EMPLOYMENT TRIBUNALS

Appellant JD Wetherspoon plc

Respondent Commissioner for HM Revenue and Customs

Heard at: Watford (by CVP) **On**: 25 June 2021

Before: Employment Judge McNeill QC

Appearances

For the Appellant: Mr S. Rice-Birchall, Solicitor
For the Respondent: Mr T. Poole, one of Her Majesty's Counsel

JUDGMENT

The Appellant's application for costs, made pursuant to rules 76 and 78 of the Employment Tribunals Rules of Procedure, is dismissed.

REASONS

1. This matter was before the Tribunal to determine the Appellant's application for the Respondent to pay its costs, arising from the serving of two Notices of Underpayment (NoUs) pursuant to section 19 of the National Minimum Wage Act 1998 (NMWA), and the Respondent's subsequent contesting of the Appellant's appeal against the NoUs. The NoUs were in respect of arrears of pay in the total sum of £7,501.96 as well as a financial penalty in the sum of £10,113.59. They were served on the Appellant on by the Respondent on 2 October 2019.

2. The costs application was made pursuant to rules 76 and 78 of the Employment Tribunals Rules of Procedure.

3. Rule 76 provides that:

> *"(1) A Tribunal may make a costs order….and shall consider whether to do so, where it considers that –*

(a) a party…has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way the proceedings (or part) have been conducted; or
(b) any claim or response had no reasonable prospect of success…".

4. Rule 78 contains provisions as to the amount of a costs order.

5. The Tribunal is required to consider whether the threshold requirements for making a costs order are met and, if so, whether to exercise its discretion to make a costs order.

6. The particular grounds for the application were that the position taken by the Respondent, in relation to the issue of the NoUs and the Respondent's subsequent contesting of the appeal against those NoUs, was unreasonable and had no reasonable prospect of success.

7. The application was made in an email to the Tribunal dated 2 February 2021 in which the Appellant also confirmed that the appeal would not be pursued. The Appellant's withdrawal of the appeal followed the withdrawal of the NoUs by the Respondent, on 28 July 2020.[1]

Background

8. The key dispute between the Appellant and the Respondent that gave rise to the NoUs and the subsequent appeal concerned the meaning of the words "living accommodation" in regulations 9(1)(e) and 16 of the National Minimum Wage Regulations 2015 (NMWR). In short, where living accommodation has been provided to an employee, a notional amount in respect of the value of that living accommodation can count towards the National Minimum Wage (NMW). This is known as the "accommodation offset".

9. The ten individuals, to whom the NoUs that were subject to the appeal applied, had been provided with accommodation by the Appellant. The accommodation, however, did not include a bed.

10. The term "living accommodation" is not defined in the legislation but there is a National Minimum Wage Manual (NMWM) that provides technical guidance regarding the entitlement and enforcement of the NMW. The NMWM is publicly accessible online. It is endorsed by BEIS as a measure by which HMRC should enforce the NMW legislation.

11. At the relevant time, the NMWM dealt with "living accommodation" at NMWM10100. It stated, among other matters relevant to the determination of whether accommodation was "living accommodation", that accommodation should be regarded as "living accommodation" for NMW purposes "when it provides the worker with access to and free use of a bed". NMWM10100 stated that HMRC officers should form a view

[1] The NoUs were replaced by NoUs which were restricted to other NMW risks previously identified and agreed between the parties.

"based on an examination of the actual arrangements in place". The guidance has now been amended to exclude references to the provision of a bed.

12. Further guidance provided in NMWM10110 stated that it was "not possible to provide a definitive list of all the circumstances and arrangements that might be regarded as living accommodation" and that Compliance Officers need to "form a view based on an examination of the actual arrangements in place". The issue was "whether the basic facilities exist to enable the worker to live in the accommodation".

13. The Respondent, exercising its enforcement role and considering whether the Appellant was complying with the NMW legislation, carried out an investigation, which commenced in 2016. The investigation covered a number of matters and, in some of those matters, it was agreed that arrears of pay were due. The issue of the legality of a deduction from workers' pay arising from the provision of accommodation by the Appellant, however, remained contentious. Following extensive correspondence and meetings between the parties, the Respondent notified the Appellant that it would be issuing NoUs pursuant to section 19 of the NMWA and it was agreed between the Appellant and the Respondent that a sample of ten workers would be included in order that the point in contention could be considered by the Employment Tribunal.

