national minimum wage applicable at the time of the underpayment; and
— the sum payable if the rate of the national minimum wage applying at the time of the arrears being determined had been applicable throughout the relevant period. As section 17(1) gives the worker a contractual entitlement it follows that a worker who has not been paid the national minimum wage has a choice. He may either bring a claim for an unauthorised deduction of wages before the employment tribunal under ERA 1996 s 23 (1)(a) or he can claim for breach of contract in the civil courts (or in the employment tribunal but only if certain conditions are satisfied.

54. In any proceedings to recover the national minimum wage, the burden of proof is reversed so that it is presumed that the individual qualifies (or used to qualify) for the national minimum wage and that he received less than the national minimum wage at the relevant time. This is an important provision and means that if the employer is to defend a claim successfully he must prove the contrary: see section 28 NMWA 1998. However, the onus would still appear to lie on the worker to establish the amount of any underpayment.

Automatically unfair dismissal

55. Section 104A ERA 1996 makes it automatically unfair to dismiss an employee if the reason or principal reason is that:

— any action was taken, or was proposed to be taken, by or on behalf of the employee with a view to enforcing or otherwise securing the benefit of specified rights under the NMWA 1998;

— the employer was prosecuted for any offence under section 31 NMWA 1998 as a result of any such action taken by or on behalf of the employee; or
— the employee qualifies, or will or might qualify, for the national minimum wage or a particular rate of the national minimum wage

Was there a dismissal?

53. There can be no successful claim for unfair dismissal unless there has been a dismissal as defined by the legislation. It is for the employee to prove that he has been dismissed within the meaning of the relevant provision. If the fact of dismissal is disputed it is for the employee to satisfy the tribunal on this point. If he fails to do so, he will lose his case.

54. It is a simple fact of employment life that in the often fraught circumstances of the termination of employment the parties will often not be acting or speaking with legal clarity or calmness. In some cases all that will happen is that the parties end up swearing and cursing at each other before 'parting'. It will not necessarily be obvious who has done or said what, and yet legally the difference between a dismissal and a resignation can be fundamental.

> 'Whatever the respective actions of the employer and employee at the time when the contract of employment is terminated, at the end of the day the question always remains the same, "Who *really* ended the contract of employment?" '

Reason for dismissal

55. In **West Midlands Co-operative Society Ltd v. Tipton** [1986] ICR 192, the House of Lords has unequivocally affirmed that in determining whether the employer has acted fairly in relying upon the reason for his dismissal, the Tribunal should take account of evidence which emerges in the course of an internal appeal. In a very important passage Lord Bridge, with whose judgment Lords Roskill, Brandon, Brightman and Mackay concurred, justified this approach as follows:

> 'Under [s 98 of the Act of 1996] there are three questions which must be answered in determining whether a dismissal was fair or unfair:
> (1) What was the reason (or principal reason) for the dismissal?
> (2) Was *that* reason a reason falling within [subsection (2) of s 98] or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which that employee held?
> (3) Did the employer act reasonably or unreasonably in treating *that* reason as a sufficient reason for dismissing the employee?

56. As to question (1), Cairns LJ said in **Abernethy v. Mott, Hay and Anderson** [1974] ICR 323, in a passage approved by Viscount Dilhorne in the case of **W Devis & Sons Ltd v. Atkins** [1977] AC 931 HL:

> ''A reason for the dismissal of an employee is a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee. If at the time of his dismissal the employer gives a reason for it, that is no doubt evidence, at any rate as against him, as to the real reason, but it does not necessarily constitute the real reason.

> He may knowingly give a reason different from the real reason out of kindness …''

70. However, in cases of alleged mixed motivations, once the employee has put in issue with proper evidence a basis for contending that the employer has dismissed out of pique or antagonism, it is for the employer to rebut this showing that the principal reason is a statutory reason. If the tribunal is left in doubt, it will not have done so.

71.The burden remains on the employer even where the employee alleges that the dismissal was for a reason that is automatically unfair. The burden is not on the employee to prove such a reason. This was the view of the Court of Appeal in **Maund v. Penwith District Council** [1984] ICR 143 CA. The employee was ostensibly dismissed for redundancy but alleged that the real reason was his trade union activities. The industrial tribunal held that it was for the employee to establish this, but both the EAT and CA disagreed. They held that the burden of proof remained at all times firmly upon the employer and if he fails to discharge that burden the dismissal is inevitably unfair.

