EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		Respondent
MR G TIGHE (C1)	AND	KASTEEL COLLECTION LTD
MRS L TIGHE (C2)		

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT: BRISTOL ON: 1ST / 2ND NOVEMBER 2021

EMPLOYMENT JUDGE: MR P CADNEY
(SITTING ALONE)

APPEARANCES:-

FOR THE CLAIMANTS:- **IN PERSON**

FOR THE RESPONDENT:- **MR M PARKER (SOLICITOR)**

JUDGMENT

The judgment of the tribunal is that:-

i) The claimants' claims for unlawful deduction from wages (accommodation offset);

ii) The claimants' claims for breach of contract (pension);

Are well founded and upheld.

iii) The claimants claims of automatically unfair dismissal s104(1)(b) ERA 1996;

Are not well founded and are dismissed.

iv) Directions in respect of remedy are set out below.

Reasons

1. By a claim forms presented on 27th July 2020 the claimants brought the following complaints (as set out in the case management directions) :

a) Automatic Unfair dismissal s104(1) (b) ERA 1996 (asserting a statutory right); (it is not in dispute that neither claimant has two years' service and cannot bring a claim for "ordinary" unfair dismissal.)

b) Unlawful deduction from wages in the unlawful deduction of accommodation offset payments exceeding the statutory maximum.

c) Unlawful deduction from wages in that the deduction of the accommodation offset payments reduced the claimants' pay to below that required by the National Minimum Wage.

d) Unlawful deduction from wages / breach of contract in the failure to make appropriate pension contributions.

2. To be strictly accurate it should be pointed out that b) and c) above are not separate issues but separate parts of the same issue; there is no statutory maximum per se but for the purposes of calculating the national minimum wage (NMW) the statutory maximum is disregarded, but any amount in excess of it is taken into account.

3. The tribunal has heard evidence from both claimant's; and on behalf of the respondent from Mrs Gretchen Boon, a director of the respondent company.

Background Facts

4. In this section I will set out the background facts. The specific points in dispute will be discussed and the findings set out in the discussion below.

5. The claimants are a married couple from South Africa. They arrived in the UK on 29th May 2019 intending to buy and run a pub in Bristol. That did not prove possible and they sought employment in the hospitality industry. The respondent operates an hotel "10 Castle Street" Cranborne, Dorset. The claimants saw an advertisement which they say was for a "live in couple" to work at the hotel; however, they have been unable to obtain a copy and the advert is not before me in the bundle. They met Mrs Boon on the 20th June 2019 and accepted roles as a "Caretaking Couple" (as set out in the original joint contract of employment). In addition to the hotel the respondent also owned a three bed property described as "The Cottage" (9 Castle Street) which was empty, and which was subsequently occupied by the claimants for

the whole of their period of employment. It is not in dispute that they were never provided with a tenancy agreement, or any written licence to occupy the property, setting out the rent or any other terms of occupation, other than those set out in the contracts of employment which are set out below. Again it is not in dispute that throughout their employment £700 was deducted from each of their monthly wages as representing the rent for the cottage, which in each case was fifty percent of their wages.

6. There are no complaints from the claimants about any matters prior to the Spring / early Summer 2020 when Mr Tighe overheard Mr Boon and a friend Steve chatting at a barbeque. He heard Steve say to Mr Boon that it was not lawful to charge employees more than twenty percent of their wages for accommodation. Mr Tighe told his wife, made further enquires online, and contacted a barrister, the Wimborne Citizen's Advice Bureau and HMRC. He concluded that the amounts being deducted from his and his wife's wages representing accommodation costs were unlawful.

7. On 29th June 2020 he met Mr and Mrs Boon, and explained his understanding of the law. Mr Boon disagreed with him. On 7th July 2020 he sent Mr Boon an email setting out why he believed the accommodation deductions from their wages were unlawful (essentially as they reduced the wages to below the National Minimum Wage and exceeded the permitted accommodation offset amounts). What happened thereafter is in dispute. Mr Tighe contends that he met Mr Boon in the bar of the hotel. Mr Boon said "It's over" which Mr Tighe took to mean that they were being dismissed: " I asked him are you dismissing us, he said yes it's over, I asked - and our accommodation when do you want us out - and he said today" (Claimants joint witness statement para 10) . Mrs Boon then entered and told both men to calm down. Mr Tighe told Mrs Boon that they had just been fired and left.

