



EMPLOYMENT TRIBUNALS

Claimant: Mr John Charles

Respondent: Waterton Academy Trust

Heard from: Leeds Employment Tribunal, by cloud video platform (CVP)

The hearing was held remotely, by video link, (V) because of the restrictions arising from Covid 19.

On: 25 January 2021

Before: Employment Judge Kate Armstrong

Representation

Claimant: Mr Richard Lees (counsel)

Respondent: Miss Ruth Kennedy (counsel)

RESERVED JUDGMENT

1. The Respondent has made an unauthorised deduction from the Claimant's wages and is ordered to pay to the claimant the gross sum of **£9,373.80** in respect of the amount unlawfully deducted.
2. The Respondent failed to provide a written statement containing particulars of the change of the identity of his employer after a transfer of undertaking in July 2018. The Respondent is ordered to pay the Claimant the sum of **£692.02** in respect of this failure.

REASONS

Claims

1. On 24 July 2020 the Claimant brought a claim for unauthorised deductions from wages pursuant to s.13 Employment Rights Act 1996. He claims that the Respondent made an unauthorised deduction of £9,373.80 from his final salary payment on 13 March 2020. The Respondent accepts making a

deduction but asserts that it was authorised, in order to pay for the cost of repairs to the property which the Claimant occupied as a condition of his employment.

2. The Claimant also claims compensation for failure to provide a written statement containing particulars of change to the identity of his employer following a transfer of undertaking in July 2018, pursuant to s.4 ERA 1996 and s.38 Employment Act 2002 (EA 2002). The Respondent accepts that it failed to provide such a statement.

Conduct of the hearing

3. The hearing took place via video hearing, namely CVP, on 25 January 2021. The parties' representatives and the claimant were able to connect to the hearing and fully engage. The Claimant lost connection at one point and proceedings were briefly paused until he was able to reconnect. Three representatives from the Claimant's union were also present to observe proceedings.
4. The Tribunal took a short break approximately every hour.

Issues for the tribunal to decide

5. At the outset of the hearing, the issues for the Tribunal to decide were identified as follows:

Unauthorised Deductions from Wages

- 5.1. Was the deduction authorised by a relevant provision of the Claimant's contract (s.13(1)(a) ERA 1996) namely clause 5.4 of the service occupancy agreement dated 6 October 2008? The Claimant submits that the service occupancy agreement did not form part of his contract of employment.
- 5.2. If not – did the Claimant signify in writing his agreement or consent to the making of the deduction (s.13(1)(b)) by the email sent from his union representative to the Respondent on 18 February 2020?
- 5.3. If the deductions are in principle authorised, what is the sum that is authorised? In particular:
 - (i) are the proposed repairs required due to damage, beyond reasonable wear and tear?
 - (ii) Does the agreement extend to repairs to the garden?
 - (iii) What is the cost of the repairs?

Failure to provide written statement of particulars of change

- 5.4. The Respondent accepted that it had not provided a written statement of particulars of change to the Claimant after the TUPE transfer in July 2018. Therefore the only issue for the Tribunal was whether to award the minimum amount of 2 weeks' pay or whether it is just and equitable to award the higher amount of 4 weeks' pay.

Evidence

6. I have considered the contents of an electronic bundle, comprising 130 pages. I have read the witness statement of the Claimant (undated, 37 paragraphs) and the schedule of loss (undated, total claimed £9,873.80). I have considered all of the documentary evidence, even if I do not specifically refer to it below.
7. I heard oral evidence from the Claimant, given on oath. The Claimant confirmed the contents of his unsigned witness statement and answered questions in cross-examination and re-examination.
8. The Respondent did not rely on any written or oral witness evidence.

Background

9. The Claimant commenced employment as a caretaker at Kinsley School, Pontefract, on 21 July 2008. A condition of his employment was to reside at a property on the premises. His employment transferred to the Respondent in July 2018 at which stage the school was re-named Kings Meadow School. Following an extended period of sick leave, the Claimant's employment was terminated by agreement due to ill-health retirement on 13 March 2020. The Claimant expected to receive a payment of £9,849.73 comprising basic pay, 11 weeks' notice pay, 11.2 weeks' holiday pay (he had not taken any annual leave for 2 years due to ill health), and a 5% shift allowance. He received a payment of £475.82. The Respondent claims that it has lawfully deducted the sum of £6,900 from the Claimant's wages to cover the cost of repairs to the Property, authorised by his contract of employment or in the alternative by his agreement.

