THE INDUSTRIAL TRIBUNALS

CASE REF: 6512/17

CLAIMANT: **Emma Nugent**

RESPONDENT: **Capita Business Services Limited**

DECISION

The decision of the tribunal (Employment Judge sitting alone) is that the claimant is contractually entitled to the sum of £104.61 in respect of unpaid overtime.

Constitution of Tribunal:

Employment Judge (sitting alone): **Employment Judge Knight**

Appearances:

The claimant appeared and represented herself.

The respondent was represented by Mr J Logan, Operations Partner of the respondent.

ISSUES

1. The issues to be determined by the tribunal were:

   (a) Whether during her employment the claimant had worked hours in excess of her normal hours of work; and if so

   (b) Whether the respondent had failed to pay the claimant for overtime, in breach of contract.

FACTS

2. Having considered the written and oral evidence of both the claimant and the respondent and considered documentation to which it was referred, the tribunal found the following facts to be proven on a balance of probabilities:

3. The claimant was employed by the respondent as a Disability Assessor ("DA") home based from 10 April 2017 until 21 July 2017. Her role was to carry out medical assessments in the benefit claimant's home or clinic and write detailed reports on the medical conditions of persons claiming Personal Independence

Payments, which are then sent by the respondent to the Department for Communities ("DfC").

4. She was employed on a permanent basis but was subject to a 6 month probationary period and becoming an "approved" DA. Her starting salary was £34000.00 per annum. Her normal hours of work were 37.5 per week, with actual hours worked on a duty rota between the hours of 8am until 8pm Monday to Saturday which was confirmed by her line manager in advance. The rota days could include weekends and Bank Holidays and have variable start and finish times.

5. Clause 6 of the claimant's statement of terms and conditions of employment ("the contract"), sent to her at the beginning of her employment states: *"In order to be flexible to meet customers' needs, you may be required to work additional hours from time to time".*

6. Clause 7 of the contract dealt with overtime and states that:

> *"Overtime payments will only be paid in exceptional circumstances when the work is essential and must be approved in advance and authorised by your line manager. Overtime payments are not considered appropriate for any extra hours spent travelling on business, entertaining or attending a training course/conference.*
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> *If less than one hour's extra time is worked on any day this will not count for overtime payment. When overtime of one hour or more has been worked, extra time will be measured to the nearest quarter hour to calculate overtime payments. Hours worked above normal contracted hours will be paid for as follows:*
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> |---|---|
> | *Up to 37.5hours* | *Basic Rate* |
> | *Monday to Saturday* | *1.5 times basic rate* |
> | *Sunday or Bank Holiday* | *2 times basic rate* |
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> *In some circumstances you may take time in lieu instead of receiving payment for extra hours worked. Your Manager will decide whether this is appropriate."*

7. The respondent sets a monthly target for the closure of reports ie reports submitted to DfC, which is worked out at an average of 2.5 completed reports per person per day. Failure to meet the target can lead to loss of revenue and financial penalties for the respondent. This target remains constant even if an employee is absent from work. "Weekly messages" were sent by email to DAs, including the claimant setting out the expectation that at least 2.5 reports would be submitted daily. The tribunal did not accept the claimant's contention that she was unaware of this target. At the hearing it was conceded by the respondent that that new DAs will probably not have seen enough customers to be able to meet this target until after the first twelve weeks of their employment.

8. It appears that these targets were not being met resulting in backlogs of reports. An email from the NI regional manager to Area Managers on 6 March 2017, predating the claimant's employment, confirmed that overtime could be offered in evenings and weekends but that during the week overtime would only be authorised for reports submitted over and above the required 2.5 minimum completed reports. The amount of overtime hours worked could be and was verified retrospectively by the number of reports submitted by each DA to the system and not returned as

requiring amendment. Mr Riddiough explained that one report will equate to one hour's overtime. It was also an option for managers to give extra "admin" days by cancelling appointments so that DAs with a backlog could catch up with report writing. The claimant said that this practice was not communicated to her directly by her line manager and that she found the overtime policy to be unclear.