8. In the days that followed there were WhatsApp exchanges between the parties the most significant of which occurred on 13th July. Mrs Boon texted saying that as the claimants had neither been sacked nor resigned and as they were still on the payroll the issue with the house did not justify them not working. Mr Tighe responded repeating that they had been unambiguously dismissed by Mr Boon on 7th July. This resulted in a meeting on 4th August 2020 at which Mr Parker was also present at which the respondent asserts that the claimants resigned or that at least that that was the agreed date of termination.

Contracts

9. The claimants had two different contracts of employment. The first is dated 21st June 2019 and was prepared by Ms Boon. It is a joint contract which describes the Job Title as "Caretaking Couple". The salary is set out as (section 6.1) " Your salary will be £1,400.00 per month including tips, (20 hours each unpaid in exchange for living accommodation, 20 hours each paid)." Section 19.1 sets out that "anyone who lives in the company accommodation" will be responsible for additional bills beyond rent, water, internet and rates which will be paid by the company, and that a separate

tenancy agreement will apply. However no tenancy agreement was ever provided and no charge was ever made for anything beyond the £700 per month deduction from wages.

10. The second is dated 7th February 2019, but it is agreed that it was in fact 7th February 2020. The copy in the bundle relates solely to Mr Tighe and was prepared by Luke Ramsden. Mr Tighe's title is given as Head of Maintenance. The hours of work were 35 hours per week on average (over a 17 week period). Pay was £8,400 gross per annum (£700 per month) with the rental value of 9 Castle Steet "£1400 pcm will also be included in your remuneration". It has not been suggested that Mrs Tighe's contract contained any different terms.

11. Accordingly although the contractual expression is different under both contracts the total monthly remuneration for each claimant was £1,400 per month. Under the terms of the first contract £700 was deducted each month to represent the accommodation cost whereas under the second the value of the accommodation provided was deemed to be part of the remuneration. Whilst the difference may affect the tax payable it does not affect my task as in practice it amounts to the same thing; and no argument has been advanced before me that any different considerations arise from the different contractual terms.

Unlawful Deduction from Wages – Accommodation Offset

12. I have only considered this claim as a claim for unlawful deduction from wages and not a breach of contract as the sums deducted were provided for in the contracts and are only unlawful to the extent that the amounts referrable to accommodation costs are to be taken into account in determining whether the claimants did or did not receive the National Minimum Wage (NMW)

13. The primary dispute is the issue of whether the accommodation cost is to be taken into account in determining whether the claimants had been paid the National Minimum Wage (NMW). It is not in dispute that the maximum offset charge was originally £7.55 per day, increasing to £8.20 per day in April 2020. The actually cost to each of the claimant's has been claimed at £20 per day (although £700 per month in fact equals £23 per day on an annualised basis on my calculation). Whichever is correct it significantly exceeds the statutory permitted sum which can be ignored in calculating the National Minimum Wage at any point in the claimants employment.

14. Regulations 9 to 16 set out the basis of calculating the national minimum wage. Reg 12(1) provides that deductions for the provision of living accommodation are not to be taken into account for calculating the NMW (i.e. the headline figure prior to the deduction is the correct basis of assessment) provided the deduction complies with Regulation 14. Regulations 14 and 16 of The National Minimum Wage Regulations provide :-.

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).

(paragraph (2) is of no relevance to this case)

16.— Amount for provision of living accommodation

(1) In regulations 9(1)(e), 14 and 15 , the amount as respects the provision of living accommodation is the amount resulting from multiplying the number of days in the pay reference period for which accommodation was provided by [£7.55 and 8.20 at the relevant times in this case] .
(2) Living accommodation is provided for a day only if it is provided for the whole of a day.
(3) Amounts required to be determined in accordance with paragraph (1) as respects a pay reference period are to be determined in accordance with the regulations as they are in force on the first day of that period.

