Case Number: (1) 3313798/2019
(2) 3313804/2019

EMPLOYMENT TRIBUNALS

Claimants		**Respondent**
(1) Barham Care Centre Limited (2) Primary Homecare Limited	**v**	The Commissioners for Revenues and Customs

Heard at: Norwich **On:** 3 February 2020

Before: Employment Judge Postle

Appearances
For the Claimants: Ms A Palmer, Counsel.
For the Respondent: Mr R Talalay, Counsel.

RESERVED JUDGMENT

1. The appellants appeal against the respondent's two notices of underpayments dated 6 March 2019 under the National Minimum Wage Act 1998 succeeds.

REASONS

1. This is an appeal against notices of underpayments under s.19 of the National Minimum Wage Act 1998. The underpayments where issued by the respondent on 6 March 2019.

2. The notice is in respect of two workers and they are:-

   (i) Mr Sevdalin Salyov (a former employee of the first appellant) – amount underpaid £357.84.

   (ii) Mr Kristiyan Krumov (a former employee of the second appellant) – underpayment £342.36.

3. In this Tribunal the issues to be determined are agreed and are set out at page 61 of the bundle. The contentious deductions fall into three categories:-

   (i) Deductions for accommodation whilst residing at housing provided by Cardinal Healthcare Properties Limited and a penalty clause upon the workers terminating their contract prior to a 6 month break clause.

   (ii) Deductions for training/shadowing, deductible due to a contractual provision by reason of the workers leaving the appellant's employment prior to the completion of 6 months employment.

   (iii) Deductions for the charges for the DBS checks in addition to the fee of £44 to a maximum of £61.60 said to be deducted due to a contractual provision by reason of the workers leaving the appellant's employment prior to 6 months employment completion and/or as payment for the purchase of goods and services for the employer.

4. The Tribunal had the benefit of a bundle of documents consisting of 324 pages.

5. In this Tribunal we have heard evidence for the appellants, Mr Adrian Fairburn a Director of Primary Homecare Limited. He is also a Director of Barham Care Centre Limited. Apparently, there is no direct legal relationship between Primary Homecare Limited and Barham Care Centre Limited other than common ownership directorship. For the respondent we heard evidence from Ms Michelle Burton a National Minimum Wage Compliance Officer. Both giving their evidence through prepared witness statements (none of which witnesses' evidence has to be said were particularly forthcoming or helpful to the Tribunal in addressing the issues to be determined).

6. Mr Salyov was employed by the first appellant at a care home providing long term nursing care as a healthcare assistant under a contract of employment dated 18 February 2017 and signed by all parties (page 96).

7. Mr Krumov was employed by the second appellant also as a house carer under a contract of employment dated 2 March 2017, the contract in the bundle at page 112 does not appear to have been signed.

8. Like many companies in the care sector, they have relatively high turnover of staff, and at various times suffering from severe staff shortages. As a result of this the appellants, and no doubt many other care providers cast their net wide for recruitment, as far as Europe and elsewhere. That in itself presents its own problems for workers coming from abroad as they face problems in organising and obtaining satisfactory accommodation.

9. It would appear as a result of the above the appellants decided to set up an entirely separate business, Cardinal Healthcare Properties Limited (Cardinal) to provide accommodation for employees from Europe and elsewhere and the company purchased properties for this purpose. Apparently, staff were allowed to stay in accommodation after they have left the employment of the appellants, although there was no direct evidence provided that this had occurred in the past.

10. It would appear that the property company Cardinal was a separate business and purchased residential property to provide accommodation for its employees. The company also purchased a wide range of residential/commercial property for development, sale and offices. All these are managed by an employee of Cardinal Healthcare Properties Limited and is an entirely separate entity from that of the appellant companies.

11. Mr Salyov and Mr Krumov signed a tenancy agreement (as joint tenants) with Cardinal Healthcare Properties Limited on 7 February 2017 (page 87). The agreement refers to at clause 1.8 – pay rent and utility costs which would be paid by automatic deduction from their 4 week pay (page 88) and further, the deposit for rental will be taken from their pay over a 6 month pay period.