14. In short, the Respondent's view was that living accommodation had not been provided to the employees in question. The Appellant's view was that living accommodation had been provided. If the Appellant was correct, it should be allowed to apply the "accommodation offset" in accordance with regulation 14 of the NMWR.

15. In informing the Appellant on 28 July 2020 that it was withdrawing the NoUs, the Respondent, by its NMW Case Officer, told the Appellant that, having further considered matters raised by the Appellant with "the latest available evidence and tribunal decisions concerning what constitutes the provision of 'living accommodation'", the Respondent was now of the view that living accommodation appeared to have been provided to workers identified in the NoUs and that the "accommodation offset" could therefore be applied.

16. The reference to "tribunal decisions" was a reference to two decisions of the Employment Tribunal heavily relied on by the Appellant in making its costs application: **Royal Northern & Clyde Yacht Club v The Commissioners for Her Majesty's Revenue and Customs** Case No. 4123857/2018 and **Greene King Services Ltd v The Commissioners for Her Majesty's Revenue and Customs** Case No. 3332111/2018. The decision in the **Royal Northern & Clyde Yacht Club** case was promulgated on 8 July 2019 and the **Greene King** decision on 24 December 2019. The **Royal Northern & Clyde Yacht Club** case was not brought to the attention of the Tribunal by the Respondent in **Greene King**.

17. In both those cases, the Respondent (the same respondent as in the current case) contended that accommodation provided to particular workers was not "living accommodation" within the meaning of regulation 14 of the NMWR because the employer had not provided a bed. The accommodation, the Respondent contended, could therefore not be deemed to be living accommodation for the purposes of NMW calculations and the accommodation offset. The Respondent relied in those cases on the provisions of the NMWM and, in particular, that accommodation could not properly be described as "living accommodation" unless it had a bed. This was described by the Employment Judge in **Greene King** as a "tick box" exercise by the Respondent.

18. In both cases, the Tribunal concluded that the Respondent had taken too narrow an approach to the interpretation of "living accommodation" and that the absence of the provision of a bed by the employer should not, without more, lead to the conclusion that accommodation was not living accommodation. Whether accommodation amounted to "living accommodation" within the meaning of regulation 14 required a broader approach to be taken. The NMWM referred to "all the circumstances and arrangements" and referred to the Compliance Officer forming a view "based on an examination of the actual arrangements". In **Greene King**, it was held that living accommodation is "accommodation capable of being lived in and this must involve a consideration on a case-by-case basis".

Statement of Facts and Issues and Written Submissions

19. The parties provided a very helpful Statement of Agreed Facts and Issues. They also provided clear and helpful written submissions which were developed orally before me. The matters contained in all those documents are taken into account in this decision, although they are not repeated in full.

20. I was provided with a bundle of authorities which helpfully contained the NMW legislation and guidance and a number of authorities to which I was referred during the course of oral argument.

Issues

21. In the agreed Statement, the issues for determination by the Tribunal were stated to be as follows:

    (i) Has [the Respondent] acted unreasonably in the way that the proceedings have been conducted?
    (ii) Did [the Respondent's] ET3 response have no reasonable prospect of success?
    (iii) Should a costs order be made against the Respondent?

Summary of submissions

22. The Appellant referred to the Respondent's NMWM and to the reference to accommodation being regarded as living accommodation "when it provides the worker with access to and free use of…a bed". The Appellant submitted that the Respondent's approach in the current matter was to apply this as a "gateway" provision: if the employer did not supply a bed, the accommodation was not "living accommodation". The Appellant referred to extensive correspondence between the Appellant and the Respondent in which it was repeatedly made clear by the Respondent that it was the failure to provide a bed that was the reason for not deeming the accommodation to be living accommodation. This was a flawed approach.

23. The Respondent knew about the **Royal Northern & Clyde Yacht Club** case before it served the NoUs and knew about the **Greene King** case when that decision was promulgated. Neither of those decisions was appealed by the Respondent and the Respondent did not bring **Royal Northern & Clyde Yacht Club** to the attention of the Employment Judge in **Greene King**.

24. Although the Respondent had taken a similar "tick box" approach in the current case as it had taken in those other two cases and, in spite of two different Tribunals finding that this was contrary to the proper interpretation of "living accommodation" in regulation 14 of the NMWR, the Respondent persisted in serving the NoUs and then contesting the appeal. When the Respondent was asked by the Appellant to explain its reasons for its change of position in July 2020, it responded, on 24 September 2020, suggesting that the provision of a bed was only part of its consideration. This was wholly disingenuous. The Respondent's position was unreasonable. That position, which was reflected in the Respondent's response, had no reasonable prospect of success.