15. It follows that any amount above £7.55 / £8.20 deducted "for the provision of living accommodation" is to be taken into account in calculating whether the amounts received by the claimants did or did not fall below the NMW, if the deduction relates to the provision of living accommodation within the meaning of Reg 14. The NMW Regulations do not provide any definition of the term 'living accommodation', but the BEIS guide advises that it 'has to provide the worker with free access to accommodation suitable for day to day living, such as providing access to a bathroom and suitable sleeping facilities' which it clearly did in this case; and the IDS Handbook (Wages) states that:-

The accommodation offset rules apply where the employer provides accommodation to the worker in the following circumstances:

i) the accommodation is provided in connection with the worker's contract of employment

ii) a worker's continued employment is dependent upon occupying particular accommodation, or

iii) a worker's occupation of accommodation is dependent on remaining in a particular job.

.

16. For the avoidance of doubt these categories are not to be found in the legislation itself but are my judgement at least useful in determining whether the section is engaged or not.

17. The respondent contends that the deduction does not relate to living accommodation within the meaning of Regulation 14. They essentially contend that the provision of employment and accommodation are entirely unconnected, but that they have become entangled by the clumsy drafting of the contracts and the convenience of deducting the rent for the property from the claimants' salary rather than separately. There are in reality two entirely separate agreements, an employment agreement, and a tenancy agreement. The appearance of a link between the two is an error caused or compounded by the drafting of the employment contracts and the fact that the rent was deducted from wages rather than being paid separately as it should have been. The essence of its case is that in order for the accommodation to fall within reg 14 there must be a requirement to live in the property in order to perform the role and there was no such requirement in this case. As a consequence the deductions are not for the provision of living accommodation and do not fall within the ambit of Reg 14 and are not to be taken into account in calculating the NMW.

18. Mrs Boon's evidence is that the roles performed by the claimants were not dependent upon or linked with the accommodation. When she interviewed them they had been living in hotels and had no permanent base. The property was empty and it was offered to them and accepted by them. It was not necessary for them to live in that or any other particular property to perform their roles and the two were not linked. It was in the circumstances simply convenient to deduct the accommodation costs from their wages.

19. Accordingly the respondent submits that the provision of the accommodation necessarily does not fall within the second or third category identified above in that the employment was not dependant on occupying the accommodation, and occupying the accommodation was not dependant on remaining in employment. Moreover it does not fall within the first category as it was not in reality provided in connection with the contracts of employment, and any apparent contractual connection is coincidental and the result of clumsy drafting.

20. In addition the respondent relies on the fact HMRC conducted an inspection of their pay records, possibly as a result of Mr Tighes' enquiry with them. On 13th August 2021 the outcome of the check revealed that "you appear to be paying your workers at least the correct rate of NMW". It set outs the provisions in respect of accommodation offset and does not suggest that there is has been any breach. The respondent submits that if HMRC has not concluded that there is any breach of the NMW regs then there cannot be any, given that it is the statutory enforcement body for the NMW, or at very least that this conclusion carries very significant evidential weight. The difficulty I have is that the letter is dated approximately one year after the claimants' employment ended and I have no way of knowing if the inspection included any historic analysis of pay records and if it did how the conclusion was reached that the amounts deducted for accommodation did not cause the respondent

to be in breach of the NMW Regs. In the end in my view I have to determine the issue on the basis of the evidence before me.

21. The claimant's evidence is that they were not offered any alternative nor told they could find their own accommodation, and were effectively offered the job and the accommodation as a package. No question of them being able to find their own accommodation ever arose and as far as they understood it they were required to live in the "The Cottage" as a condition of their employment.

22. There is in reality in my view no significant dispute of fact between the parties. The claimants do not allege that they were ever expressly told that they were required to occupy the Cottage as a condition of their employment other than that they understood from the advertisement that it was a live-in role, and a live-in role was offered to them, and nothing was ever said or done to suggest that they were not required to live-in; and the respondent does not allege that it ever expressly informed the claimants that the two were not linked and that they were perfectly entitled to find their own accommodation.

23. Effectively the claimants invite the tribunal to conclude that this was a live in role and that the accommodation and employment were intrinsically connected; and the respondent invites the tribunal to conclude that in the absence of any express oral or written contractual requirement to live in that here was no such connection.