72. The only exception to this, as the **Maund** case recognised, is where the employee does not have sufficient qualifying period to claim unfair dismissal. In such a case the employee has to establish that the tribunal has jurisdiction to hear the claim. This can be done only if the employee can show that the reason for dismissal is one of those automatically unfair reasons where no qualifying period is required. Accordingly, where the reason had to be established to confer jurisdiction on the tribunal, the onus is on the employee.

73. Obviously if the employer manufactures an artificial reason in order to conceal the true reason, no tribunal should simply accept the manufactured reason. As the EAT commented in **Maund v. Penwith District Council** [1982] IRLR 399 at 401:

> 'If an admissible reason is engineered in order to effect dismissal, because the real reason would not be admissible, the true view in our judgment must be that the employer fails because the underlying principal reason for the dismissal is not within [s 98(1), (2)]'.

DISCUSSION and DECISION

74. The claimants acknowledge that they were paid £750 each for July and August. These amounts are different to the amounts shown in the itemised pay statements produced by the respondent. The evidence about what sums were paid supports the claimants in that it is consistent with the agreement they say they entered into. The detailed amounts said to have been paid by the respondent were not confirmed by anyone else. The Tribunal does not accept that September wages were paid early for some reason personal to the claimants. The recording of the argument on 1 October has statements from Mrs Patyi that the wages are always late although this is disputed by the respondent, it is likely that the wages for September would not ordinarily have been paid until later in October. The reason they now claim additional sums for July and August is that if they worked the hours they said they worked, they would be entitled to NMW for those months, they were mainly concerned with the non-payment for September. The Tribunal does not accept that the respondent paid each month and for the final week in terms of the

hand written itemised pay statements which were produced. The Tribunal is not ignoring the apparently corroborative evidence that supports the respondent to some extent. It is inherently unlikely that the respondent was unable to produce any support for the payments she says she made for the dates she says she made them. In determining what amounts were paid, the Tribunal noted that Mr Murphy's bank statements which would show the cheques which were drawn for cash were not produced. A simple receipt signed by the claimants would also have sufficed. Although the respondent claims to have provided pay slips for each salary payment, she accepts that she did not so for the final payment. However, the Tribunal received no explanation why the final payslips were in the bundle and why Mr Whitney spoke to the final payslip being written and handed over on 1 October. The Tribunal considered that this evidence made the respondent's account and that of her witnesses less credible. The claimants would have disputed the itemised pay statements so far as employer, deductions, hours and amount were concerned from the first time they saw the pay statements.

75. The Tribunal concluded that the itemised pay statements were never supplied to the claimants. Even on the face of the documents prepared by the respondent, they do not state the correct hours, rate of pay or deductions for accommodation and utility bills. It is not disputed that deductions of £50 were made each week by agreement. The Tribunal and the claimants could not tell if the balance of £12.50 each per week was justified as utility bills. The Tribunal decided to make a declaration under section 12 of the Employment Rights Act and considered whether a financial remedy should be granted. The Tribunal determined that it should because of the considerable difficulty created by the respondent because of the failure to comply with the statutory provision. As there are only two weeks within the 13 weeks prior to the presentation of the claims on 18 December 2016, the Tribunal determined that it would be appropriate to award each claimant £100.

76. The respondent says she supplied a statement of terms and conditions of employment to the claimant after Mrs Patyi raised the issue with her. There are hand written statements of terms in the bundle. As with the itemised pay statements, they show the respondent as the employer, the hours worked as contended for by the respondent, and the amount of pay, all of which would be disputed by the claimants. The hours surprised Mr Hackett. The fact that there were no such disputes lends credence to the claimants' evidence that they did not receive them. It is common practice to ask the employee to sign a form of acknowledgement that he has received the statutory statement. This simple expedient was not adopted with the written statement or any other written document allegedly provided by the respondent. The Tribunal dos not doubt that the document was shown to Mr Hackett who was delivering rugs to the respondent's house in mid-September but the Tribunal finds that it was not handed over to the claimants. In the transcript of the meeting on 1 October, Mrs Patyi is complaining about not receiving a letter of employment which the respondent refers to as a letterhead. Either way what was still wanted was written confirmation of employment which would have been unnecessary if the statement had been issued at the time the respondent and Mr Hackett say.