12. Both Mr Salyov and Mr Krumov signed a deduction agreement (page 107) authorising that in the event of their employment lasting less than 6 months they would be liable to repay the following:-

    (i) Shadow training;

    > "The employee agrees to pay the employer for the total shadow training hours (as set out in the employees' weekly rotas) at the applicable National Minimum Wage hourly rate in force during the period of shadow training, however, the employee agrees that should he/she leave employment with the employer within a 6 month period of commencing employment, he/she will be liable to reimburse the employer in respect of the cost of shadow training paid to the employee. By signing this agreement the employee gives permission for the full amount to be deducted directly from the salary should the situation arise."

    (ii) Care certificate induction training;

    > "The employer will incur all costs associated with providing the above training to a total of 18 hours at National Minimum Wage however, the employee agrees that should he/she leave employment with the employer within a 12 month period of commencing the employment he/she will be liable to reimburse the employer in respect of the cost of training outlined above. By signing this agreement the employee gives permission for the full amount to be deducted directly from their salary should the situation arise."

(iii) Disclosure and Barring Check

> "The employer will incur all costs associated with a disclosure and barring service check and at cost of £62.58 however, the employee agrees that should he/she leave the employment with the employer within a 6 month period of the employment start date, he/she will be liable to reimburse the employer in respect of the cost of the DBS check. The employee gives permission for the full amount to be deducted directly from their salary should the situation arise.
>
> I have read and fully understand the above terms and conditions."

13. The worker/employee has therefore agreed the appellant/employer making the deductions from their wages.

14. It does not appear that either employees dispute their signatures which appear on the agreement authorising the deduction given certain future eventualities.

15. Furthermore, Mr Salyov in his contract of employment (page 94) agreed the deduction being made in the event by letter of 8 February in which he confirms his acceptance to the attached contract and specifically at the following clauses:-

> "10.3 The wages department reserves the right to deduct from your salary any outstanding monies owed to the employer.
>
> Deductions from pay
>
> 22. The employer is contractually entitled to deduct from your salary (which includes wages and any bonuses) any monies due and outstanding to the employer by you including without limitation, any sum in respect of due notice not given in respect of holiday taken I excess of your accrued entitlement.
>
> Accommodation
>
> 26. At the absolute discretion of the employer you will be assisted to find accommodation for living purposes. You will be notified in writing of rent and associated costs applicable. The wages department reserves the right to deduct from your salary any outstanding debt in respect of rent, telephone calls, gas and electricity."

Those clauses also appear in Mr Krumov's contract (page 112), particularly clauses 11.4, 23 and 26.

16. In relation to the accommodation issue/rent, it is not in dispute that Cardinal could charge a rent and the related costs, and that the contract was for a 6 month period, namely the tenancy and could not be brought to an end earlier than the 6 month agreement. Furthermore, clause 26 of both workers' contracts permitted deduction from the employees' wages.

17. When the employees/workers terminated their employment before 6 month period had been reached and likewise their tenancy was terminated earlier meant that Cardinal would charge them for the balance of rent up to the end of the 6 month period.

18. The question is whether those deductions fall within the ambit of the National Minimum Wage Regulations 2015 particularly regulation 12.

19. It would appear the appellants' position is that the sums deducted were authorised and agreed under the contract between the employees and Cardinal, to a property company being a separate entity from the appellants. Particularly as Cardinal was not the employer of the employees the deductions were made in accordance with the tenancy and were not for the employers' own use and benefit and so do not fall within the ambit of regulation 12 of the 2015 Regulations. The appellants relying on s.54(4) of the National Minimum Wage Act 1998 which defines employer as "the person by whom the employee or worker is (or where the employment has ceased, was) employed".

20. Whereas the respondents' position is that the appellants narrow construction is wrong and has the potential to neuter the purpose of regulation 12. Moreover, the approach of the Tribunal should be to consider the 2015 Regulations applying a purposive approach. The respondents submit it is not in dispute the appellants appear to share the same corporate structure as Cardinal, sharing directors and partners. Furthermore, Cardinal was created by the Fairburn family to provide accommodation to its workers employed in their other businesses. Therefore, it is submitted that rent and other charges collected and operated by a separate company owned and operated largely by the same people as the employer was therefore for the benefit of the employer in fact and law. The respondent says that the money in effect ends up in the same place as if the employer was the landlord.

21. Furthermore, the respondents argue that each employee was informed that they needed to leave the accommodation on the termination of their employment evidencing the connection between the appellants and Cardinal. However, there appeared no evidence to support this fact before the Tribunal.