Findings of fact

10. On commencement of his employment, the Claimant was granted a licence to reside at Old School Bungalow ('the Property'), a property on the site of the school, as a condition of his employment and until termination of his employment. The Claimant's evidence is that the Property was not habitable and he and his then wife carried out extensive redecoration before moving in, around August 2008. The Respondent has no knowledge of the condition of the property in 2008 and I accept the Claimant's evidence on this point.
11. In February 2015 at the Claimant's request he was provided with a copy of his contract of employment (**40-52**) and a service occupancy agreement (**53-55**) both dated 6 October 2008. Both documents are unsigned.
12. The relevant provision of the Claimant's contract of employment for these proceedings is contained within clause 1, as follows (**53**):

'It is a condition of your employment that you are required to occupy the school house on a service occupancy basis. You will be required to sign a service occupancy agreement to confirm an [sic] agree to be bound by the terms and conditions within it.'

You will be required to vacate the property when your employment as Caretaker at Kinsley Primary School ceases'

13. The relevant clauses within the Service Occupancy Agreement (**53-55**) are as follows:

'1.1. 'the Property' means the house known as Old School Bungalow, Wakefield Road, Kinsley, Pontefract, WF9 5FJ.

1.3. 'the Employment Agreement' means the employment agreement dated (date) and made between (1) the Employer and (2) the Occupier'

2. Employment

2.1. The Occupier is employed by the Employer under the Employment Agreement as a caretaker

2.2. The Employer requires the Occupier to reside at the Property for the proper performance of his duties under the Employment Agreement.

5. Occupier's Agreements

The Occupier agrees with the Employer:

5.2. That the Employer and any persons authorised by him may enter the Property at any time to inspect the Property, yearly inspections will be compulsory;

5.4 To keep the Property [and the Contents] in good condition and to make good all damage, fair wear and tear excepted, monies owed in relation to damages will be recoverable from salary;

5.7. To ensure that the Property is cleaned daily and that all rubbish is disposed of daily in the rubbish bins provided;

5.9. Upon ceasing to be employed under the Employment Agreement, to vacate the property promptly, [and] to pay for repair of any damage to the Property [and to repair or replace any items of the Contents that may have been lost damaged or destroyed,] fair wear and tear excepted.

5.10. to maintain and keep the curtilage or garden [if any] of the Property in reasonable order and condition

5.11. to immediately report to the Employer any blockages or drains, leakage's [sic] from pipes or defects of internal or external fixtures, fittings, or apparatus'

14. On 9 February 2018 the Claimant was suspended following a conduct issue. He did not return to work before commencing a period of sick leave on 1 April 2019 which lasted until the termination of his employment.

15. The Claimant's employment transferred to the Respondent in July 2018 under the Transfer of Undertakings (Protection of Employment) Regulations 2006. The Claimant has never been provided with a written statement containing particulars of the change of identity of his employer.
16. There is a dispute between the parties as to whether the Claimant has breached the service occupancy agreement by refusing to allow entry for inspections, and that this has led to disrepair of the property. The Respondent has not provided sufficient evidence for me to find that this is the case. In the notes of a grievance meeting at **111** there is reference to monthly external inspections between January to May 2019 *'whilst further attempts were made to agree a date for access to the property'*. There is no evidence in the bundle that the Claimant unreasonably refused access during this period. The respondent's records of contact with the Claimant demonstrate that between April and May 2019 he was willing for inspections to take place and for works to be carried out (**61-62**). An internal inspection took place on 10 May 2019. Works were quoted for comprising guttering repairs, replacement of external doors, installation of smoke detectors, replacement of carpets and repainting the property throughout, in the sum of £11,381.00 plus VAT (**69**). There is no evidence that these works were necessitated due to any earlier lack of inspection. There is no evidence of the Claimant refusing access to the property at any date between this inspection and the next inspection in April 2020, after his employment had terminated (see further below).
17. In late 2019, the Claimant indicated a wish to consider taking ill-health retirement. A GP report was obtained in January 2020 which recommended ill-health retirement, due to chronic anxiety and depression (**72 - 73**).
18. On 12 February 2020 a meeting took place between Mrs Alison Waddington (HR officer); Mr Robert Cochrane (Headteacher) and Mrs Carole Dewrow (the Claimant's union representative). The Claimant did not attend due to his ill-health (**75 - 77**). It was agreed that the Claimant would take ill-health retirement from 13 March 2020. The service occupancy agreement and proposed work to be completed at the Property were discussed. Mrs Waddington stated that the bungalow needed to be vacated *'in a clean and good state of repair'*, that a date would be set for a further inspection and following this *'Costs for works carried out (damage repair, deep clean etc.) to get the bungalow back to a respectable standard will be met by JC as per agreement. Monies owed for these works will be recovered from salary, where necessary – works will not be above and beyond the necessary standards.'* The minutes then record that Mrs Dewrow *'agreed with all of the above on JC's behalf, and confirmed she also felt it to be fair. CD provided evidence to both AW and RC that JC gave her the rights to act on his behalf.'* The Tribunal was not provided with the evidence referred to.
19. On 18 February 2020, there was an email exchange between Carol Dewrow (the Claimant's union representative) and Alison Waddington (the Respondent's HR Officer) (**78**). Mrs Waddington at 15.19 states as follows: *'John has emailed disputing paying for any repairs or maintenance. I have gone back informing him I will speak with the Chief Operations Officer however we are following the occupancy agreement.'* Mrs Dewrow responds at 15.49: *'He was aware of the repairs to be paid for. Once he*