77. The Tribunal found that a statement of terms and conditions was not provided to the claimants during their employment or by the time when proceedings in the Tribunal were commenced. Even on the evidence of the respondent which was not accepted, the statement does not show the correct salary or hours or deductions

from wages on account of accommodation or the notice period so at the very least is not accurate as to its terms and was supplied late. The Tribunal considers that it is just and equitable to award 4 weeks' pay at £196.15 a week which is £784.60.

78. There was a dispute about the number of hours worked each week which the Tribunal was unable to resolve. The claimants said they worked 9 hours a day for 6 days. The respondent is quite specific about the hours that were specified and worked and amount to very much less than the claimants' calculation. The Tribunal was unable to determine the number of hours the claimants worked over the period of their employment. The Tribunal is satisfied that the claimants worked many more hours than the respondent says but the claimants have not established that they worked the hours that they claim. The respondent satisfied the Tribunal that such was the lifestyle at the time such hours would not have been required. There is evidence that the respondent demanded work be carried out whenever it suited her without any regard for the claimants' needs but that does not assist in determining how many hours were worked. The claimants did not require a statement of hours from the respondent in terms of the NMWA. The Tribunal does not accept that the respondent noted the hours worked in detail in a diary for calculating the hours entered into the itemised pay statements but she may well have kept a note in order to have some idea of the cost of the arrangement.

79. The respondent says that the claimants were given a written warning on 1 October which led to Mrs Patyi's attitude and application to her work deteriorating throughout the day.The Tribunal considered that no written employment documentation was handed to the claimants during their employment and by parity of reasoning, the Tribunal is doubtful that a written warning was given to the claimants although a very severe and possibly unjustified reprimand does seem to have been given. The relationship between the parties certainly deteriorated that day.

80. Part of the argument on 1 October was recorded by both parties so while it was accurate, the Tribunal was conscious that each side might be trying to get their side of the story on the record. Prior to the recorded episode, the Tribunal considered that the claimants were strongly reprimanded by Mr Murphy on behalf of the respondent which was reiterated by the respondent. The claimants took this reprimand very badly and said they were leaving. The evidence from Mr Murphy is that he asked them about working their notice. The Tribunal concluded that this was reliable evidence and this was consistent with the claimants having resigned. Even if the Tribunal is wrong in its conclusion and that Mr Murphy dismissed them (leaving aside any question of his authority to do so), any dismissal was because the respondent was not satisfied with the pace or the quality of the work they were doing. It was not because they were claiming National Minimum Wage or because they had asserted their right to a statement of terms of employment or anything else. They had not claimed the former and the respondent was untroubled by the latter.

81. The respondent says that the diary in which she noted the hours went missing shortly after the claimants left the house, with the implication that they took it. This is unlikely because during the course of the final part of the day, the claimants were not alone in the kitchen and the issue which caused them to leave had only blown up towards the end of that day. The Tribunal considers that this is an excuse the

respondent has invented in order to prevent the detailed ascertainment of the hours worked by the claimants.

82. It is likely that the alleged theft of cash in July was raised in October in order to intimidate the claimants. The Tribunal considered that if the claimants really had been suspected, they would have been dismissed at the time of the alleged theft.

83. Mrs Patyi said that the advice she received from the CAB after she left the respondent's house was that in order to claim for her unpaid September wages she had to make her claim under the National Minimum Wage provisions. Her concern all along seems to have been with the payment for September. It would be consistent for the respondent not to pay for that month as it was likely to be outstanding as she always paid late and she wanted to make things as difficult as possible for the claimants. The cash payment covered the final week of work only.

84. The Tribunal awarded the claimants £850 each being the reduced agreed salary for September. In the case of Mrs Patyi, she was loaned £100 for her own food and this was deducted from her award. The Tribunal did not include in the calculation deductions for accommodation as the respondent says that the amounts due were paid.

85. The Tribunal finds that the claimants were not dismissed so they are not entitled to notice of termination or pay in lieu of notice. Even if they were dismissed, they were not dismissed for an inadmissible reason. They do not have the qualifying period of employment to claim unfair dismissal but the issue of notice might have arisen. The claims of unfair dismissal are dismissed.

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Employment Judge Truscott QC

Date 21 March 2018