



Case No: 2206722/2018AV

EMPLOYMENT TRIBUNALS

BETWEEN

Appellant

GUISEPPE CARUSO Trading as Albro House Hotel Ltd

Respondent

THE COMMISSIONERS FOR HM REVENUE AND CUSTOMS

Hearing

HELD AT: London Central (CVP audio video call) ON: 25 NOVEMBER 2020

BEFORE: Employment Judge Russell (sitting alone)

REPRESENTATION:

Appellant Mr Caruso in person

Respondent: Mr Kirk, Counsel

Judgment

- a. **The Appellant's appeal under Section 19C of the National Minimum Wage Act 1998 is dismissed.**
- b. **The Appellant is ordered to pay £30,566.89 to Mr David Lock forthwith. Tax arising to be deducted after payment and paid to the Respondent by Mr Lock.**
- c. **The Appellant is ordered to pay £29,213.14 to Ms Nuritia Lock forthwith. Tax arising to be deducted after payment and paid to the Respondent by Mrs Lock.**
- d. **The Appellant is further ordered to pay a penalty of £40,000 to the Respondent pursuant to Section 19A of National Minimum Wage Act 1998.**

Background

1. This has become a protracted claim (partly due to the hiatus caused by Covid and partly due to the fact Mr and Mrs Lock now live abroad in her home country of Kyrgyzstan) arising from Mr Caruso's appeal against two Notices Of Underpayment (NOUs) served on his business on the basis he had underpaid his 2 principal employees Mr and Mrs Lock , a married couple who had run his hotel for some three and a half years . The alleged debt reflected the difference between the national minimum wage and what the Locks were actually paid which Mr Caruso disputed on the grounds they were self-employed and therefore not subject to the provisions of the National Minimum Wage Act ((

resolved in favour of the revenue prior to this hearing) and on the grounds they had received more than the minimum wage taking into account accommodation provided and commission payments paid (still to be resolved). This hearing was the final determination of his appeal against the NOUs served in respect of both former employees to include a significant tax penalty in each instance. I dismissed the Appellant's appeal in its entirety having heard the evidence and here are the reasons for this judgement.

Reasons

Findings

2. I had already determined at the previous hearing of 9 July 2017 , leading to this case going part heard , that Mr and Mrs Lock were workers for the purposes of the National Minimum Wage Act 1998 (NMWA) Sections 1(1) and 54 of the NMWA. And in fact I now find they were in fact "employees" given the degree of control exercised by Mr Caruso , that they were treated as employees throughout , PAYE was paid on their behalf from the beginning of their employment and the ever present mutuality of obligation between them and Mr Caruso .
3. I do not accept Mr Caruso's evidence that he was unaware of the fact they received payslips and had had tax deducted at source and find that his attempt to categorise them as self-employed was a step taken to evade tax and or other statutory/ contractual commitments such as holiday and sick pay and the requirements of the NMWA legislation. However, I do not go into further detail on this as it has already been determined that they qualify to be paid at least the national minimum wage .So whether they were workers or employees the NMWA applies.
4. I had also previously determined that Mr and Mrs Lock worked 7 hours a day for 7 days a week. It may be that they worked longer hours than that as Mrs Lock (who gave evidence on oath as well as Mr Duffy for the Respondent and Mr Caruso himself) now claims in evidence, but I make no further findings on this. I have proceeded as has the Respondent based on the 7 hours a day 7 days a week earlier determination. However I do accept her evidence that she was told by Mr Caruso that the hours would be limited to 2 or 3 a day for each of her and her husband so that (leaving the alleged commission to one side for the moment) the minimum wage threshold would be met set against the £250 a week payment and accommodation offered but this promise, one of many promises made, was broken by Mr Caruso . As was , for instance, the fact that a night manager was to be employed to assist them, but this did not happen. What is clear is they had limited time to do anything other than work hard for the benefit of guests and Mr Caruso's business and had precious little spare/social time during the period they worked at his hotel from on or about 17 March 2014 to 19 November 2017 the date they actually left.
5. Whilst there was no specific agreement for the Locks to have the use of more than one room at the hotel it was agreed they would live in and be provided accommodation and it is wholly legitimate for them to also use another room for their belongings other than the bedroom provided along with use of a kitchen . I find the second room they used was not one that was readily lettable and had been used as a storage room before . In any event Mr Caruso accepted that

the hotel was usually only half full and rarely completely full and so even if they had not used this second room and even if it had been in a condition to rent out to paying guests it would not have led to a material increase in Mr Caruso's hotel takings. It is also clear Mr Caruso knew that Locks were using the second room and whether he was pleased with this or not he allowed them to do so.