sees the agreement he will be fine. It is this email which the Respondent relies on as the Claimant's agreement or consent in writing to the deduction made on 13 March 2020.

20. On 28 February 2020 Mrs Dewrow emailed Mrs Waddington again, stating that she had spoken to the Claimant and he wished to query a few points. Specifically, it was apparent that he would not accept that he should pay for replacing the fire, damage caused by a leaking pipe, wear and tear due to items being used for 11 years without replacement, or repair to blocked pipes (87).
21. On 13 March 2020 the Claimant received a final payment from the Respondent, in the sum of £475.82 (89). The Claimant was expecting to receive £8,010.40 (the sum set out in his ET1), although he has since revised this figure to £9,373.80 (as set out in his witness statement). The Respondent in its ET3 pleads that the final net salary would have amounted to £7,631.08, and that £6900 is to be deducted.
22. It is not clear on what basis the deductions were calculated on the 13 March 2020, as at that time the only dated quotation for works was that dated 30 May 2019 in the sum of £11,381.00 plus VAT. It may be that the Respondent had by then obtained the undated quotation from Redbrick on which they now rely, although that would not explain why the sum paid was £475.82 rather than the £731.08 which they now accept is the minimum due. No evidence has been provided by the Respondent to explain the calculation.
23. On 16 April 2020 an inspection of the Property was carried out by Redbrick Contracts. A leak was identified in the bathroom and the bath was removed in order to repair this. A quotation for remedial works to the bathroom subsequently followed (98). These works have not been carried out and the Claimant is still without a usable bath.
24. There is also an undated quotation from Redbrick as follows (117):
- 'Strip out and repair 2 no external doors with 2 new doors complete with ironmongery: £1800 +VAT*
- To strip, prepare and decorate the complete bungalow including all walls, ceilings, and woodwork: £3500 +VAT*
- To undertake a deep clean to the entire bungalow including carpets: £850 +VAT*
- To carry out a tidy up of the external garden areas including strimming, weeding and minor paving repairs: £750 + VAT'*
25. It is this quotation which the Respondent now relies on as the correct sum to be deducted from the Claimant's wages, a total of £6,900 (the Respondent does not seek to deduct the VAT from the Claimant's salary). The Respondent therefore pleads that the amount owing to the Claimant is £731.08.

26. On 22 April 2020 Mrs Dewrow emailed the Respondent on behalf of the Claimant, requesting that the Claimant be paid his full final payment as '*The contracts person who spoke to John has assured him once again that repairs are just wear and tear and due to the lack of up keep over the years from the Council and not down to John himself.*' (92)
27. On 4 May 2020 Mrs Waddington emailed the Claimant attaching the quote from Redbrick and informing him that the cost of the works would be deducted from his final pay (105).
28. The Claimant submitted a grievance on 11 May 2020, stating that he did not agree to the deductions and that the Respondent had breached their own obligations under the service occupancy agreement and had failed to maintain the property (108). Following a grievance meeting on 15 June 2020 (123), the grievance was dismissed on 22 June 2020 (128).
29. The Respondent's case is that it has been unable to finalise the sums due as they have not been able to access the property and they would need to carry out a full inspection of the property whilst unoccupied in order to provide finalised costs. They offer that in the interim the Claimant's salary could be placed in an escrow account pending final confirmation of the sums due.
30. The Claimant accepts that since the inspection on 16 April 2020 he has not allowed any further access to the property due to his mental ill-health and anxiety / trust issues. The claimant says that Mr Gittins, who attended his property on 16 April 2020, reassured him that the work to be carried out was all as a result of 'reasonable wear and tear', or the Respondent's failure to maintain the property, and that the Respondent would be responsible for meeting the costs. The Claimant gave evidence that once it had transpired that the Respondent still sought to recover the cost of the repairs from him, this adversely affected his mental health, he had lost all trust in Mr Gittins and the Respondent, and would not allow them access to the property. This unfortunately means that he has not allowed anyone to access the property to replace the bath that has been removed, or to replace a fire which was removed in 2019.
31. The Claimant continues to reside at the property to date.