25. The Appellant had incurred considerable costs in appealing, including during the period of seven months from the date of the **Greene King** judgment when its legal costs were accumulating. The Tribunal should exercise its discretion to order the Respondent to pay the Appellant's costs, to be subject to detailed assessment in the County Court.

26. Although it was common ground that a party's conduct prior to proceedings being commenced could not found a costs order, the Appellant submitted that costs should be awarded from the date that the NoUs were served rather than the date of the appeal. The date that the NoUs were served, the Appellant submitted, was the equivalent of the date for starting a claim in the Tribunal, which was the normal date from which costs could be awarded. The appeal was, in effect, a response to the NoUs, there being no specific requirement in the Employment Tribunal Rules of Procedure or in the 2017 Presidential Guidance on statutory appeals for the service of a response to an appeal.

27. The Respondent disputed this. Rule 76 refers to the "bringing" of proceedings and the way in which "proceedings" are conducted and to a "claim or response" having no reasonable prospect of success. A claim is defined in rule 1 of the Rules of Procedure as "any proceedings before an Employment Tribunal making a complaint". The relevant time to consider in relation to a potential costs award is therefore only from the filing of the appeal, which is the "claim" for these purposes.

28. The Respondent submitted that it had acted reasonably and that its position set out in its response could not be said to have no reasonable prospect of success. Costs orders should not be determined by reference to whether the NoUs were unreasonable but, by reference to rule 76(1)(a) and (b) of the Rules of Procedure and whether the response had no reasonable prospect of success.

29. "Unreasonable" does not merely mean wrong or misguided in hindsight. It is not unreasonable conduct *per se* for a party to withdraw a claim before it proceeds to a final hearing. As stated in **McPherson v BNP Paribas (London Branch)** [2004] 4 Costs LR 596, tribunals should not adopt a practice on costs that would deter parties from making "sensible litigation decisions". The correct approach was to look at whether the conduct was unreasonable.

30. The Respondent had not just carried out a "tick box" exercise. The Respondent pointed to correspondence in August 2019 making enquiries which included an enquiry of an employee as to whether the employee had purchased a bed or been provided with a bed by some other means. It also relied on correspondence, dated after the NoUs were served in October 2019, seeking further information as to the nature of the accommodation provided. The Respondent accepted that the provision of a bed is not determinative and that "a view should be formed based on an examination of the actual arrangements in place".

31. In the alternative, if the Respondent did treat the provision of a bed as a "gateway" provision, this was not unarguable. The question of whether there were reasonable prospects should be judged on the basis of information that was known or reasonably available at the relevant time.

32. The NMWM should be treated as an important aid to interpreting the legislation and should be afforded considerable weight. The Respondent made reference to **Ali v London Borough of Newham** [2012] EWHC 2970 (Admin), at paragraph 39 in which some national guidance produced by the Department for Transport on the use of tactical paving was being considered. Kenneth Parker J referred to giving weight to such guidance according to the context in which it had been produced. A number of factors were identified including "the extent to which the (possibly competing) interests of those who are likely to be affected by the guidance have been recognised and weighed" and "the importance of any more general public policy that the guidance has sought to promote".

33. The purpose of the NMWA is to ensure that workers are paid at the NMW. It is there to prevent exploitation of workers and generally does not permit benefits in kind to be taken into account. Living accommodation is an exception but only to a limited extent. A purposive approach should be taken to this aspect of the legislation. The Respondent referred to **Leisure Employment Services Limited v HMRC** [2006] ICR 1094 (EAT) and [2007] ICR 1056 (CA) in support of this submission and referred to an observation made by Buxton LJ in the same case that the meaning of "living accommodation" was "obviously capable of a good deal of debate".

34. Decisions of Employment Tribunals do not constitute any binding authority and there is nothing unreasonable in parties seeking to argue a point that has been rejected by another Tribunal. I should not speculate on why no appeal was pursued in the **Royal Northern & Clyde Yacht Club** and **Greene King** cases.

35. The Respondent submitted that I should consider what would have happened if this appeal had proceeded to a final hearing. I should conclude that, even if the Respondent had been unsuccessful, a Tribunal would not have awarded costs against it.