22. On the training issue, the appellants appear to rely on regulation 12(2) and the leading authority Revenue and the Customs Commissioners v Lorne Stewart Plc [2015] ICR 708 where an employee had signed a contract with her employer to pay back the cost of £1,800 voluntary training course if she left within a 2 year period. In that case Judge Shanks held that the term "any other event" in regulation 12(2)(a) could include the voluntary resignation of the employee and as such it was not a reduction for the employer to reclaim part of the cost given the contractual liability for repayment on resignation.

23. Whereas the respondents position is that the Lorne case is not relevant to the issues before the Tribunal. The reason being pursuant to regulation 33 of the 2015 regulations "the hours a worker spends training when the worker would otherwise be doing time work are treated as hours of time work". Further it would appear the appellants have accepted that this training was time work (page 295) and therefore cannot be permissible within the purpose of the 2015 regulations to contractually bind employees to pay their wages if they leave within a certain period of time thereby reducing their salary to below the National Minimum Wage.

24. On the DBS checks, the appellants position is that it is not possible to go direct to DBS, that in fact you have to go through a middle person therefore they have no choice but to pay the administration fee charge. It is therefore a necessary expense and it is not the employer imposing an administrative charge for handling the application.

25. Furthermore, the appellants rely upon the respondent's own guidance, the National Minimum Wage Manual which confirms fees for checks are the liability of the individual and therefore any deduction from the workers' pay will not reduce the National Minimum Wage paid since it is paid over by the employer to a third party to meet a liability of that worker.

26. The respondent's position is they now accept the fee of £50 is allowable but appear to contest the right to deduct the administrative charge as not being allowable under the regulations.

The Law

27. S.1(1) of the 1998 Act provides the basic right:-

> "(1) A person who qualifies for the national minimum wage shall be remunerated by his employer in respect of his work in any pay reference period at a rate which is not less than the national minimum wage."

28. The Tribunal reminds itself that as this is an appeal the burden of proof is on the employer to demonstrate that they have paid the National Minimum Wage as set out in s.28(3) of the 1998 Act.

29. S.19 of the National Minimum Wage Act 1998 (NMWA) provides for an officer of the respondent to make a notice of underpayment where they are of the opinion that a worker who qualifies for the National Minimum Wage has been underpaid in any given reference period.

30. Regulation 8 of the National Minimum Wage Regulations 2015 (NMW Regs) provides:-

> **"Remuneration in a pay reference period**
>
> The remuneration in the pay reference period is the payments from the employer to the worker as respects the pay reference period, determined in accordance with Chapter 1, less reductions determined in accordance with Chapter 2."

31. Chapter 2 deals with reductions and regulations – 11(1) provides:-

> "**11 Determining the reductions which reduce the worker's remuneration**
>
> (1) In regulation 8, the reductions in the pay reference period are determined by adding together all of the payments or deductions treated as reductions in that period in accordance with this Chapter."

32. Regulation 12 of the NMW Regulations provides, insofar as is relevant:-

> "**12 Deductions or payments for the employer's own use and benefit**
>
> (1) Deductions made by the employer in the pay reference period, or payments due from the worker to the employer in the pay reference period, for the employer's own use and benefit are treated as reductions except as specified in paragraph (2) and regulation 14 (deductions or payments as respects living accommodation).
>
> (2) The following deductions and payments are not treated as reductions—
>
> (a) deductions, or payments, in respect of the worker's conduct, or any other event, where the worker (whether together with another worker or not) is contractually liable;
>
> …..
>
> (e) payments as respects the purchase by the worker of goods or services from the employer, unless the purchase is made in order to comply with a requirement imposed by the employer in connection with the worker's employment."

Commissioner for Revenue and Customs v Lorne Stewart Plc [2015] ICR 708

33. Here the claimant voluntarily resigning within 2 years triggered a contractual right for the employer to recoup part of her training costs, that was held to qualify as "any other event" allowing the employer to deduct the amount from final wages even though it reduced the hourly rate below the National Minimum Wage.

34. Regulation 14(1) of the NMW Regulations deals with living accommodation provided by the employer and provides as follows:-

> "**14 Deductions or payments as respects living accommodation**
>
> (1) The amount of any deduction the employer is entitled to make, or payment the employer is entitled to receive from the worker, as respects the provision of living accommodation by the employer to the worker in the pay reference period, as adjusted, where applicable, in accordance with regulation 15, is treated as a reduction to the extent that it exceeds the amount determined in accordance with regulation 16, unless the payment or deduction falls within paragraph (2)."