Relevant law and conclusions

Unauthorised Deductions from Wages

32. Was the deduction authorised by a relevant provision of the Claimant's contract (s.13(1)(a) ERA 1996) by virtue of the service occupancy agreement dated 6 October 2008?

22.1. Section 13 ERA 1996 provides as follows:

'(1) An employer shall not make a deduction of wages of a worker employed by him unless –

(a) *The deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract*

...

(2) *In this section 'relevant provision', in relation to a worker's contract, means a provision of the contract comprised –*

(a) *in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or*
 (b) *in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.'*

22.2. The respondent relies on clause 5.4 of the service occupancy agreement:

5.4 To keep the Property [and the Contents] in good condition and to make good all damage, fair wear and tear excepted, monies owed in relation to damages will be recoverable from salary;

22.3. The Claimant was in receipt of a copy of this contract prior to the deductions being made, as it was provided to him in 2015.

22.4. The issue for the Tribunal is whether the terms of the service occupancy agreement are terms of 'the worker's contract' for the purposes of s.13 ERA 1996.

22.5. 'a worker's contract' is defined at s.230(3) ERA 1996 as follows:

'(3) in this Act "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.'

22.6. A 'contract of employment' is defined at s.230(2) ERA 1996:

'(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.'

22.7. It is therefore clear that in order for the deductions to be authorised, the relevant clause must form part of the Claimant's *contract of employment*.

- 22.8. In her submissions, Miss Kennedy invited me to find that the service occupancy agreement was incorporated into the contract of employment because the two are inextricably linked – the contract of employment provides that it is a ‘*condition*’ of the Claimant’s employment that he must occupy the Property, and that he will be ‘*required to sign a service occupancy agreement*’.
- 22.9. I do not accept this submission. Firstly, the words used in the contract of employment do not incorporate the service occupancy agreement into it. Agreeing to the service occupancy agreement is a *condition* of the employment contract, it does not *form part of* it. Secondly, the two documents are distinct agreements with different primary purposes. The service occupancy agreement creates a licence to occupy the Property. The contract of employment is a contract of service setting out the terms of the Claimant’s employment. They give rise to distinct rights and obligations.
- 22.10. The Claimant’s agreement that he will sign the service occupancy agreement (although there is no evidence that he has in fact signed either agreement), does not in my view incorporate its terms into the Contract of Employment. Rather, it indicates an agreement to be bound by a separate, albeit parallel, contract. Both documents cross-refer to each other as separate agreements, which in itself demonstrates that they are indeed not one and the same.
- 22.11. The contract of employment does not include a term authorising deductions from wages. The service occupancy agreement is not incorporated into the employment contract. Therefore, the deductions are not authorised by a relevant provision of the Claimant’s contract of employment.
33. *If not – did the Claimant signify in writing his agreement or consent to the making of the deduction (s.13(1)(b) ERA 1996) by the email sent from his union representative to the Respondent on 18 February 2020?*
- 23.1. The email dated 18 February 2020 is a conditional, equivocal statement: ‘*He was aware of the repairs to be paid for. Once he sees the agreement he will be fine.*’ I find that this is an expression of Mrs Dewrow’s opinion of what the Claimant *will* agree to at some future point, not confirmation that he *does* agree to any deductions.
- 23.2. Miss Kennedy submitted on behalf of the Respondent that when seen in the context of the meeting on 12 February 2020, at which Mrs Dewrow indicated that the Claimant agreed to deductions in principle, with the sum to be confirmed, the email amounts to an agreement. I do not accept this submission. It must also be seen in the context that it is in response to an email from Mrs Waddington notifying Mrs Dewrow that the Claimant has expressly *not* agreed to the deductions. I am not satisfied that in that context, the conditional statement of Mrs Dewrow on 18 February 2020 amounts to an agreement to the deductions.

23.3. Furthermore, the email of 18 February 2020 was followed up with an email from Mrs Dewrow on 28 February 2020 which challenges the repairs said to be chargeable, stating that the Claimant refuses to pay for blockage to pipes, water damage, replacement of the fire, and wear and tear over 11 years. It is clear from that email that the Claimant would dispute all of the repairs subsequently relied on in the undated quotation from Redbrick.

23.4. Therefore, I find that the email of 18 February 2020 does not amount to an agreement in writing to the deduction made on 13 March 2020.