24. For completeness sake, the question of the relationship between the provision of and deduction for accommodation costs and the NMW was considered by the EAT in *Commissioners for HMRC v Ant Marketing Ltd [2020] IRLR 744*. The case turned on the issue of the meaning "employer" where the employer (AM Ltd) was a different legal entity from that providing the accommodation (which is not in issue in this case); and any further observations are strictly obiter. However Choudhury P emphasised that the decision turned on the narrow question before the tribunal and that a broad purposive approach to construction is appropriate for a piece of social legislation. In this case the purpose of this part of the legislation is to prevent employers of low paid workers from avoiding the obligation to pay then NMW by levying excessive charges for accommodation. However in my judgement for the reasons set out below on the facts of this case the employer provided living accommodation within the meaning of Reg 14 however broadly or narrowly it is interpreted and it is not necessary to rely any purposive construction of the legislation.

25. There are in my view a number of difficulties for the respondent. Firstly it did as the employer provide living accommodation to its workers, the claimants, and did, as it was contractually entitled to, make deductions from their pay in respect of the provision of that living accommodation. On the face of it, therefore, the deductions appear to fall squarely within the wording of Reg 14 and are therefore subject to the Reg 16 limits, without any further consideration of any connection with employment in any event. Certainly, I have not been referred to any authority that supports the respondent's position that reg 14 is only engaged and/or is limited to situations in

which there is a requirement to live in the accommodation in order to perform the role.

26. Secondly the claimants were never provided with any tenancy agreement. It follows that the only basis for making any deduction, and certainly the deduction of any specific amount, for the provision of the accommodation is contained in the terms of the employment contracts. In my judgement it is impossible to conclude that the living accommodation was not provided "in connection" with the employment (category i) above) where the only legal basis for requiring the claimants to pay for the accommodation is found in the contracts of employment themselves.

27. Thirdly, the first contract explicitly provides that twenty hours work is provided in exchange for the accommodation; and the second explicitly provides that the notional rent will be deemed to be part of their remuneration. Given that the respondents themselves prepared and rely on two separate contracts both of which explicitly link the work and the pay with the provision of the accommodation the suggestion that the two are not linked is in my view simply not borne out by, or sustainable, on the basis of the documentary evidence. It equally follows inevitably in my view that for all practical purposes there was a requirement to live in the property. Even if the claimants had found alternative accommodation and moved out, under the terms of the contracts of employment the respondent would still have been entitled to deduct the rent for the property from their wages (first contract) or treat it as part of their wages (second contract). Given that they were contractually bound to pay for the accommodation from their wages it appears to me to follow automatically that for all practical purposes they were in reality required to live there.

28. In the end, however it is put, in my judgement the respondents are bound by the terms of the contracts they drafted and entered into and I cannot see any way of avoiding the conclusion that the provision of the cottage was living accommodation within the meaning of Reg 14.

29. For all of those reasons it follows in my view that there is sufficient link between the accommodation and the employment to bring the case with the ambit of Reg 14; and that the deductions were deductions within the meaning of Reg 14. Since the deductions exceed the maximum permitted accommodation offset it equally follows that any deduction greater than the permitted amount a the material time has to be taken into account in in deciding whether or not the claimant's did receive the NMW.

30. Although the specific calculation will have to be left to a remedy hearing for the reasons given below, it is inevitable that whatever the basis of the calculation that the claimants will not have received the relevant NMW for the whole of their employments.

31. In respect of remedy the position may be more complicated. The claimants' calculations are based on the original contractual terms of a forty hour week; and I have heard no argument as to whether this was or was not unilaterally varied by the terms of the second contract to a thirty five hour week. Clearly dividing the weekly

salary by thirty five will give a larger hourly rate than forty, which would be to the claimants disadvantage. However as set out above the claimants have calculated the accommodation deduction at £20 per day and it is not clear whether this is correct or should be a larger sum. If so that would be to the claimants advantage. Unless the parties can each agreement these issues will need to be resolved at a remedy hearing.

32. The directions in respect of remedy are set out below.

Breach of Contract / Unlawful Deduction from wage - Pension

33. It is not in dispute that the claimants were contractually entitled to be automatically enrolled in the NEST pension scheme but that this did not occur. In evidence Mrs Boon indicated that she understood that this issue had been resolved. However the claimants evidence is that it has not been. This claim cannot be advanced on the basis of a claim for unlawful deduction from wages as payments in respect of pension are not wages within the meaning of the Employment Rights Act 1996 (s27(2) (c). However the failure to make the pension payments is necessarily a breach of contract.