35. Employment as defined in s.54 of the National Minimum Wage Act 1998 provides:-

> **"54 Meaning of "worker", "employee" etc.**
>
> (1) In this Act "employee" means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.
>
> (2) In this Act "contract of employment" means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing.
>
> (3) In this Act "worker" (except in the phrases "agency worker" and "home worker") means an individual who has entered into or works under (or, where the employment has ceased, worked under)—
>
> (a) a contract of employment; or
>
> (b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual;
>
> and any reference to a worker's contract shall be construed accordingly.
>
> (4) In this Act "employer", in relation to an employee or a worker, means the person by whom the employee or worker is (or, where the employment has ceased, was) employed.
>
> (5) In this Act "employment"—
>
> (a) in relation to an employee, means employment under a contract of employment; and

> (b) in relation to a worker, means employment under his contract;
>
> and "employed" shall be construed accordingly."

36. There are no associated employment provisions.

37. Regulation 33 provides:-

> "**Training treated as hours of time work**
>
> The hours a worker spends training, when the worker would otherwise be doing time work, are treated as hours of time work."

Conclusions

38. The first question that arises is as to whether the deductions made by the appellants' and paid over to Cardinal Healthcare Properties Limited in respect of Mr Krumov's and Mr Salyov's rent, rental deposit and utility costs "were for the employer's own use and benefit". In accordance with regulation 12(1) of the National Minimum Wage Regulations 2015. Further in that respect, does Cardinal Healthcare Properties Limited fall within the definition of an employer in s.54(4) of the National Minimum Wage Act 1998.

39. It is clear to the Tribunal that the rent, rental deposit and utility costs were being deducted in accordance with clause 26 of the workers employment contract and the relevant provisions of the tenancy agreement, Cardinal Healthcare Properties Limited is an entirely separate legal entity to that of the first and second appellants and on the evidence before the Tribunal there is no basis in law for treating Cardinal Healthcare Properties Limited as one and the same as the two appellants.

40. The Tribunal also agrees that it is patently obvious that a payment deducted by the employer to be passed onto a third party is clearly attributable to an amount payable by the employer to someone else on behalf of the worker and therefore is not "for the employer's own use and benefit" and therefore cannot count as a reduction.

41. Clearly, Cardinal does not fall within the definition of an employer under s.54(4) of the National Minimum Wage Act 1998 and any suggestion by the respondents that their guidance suggests Cardinal could or should be treated as an associated employer is clearly wrong and has no basis in law.

42. In relation to the appellants being entitled contractually to deduct from Mr Krumov and Mr Salyov the cost of their Disclosure and Barring check and induction training in accordance with the terms of the deduction agreement. The question arises, does that amount to a deduction for the purposes of regulation 12(2)(a) of the 2015 Regulations?

43. It is clear that the appellants were contractually entitled to make the deductions in accordance with the deduction agreement, there is no doubt about this. These are clearly all deductions for which the employee is contractually liable and therefore in accordance with regulation 12(2)(a) they are clearly deductions which are not to be treated as reduction and in line with the authority of Lorne Stewart Plc. In any event, it now seems conceded by respondents that the deductions made for the DBS checks, the appellants were lawfully entitled to make in any event.

44. Dealing with the issue as to whether time spent by Mr Krumov and Mr Salyov on induction training be treated as time work under regulation 33 of the 2015 Regulation, it seems to be the case that the contract of employment only began after the training was satisfactorily completed.

45. Therefore, the Tribunal agrees Mr Krumov and Mr Salyov were not workers at that time for the purposes of the Regulation and therefore Regulation 33 plainly cannot apply in those circumstances.

46. It would therefore appear the agreement to pay back the cost of their training in the event of their leaving before 6 months employment had been completed is a valid one and cannot be subject to the National Minimum Wage legislation.

47. The appellants appeal against the respondent's two notices dated 6 March 2019 of the underpayments under the National Minimum Wage Act 1998 succeeds.

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Employment Judge Postle

Date: ……15/05/2020 .……

Sent to the parties on: .03/06/2020 ....

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For the Tribunal Office