34. *If the deductions are in principle authorised, what is the sum that is authorised?*

24.1. I have found that the deductions were not in principle authorised. However, I would have found that in any event the repairs sought are not covered by the service occupancy agreement.

24.2. Clause 5.4 of the service occupancy agreement obliges the Claimant: *'To keep the Property [and the Contents] in good condition and to make good all damage, fair wear and tear excepted, monies owed in relation to damages will be recoverable from salary.'* The Respondent would only be able to recover sums caused by damage, not fair wear and tear.

24.3. Taking each of the items on the undated invoice in turn:

24.4. There is insufficient evidence to conclude that the Claimant has damaged the two external doors. Miss Kennedy drew my attention to an extract of an email at **113** in the bundle, which refers to *'2 x external doors to replace those that appear to have been forcibly damaged'*. The Claimant in his evidence denied damaging the doors. I accept his evidence and I do not find that it is disproved by this brief hearsay comment, which does not even allege that the damage was caused by the Claimant. Therefore I find that the two external doors are not damaged, beyond fair wear and tear.

24.5. Secondly, to strip, prepare and decorate the complete bungalow including all walls, ceiling and woodwork. This is not required due to damage beyond fair wear and tear. The Claimant has been living in the Property for over 12 years and therefore redecorating throughout is simply fair wear and tear. The Claimant accepted in his evidence that there are nicotine stains in the kitchen but I do not accept that this has caused damage requiring repairs beyond redecorating which would be expected with fair wear and tear over that period.

24.6. I am unable to find that the Property is damaged beyond fair wear and tear such that it requires a deep clean including carpets. The Claimant has not yet vacated the property and therefore I am unable to assess what condition of cleanliness the property will be left in. It would be expected that a landlord would clean a property

between tenants in any event, and this would be considered 'fair wear and tear.'

- 24.7. The garden is not covered by clause 5.4, which refers to damage to 'the Property' which is clearly defined in the agreement as *'the house known as Old School Bungalow, Wakefield Road, Kinsley, Pontefract, WF9 5FJ.'* (my emphasis). Clause 5.10 imposes an obligation on the Claimant to *'maintain and keep the curtilage or garden [if any] of the Property in reasonable order and condition'* but it does not contain any provision for recovery of any costs of repair from the Claimant's salary. The works claimed are in any event minor and would amount to fair wear and tear.

Failure to provide written statement of particulars of change

35. The Respondent accepts that it did not provide a written statement of particulars of change to the Claimant after the TUPE transfer in July 2018. Therefore the only issue for the Tribunal is whether to award the minimum amount of two weeks' pay or whether it would be just and equitable to award the higher amount of four weeks' pay (s.38 EA 2002).

36. I take into consideration that the failure lasted for a lengthy period, from July 2018 until March 2020. However, I also take into account that the only amendment required was to confirm the identity of the Claimant's employer. It is apparent from the correspondence in the bundle and the fact that the Claimant brought his claim against the correct Respondent that he was in fact aware of the identity of his new employer. The other terms and conditions of his employment remained the same. Therefore I do not consider that it would be just and equitable to award the higher amount and I increase the Claimant's award by the minimum amount of two week's pay. A week's pay is stated in the Claimant's schedule of loss to be £346.01 net, therefore the award will be increased by **£692.02**

Amount due

37. The figures set out in the Claimant's witness statement and schedule of loss differ from the figures set out in his ET1. It appears that the difference is due to calculating holiday pay at his full rate of pay as opposed to sick pay, and adding a 5% shift allowance to his notice and holiday pay sums. It is appropriate that holiday and notice pay is awarded at his full rate of pay. In any event, the Claimant was not challenged on this evidence. Therefore I accept the updated higher figures. The sum due to the Claimant in respect of unlawful deductions is **£9,373.80**, calculated as follows:

Basic pay (sick pay): £369.83
Notice pay (11 weeks): £4,464.90
Holiday pay (11.2 weeks): £4,545.97
Shift allowance (5%): £469.03
Less amount paid on 13 March 2020: (£475.82)
Total: £9,373.80

38. There is reference in the schedule of loss to 'pension loss' but this has not been further particularised and therefore I do not make any further award in

this respect. I do not in any event consider that there would be pension loss in addition to the unlawful deductions specified above.

39. Therefore, the claimant is entitled to the following payments from the respondent:

- a. **£9,373.80** in respect of unauthorised deductions from wages;
- b. **£692.02** in respect of the failure to provide a written statement containing particulars of change to the identity of his employer

Employment Judge **Kate Armstrong**

Date 26 January 2021