6. The more relevant point however is that , as far as an allowance from the Revenue as to this room use is concerned the correct offset was made of the then applicable £7 a day or £49 per week against the minimum wage due .This was and is a legislative provision Regulation 9(1)(e) and Reg 16 of the NMW Regulations 2015 and so the fact a second room was used was , is and remains irrelevant in that the offset cannot be increased (as Mr Caruso wished) to take account of the value of the potential lost revenue value to him of the second room used by the Locks.
7. The wages of £125 paid to each of Mr and Mrs Lock every week were paid through cheques. But as to the main area of dispute I do not accept Mr Caruso's evidence that he also paid them commission in cash from the start of the working relationship . I find this only happened in late June 2017 some 3 years later . Immediately after the revenue investigation became known to him. Given that the coincidence is otherwise hard to explain (and I don't accept Mr Caruso's statement that he simply wanted to formalise the existing arrangement after advice from Mr Duffy on behalf of the revenue) I find the revenue complaint prompted Mr Caruso to make these payments and have the Locks sign for receipt . That this 5% commission based on turnover at the hotel allowing for an offset reflecting booking agent costs (to the extent this was how he worked out the commission as it remains an opaque arrangement) was not paid before this date and was introduced as a way of deflecting attention from the Revenue investigation. And the commission perhaps promised to the Locks before , perhaps to incentivise them to fill the hotel rooms more regularly was never paid. The reasons for my determination on this are based on the following findings:
 - a) The evidence of Mrs Lock who denied ever receiving the commission until after the end of June 2017. I found this credible and preferred this to Mr Caruso's contrary evidence. She was a believable witness and I do not find she was dissembling when she denied ever receiving a commission before the summer of 2017.
 - b) The fact no reference is made in the agreement Mr and Mrs Lock signed in 2014 (when they started work) as to any commission payments to be made or the basis on which they might be made.
 - c) The fact no reference is made in the payslips given to Mr and Mrs Lock from 2014 onwards when they started work as to any commission payments to be made. Whether cash or cheque or other form of payment the commission should have been included in the payslips but obviously could not be if there was no payment to include.
 - d) The total lack of any documentary evidence to support Mr Caruso's claims of cash commission paid . Notwithstanding the fact he claims the commissions

were paid out of petty cash when he was absent in Italy with all payments from petty cash apparently recorded and yet no such records of this being produced.

- e) The payments are said to be in cash in all cases. Not by cheque. Which is concerning in itself . But even if there was no petty cash book showing the payments, I find there is no other evidence produced of these payments , even when Mr Caruso was there, being made. And there would be for such significant sums if they were indeed made. Mr Caruso for instance said he made a note of the hotel guests and income and set up balancing entries to work out the commission due. Where is this ? And I observe that legally Mr Caruso was obliged to keep records of all payments made to show that the minimum wage threshold was met and he has failed to do so.
- f) When Mr Caruso eventually responded through his accountant with a table of payments made the alleged commissions had simply been averaged out over each accounting reference period of 2 weeks. Mr Caruso justified this by saying that as occupancy varied so did the commission payments, but this is exactly why the commission payments should differ over each reference period . The fact the true sum has not been noted is , in my determination, because the records were prepared after the event to show a payment being made whereas it had not in fact ever been calculated or paid at the time.
- g) This self-serving confusion was also apparent in Mr Caruso's reference to the VAT returns from 17 March 2014 onwards. In talking through how he used these to determine commissions due I find that he was doing so after the event to justify a payment never actually made. Perhaps in order to avoid an admission that the only payments actually received by the Locks pre the end of June 2017 were the disclosed payments, made by cheque and not cash and with a paper trail to prove payment, of £250 a week between them . However, this was a significant underpayment against the legally required minimum wage.
- h) I observe that even now Mr Caruso says he can provide proof of payment given the chance to do so but over a sustained period of some 3 years he has been given the chance to do so but has not . Indeed he has been ordered to do so by this Tribunal on more than one occasion . Specific directions made on 29 March 2020 and 9 July have been largely ignored, as have at least 3 very specific written reminders from the Respondent's solicitors and today , despite having a 354 page bundle of documents to had, there are still no documents to adequately support his claim to have made payment.

It may be that Mr Caruso did at some point make some cash payments to the Locks but if so he has no proof of this and all contemporaneous evidence points to no payment ever having been made and on the balance of probabilities I find he made no payments at all pre the end of June 2017 and that the payments then and subsequently made have been taken into account in calculating the minimum wage due,

- 8. Mr Duffy is said by Mr Caruso to accept that the 5% commission was paid from the start of the Locks' employment .However his misstates Mr Duffy's position and in his statement Mr Duffy simply records what Mr Caruso stated the position to be . It does not reflect Mr Duffy's finding then or now .

9. Money was taken from the petty cash by the Locks from time to time but to pay the chambermaid(s) and contractors when needed and not for themselves. Again, I prefer Mrs Locks evidence on this and do not accept Mr Caruso's evidence that when he was in Italy/away from the hotel they took £500 out of petty cash every fortnight from the end of March 2014 for their own use and on account of commission .
10. Mr Caruso does not dispute the NOU calculation other than in respect of the living accommodation offset and the commission paid, and I have decided both of those points in the revenue's favour . I therefore I accept the figures contained in the NOUs dated 27 March 2019 which show that £29,213.14 is due to Mrs Lock and £30,517.07 is due to Mr Lock. Sums due pursuant to s 17 NMWA to make up the additional remuneration/ balance due to them to get to then applicable minimum wage level.
11. The NOUs also requires the Appellant to pay a penalty of £20,000 to the Respondent in respect of each of Mr and Mrs Lock and the offences committed (of non-payment of the Minimum Wage) . I am satisfied this is correctly calculated and is a statutorily prescribed sum set under inter alia Section 19A of NMWA.

Judgment

12. For all these reasons I dismiss the appeal and make the orders set out in the Judgment above. Legally I am obliged to order that these sums be paid to Mr and Mrs Lock as gross sums and as the Locks are no longer employed by Mr Caruso and so tax cannot be deducted at source. If it is possible for the Revenue to agree a tax sum with them it might be possible for this to be withheld by agreement but as Mr Caruso is obliged to pay this to Mr and Mrs Lock it may be that Mr and Mrs Lock have to repay the revenue the tax due. If so they stated they understood their requirement to do so and would comply. Both they and the revenue accepted in this hearing they would cooperate with each other to ensure the judgment was effected in the most appropriate way possible.

EMPLOYMENT JUDGE - Russell

26 November 2020
Order sent to the parties on

27/11/2020

for Office of the Tribunals