36. The Respondent's decision to withdraw the NoUs was a sensible and responsible decision resulting from the case being reviewed in the light of the judgments of the Employment Tribunal in **Royal Northern & Clyde Yacht Club** and **Greene King** and the lack of further information that had been requested by the Respondent from the relevant workers both in August 2019 and after the service of the NoUs**.** Tribunals should encourage parties in appropriate cases to withdraw and not disincentivise such an approach by ordering such parties to pay costs.

37. Even if the Respondent's conduct was unreasonable or its position had no reasonable prospect of success, the Tribunal should not exercise its discretion to award costs. The Respondent has acted with good faith and in accordance with the purpose underlying the NMWA, which is to prevent the exploitation of workers and ensure that they are paid at least the NMW. It had acted in accordance with its interpretation of the legislation, which was not unreasonable. It is fundamental to the Respondent's enforcement strategy that it should investigate cases and the fear of costs orders may deter it in performing that function.

Discussion and conclusions

38. I first considered the Appellant's argument that the relevant period for considering a costs order was from the date of the NoUs. I rejected that argument. The jurisdiction to award costs relates only to the period from the beginning of proceedings and not to any earlier period. A statutory appeal of this type falls within the definition of "claim" within rule 1 of the Rules of Procedure as "any proceedings before an Employment Tribunal making a complaint". Proceedings commence when the appeal is filed. This is consistent with the jurisdiction to award costs where there is

no reasonable prospect of success, set out in rule 76(1)(b) of the Rules of Procedure, which refers to a "claim" or "response", documents which exist only from the time when proceedings in the Tribunal are commenced.

39. The Respondent submitted that in approaching this application I should consider what would have happened if this appeal had proceeded to a final hearing and whether costs would have been awarded against the Respondent if the Respondent were unsuccessful. I rejected that approach. I could not be sure what evidence would be before the Tribunal at the hearing of the appeal nor could I properly speculate as to how another Tribunal might have exercised its discretion if the threshold conditions for making a costs order were met. I considered the application on the basis of the material available to me.

40. In its response to the appeal, the Respondent stated that it issued the NoUs having formed a view based on "the arrangements in place using the information and evidence at [the Respondent's] disposal". It stated that the question of whether the accommodation "included either the consideration of or provision of a bed" was just one such deliberation and that it would always consider "the actual circumstances and arrangements in place before forming a view whether living accommodation [was] provided on a case by case basis".

41. I considered the correspondence passing between the Appellant and the Respondent, and other documentation relevant to the Respondent's investigation into the payment of the NMW to workers employed by the Appellant, dated between 26 July 2016 and 30 August 2019. During the investigation and in the face of numerous protestations from the Appellant that it was taking the wrong approach, the clear position of the Respondent, consistently maintained, was that the accommodation provided to the relevant workers was not "living accommodation" because it did not contain a bed. The questions raised by the Respondent in August 2019 as to how a bed was provided did not detract from the clear and overwhelming evidence that the NoUs were served after applying a narrow interpretation of "living accommodation", based upon the reference to the provision of a bed in the NMWM guidance. More wide-ranging enquiries that post-dated service of the NoUs could not alter the basis upon which the NoUs were served. In short, the Respondent's position at the time of serving of the NoUs plainly was that "living accommodation" required the provision of a bed.

42. At the time that the NoUs were served, the only decision which specifically addressed the question of whether "living accommodation" required the provision of a bed was **Royal Northern & Clyde Yacht Club**. For reasons which are not explained, this decision was not loaded onto the Tribunal judgments database. Nevertheless, the Respondent was a party and must be taken to have known about the judgment. It did not suggest to the contrary. By the date that the Response was filed in the Tribunal (14 January 2020), the **Greene King** decision had also been promulgated, although only very recently (24 December 2019).

43. I must consider alleged unreasonable conduct by reference to the period from the start of the proceedings. The first relevant date in relation to the Respondent is 14 January 2020, which is the date of the Response. It could not be said to have conducted itself unreasonably before that date. I considered whether the Respondent's conduct was unreasonable by reference to the position taken by it in its Response; its continued contesting of the appeal in the face of Employment Tribunal decisions that were adverse to it; and its withdrawal of the NoUs only on 28 July 2020.

44. In relation to the Response, on the basis of what was before me, I did not consider that the Response reflected the reality of the reason for the NoUs, which was that no bed was provided and that the accommodation was therefore not "living accommodation" within the meaning of regulation 14 of NMWR.