34. Again directions in respect of remedy are set out below.

Unfair Dismissal

35. The claimants' claim is that they were expressly dismissed on 7th July 2020; and that the reason for dismissal must have been their assertion of their statutory right to receive the minimum wage which had been breached by the excessive offset charge, as that was the subject matter of the dispute between Mr Tighe and Mr Boon. For a dismissal to fall within s104 ERA 1996 it is not necessary that the right in question was correctly identified or had in fact been infringed (although for the reasons given above in my judgement it had), but the claim must have been made in good faith s104(2). There are three elements to the claim:-

    i) The assertion of a relevant statutory right; that

    ii) Was made in good faith; and which

    iii) Was the reason or principal reason for dismissal

36. The primary dispute is whether the claimants were dismissed on 7th July 2020. Mr Tighe is the only person present at the meeting who has given evidence. He asserts that they were both unambiguously dismissed. Mr Boon has not given evidence and the respondent invites me to conclude that whatever may have been said in the heat

of the moment, as a matter of fact the claimants' employment continued until at least the meeting on 4th August 2020.

37. The first question is whether the words of dismissal were ambiguous or unambiguous If Mr Tighe is correct, the first words "It's over" are potentially ambiguous, but he explicitly asked whether they were being dismissed to which the answer was "Yes, It's over" and required them to leave the property that day which is on the face of it unambiguous confirmation of dismissal. Given that this is the only evidence I accept that that is what was said and that it on the face of it amounted to an unambiguous dismissal.

38. Pausing at that point, therefore, on the face of it the claimants were unambiguously dismissed; and given the nature of the dispute and in the absence of any evidence from Mr Boon the natural conclusion is that they were dismissed for asserting that the amount they were being charged or accommodation exceeded the statutory maximum. There has been no challenge to the proposition that that is a relevant statutory right or that the assertion was made in good faith; but even if there had been given the diligence with which Mr Tighe researched the issue and that clarity and detail with which he set out the basis of the assertion in his email it was plainly made in good faith.

39. Once an employee has been dismissed the general rule is that the dismissal cannot be unilaterally withdrawn, but only with the agreement of the employee. The respondent essentially contends that even if, as I have found, that there was a dismissal that the withdrawal of it must have been accepted. Firstly the claimants did not leave the property and continued to be on the payroll; it follows either that they had not been dismissed or that they had accepted its withdrawal given that they continued to occupy the property and receive pay. Specifically the respondents rely on the 4th August meeting, at which it was agreed, as the audio confirms that 4th August 2020 would be treated by all parties as the last day of employment. On the face of it this is only explicable if the claimants had either accepted that they had not been dismissed; or accepted the retraction of the dismissal. If they did not of necessity 4th August 2020 could not have been the last day of employment.

40. The meeting of 4th August 2020 is difficult to analyse. Most of the discussion revolves around the issue of the lawfulness or otherwise of the accommodation. However there was agreement that the 4th August would be the last day of employment. Clearly it could not be if the claimants had already been dismissed; and equally clearly it could not amount to notice relating back to 7th July 2020 as they had apparently been dismissed without notice. On the face of it, therefore, the respondent must be correct that by whichever route, that their employment had continued beyond 7th July. This may be unfair to the claimants as there is nothing to suggest that they explicitly understood that if they accepted that their employment ended by agreement on 4th August that it could not have ended with their dismissal on 7th July 2020.

41. However, with some reluctance, I am compelled to accept that in those circumstances the respondent's analysis must be correct and that by agreeing to the

4th August 2020 being the last date of employment that that they had at least impliedly accepted the withdrawal of the dismissal on 7th July. It follows that their employments came to an end by agreement on 4th August 2020 and not because they were dismissed on 7th July and that their claims of automatic unfair dismissal must be dismissed.

Remedy

42. As set out above the claimants' claims of unlawful deduction from wages (accommodation offset) and breach of contract (pension) have been upheld. These should simply require calculation.

43. The parties are directed to notify the tribunal within 28 days of promulgation of this Judgment whether they have reached agreement as to remedy or whether a hearing will be needed; in which case further directions will be given.

Employment Judge Cadney
Date: 25 November 2021

Judgment & reasons sent to parties: 6 December 2021

FOR THE TRIBUNAL OFFICE