45. In relation to the Employment Tribunal decisions, these did not constitute any binding authority. There may come a point where the persistent pursuit of the same unsuccessful argument by the same party in different cases, without pursuing the option of an appeal, may amount to an abuse of process but there is nothing to prevent a party re-arguing a point on which it has lost in one Tribunal before a second Tribunal.

46. The period from 14 January 2020 to 28 July 2020, when the NoUs were finally withdrawn, is not well-explained but the Respondent was taking steps to obtain further information about the accommodation with little success. The Appellant did have further documentation relevant to whether the accommodation provided was living accommodation, which it asked the Respondent to include in the bundle, but this was not provided to the Respondent by the Appellant during the course of the investigation. Given the Respondent's approach to the meaning of "living accommodation" and the need to provide a bed, it seems unlikely that the provision of this information would have made any difference to its approach.

47. The decision to withdraw the NoUs communicated on 28 July 2020 was, I accepted, a reasonable and sensible litigation decision. It was a decision that probably could have been taken a little sooner than it was but it was not unreasonable for the Respondent to continue investigating the position after it had filed its Response, particularly in the light of the two Employment Tribunal decisions that went against it.

48. Looking at the Respondent's conduct overall, I concluded that it was unreasonable for the Respondent to contest the appeal on the basis that it had taken into account circumstances other than the provision of a bed when it served the NoUs on 2 October 2019. The contemporaneous documentation clearly demonstrated that it was the failure to provide a bed that led to the decision to serve the NoUs and that the provision of a bed was treated as a "gateway" requirement. The two Tribunal decisions referred to should have caused the Respondent to reflect on its position

sooner that it did rather than waiting until shortly before 28 July 2020 to withdraw the NoUs.

49. The Respondent's position in its Response was not consistent with the reality of the reasons for its decision to serve NoUs reflected in the correspondence. On the basis that it relied on the need to provide a bed as a "gateway" requirement, in the light of the two existing Tribunal decisions which carefully considered and rejected this argument and for the reasons set out by the Employment Judges in those cases, this argument could have had no reasonable prospect of success.

50. While the legislation should be interpreted purposively and the purpose of the NMW legislation is to ensure that workers are paid at least the NMW, there was nothing inconsistent between that purpose and the meaning of "living accommodation" as interpreted in the two Employment Tribunal decisions. While other benefits are excluded, the legislation specifically provides for living accommodation to be taken into account, albeit by reference only to a fixed and notional accommodation offset.

51. In short, once the Respondent had had time to reflect on the two Employment Tribunal decisions and their implications, which might reasonably have required some time after 24 December 2019, the threshold requirements for making an order for costs were made out.

52. Turning to whether I should make a costs order in the exercise of my discretion, I took into account that the Appellant has incurred considerable costs in bringing and pursuing this appeal.

53. On the other hand, costs orders in the Tribunal are the exception and not the rule. The Respondent's enforcement role, in relation to the NMW and the prevention of the exploitation of workers and to ensure they are paid the NMW, is an important one. It was right for them to conduct an investigation in relation to the Appellant and a number of risks and arrears of pay were agreed.

54. Until the two judgments of the Employment Tribunal in the **Royal Northern & Clyde Yacht Club** and **Greene King** cases, it was not unreasonable for the Respondent, in the light of the NMWM guidance, endorsed by BEIS, to take the position it did in relation to the provision of a bed. "Living accommodation" is not defined in the NMWR and whether certain matters should or should not be taken into account is debatable. I noted that the Respondent has now amended its guidance to exclude the reference to the provision of a bed.

55. While I considered it unlikely that a fear of costs orders being made was likely to lead to fewer cases being investigated by the Respondent, I accepted that the Respondent had acted in this case in accordance with good faith and with what was, at least until the two relevant Employment Tribunal judgments were properly considered, a reasonably arguable interpretation of the legislation in the light of the NMWM guidance. It had

also acted properly and sensibly in withdrawing the NoUs rather than contesting the appeal to a full hearing. I accepted that the making of costs orders can disincentivise parties from making these types of sensible decisions.

56. Weighing up all those factors, in the exercise of my discretion, I have concluded that a costs order should not be made. The Appellant's application is therefore dismissed.

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Employment Judge McNeill QC

Dated: 29 June 2021

Sent to the parties on: .....

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For the Tribunal