9. The claimant was required to attend a full time training programme for new recruits during the first five weeks of her employment. This was to train her to elicit information from benefit claimants during the assessment meeting and how to write up reports using the IT systems. The training materials specified that *"The time to write up reports can vary and will take considerable longer when you first start the role. The write up time will reduce as you use the phrasing tool, review the feedback from QLS and receive support from your clinical coach. You must discipline yourself and use your time effectively."* She was paid her full salary during this period.

10. After the claimant successfully completed the training course, she commenced "on the job training" and carried out her first assessment on 18 May 2017 in the sixth week of her employment. She told the tribunal that in the beginning she was expected to carry out two assessments and complete two reports a day but that this quickly rose to four assessments and reports a day. In fact her post training operational schedule shows that she was not scheduled to carry out four assessments per day until Week 15, her final week of employment, when her work pattern was (4.3.4.3.4). By this stage the claimant had handed in her notice and in the event the claimant did not carry out any further assessments.

11. The claimant found her workload to be unmanageable. It often took her one hour and twenty minutes to carry out an assessment and over an hour to write up the associated report, which could exceed 4000 words. She would additionally have to rewrite reports which were returned to her for amendment. The respondent's case was that the average time for carrying out an assessment was 48 minutes, 80-90 minutes for completing the written report and which were usually between 2000-3000 words.

12. The claimant stated that she complained on "a daily basis" to her line manager, Ms Andrena Bradley, that she was "struggling" with completing her reports and was having regularly to work 60 hours per week. The claimant alleged that she frequently sent emails to Ms Bradley informing her that she was working excess hours but conceded that she did not make a formal claim for overtime in respect of these as she "did not know how to". The claimant contended that Ms Bradley never responded to any of her emails and that she was ignored. It appears however that Ms Bradley cancelled the claimant's appointments and gave the claimant an extra admin day on at least one occasion. The claimant received no payment for overtime during the course of her employment and confirmed to the tribunal that she did not raise any enquiry with her line manager as to why she was not being paid for the overtime which she allegedly worked.

13. Unfortunately emails sent by the claimant to her line manager were permanently deleted from the respondent's Office 365 system in December 2017 and despite various attempts, could not be retrieved. In addition the claimant's laptop had been recycled and also could not be retrieved. The claimant's line manager had also left the respondent's employment in December 2017. The tribunal did not accept that this was deliberately done to obstruct the claimant's claim.

14. The claimant handed in her notice to her line manager. She told the tribunal that she was no longer prepared to work until 10.00 pm each night. She worked her notice period in accordance with her contract, which ended on 21 July 2017. During her notice period the claimant's appointments were cancelled and she was given "admin days" to try to reduce her backlog of reports. She sent a mileage claim to the respondent which amounted to £463.20. The respondent delayed in paying the mileage owed. The claimant constantly emailed and telephoned Ms Bradley about her mileage expenses. Emails between Ms Bradley and Mr Riddiough in September and October 2017 indicate that Ms Bradley was trying to expedite the payment as the claimant informed her that she intended to take legal action in relation to "her expenses". There was no mention by Ms Bradley that the claimant was raising any issue about overtime payments at this time.

15. The claimant submitted her originating claim form to the tribunal on 12 October 2017, claiming her unpaid mileage expenses and unpaid overtime which she stated amounted to £2000.00.

16. Upon receipt of the claimant's originating claim form, the respondent carried out investigations prior to lodging its response. Mr Riddiough, the Regional Manager emailed Ms Bradley raising various enquiries. She responded to him by email dated 13 November 2017. A copy of this email exchange was sent in error to the claimant during the discovery process and was made available to the tribunal at the hearing. Ms Bradley informed him that the claimant was given *"6 admin days post STC on 19 June and 10,17,19,20 and 21 July due to a backlog of cases that arose due to the speed of submittals".* She confirmed that the claimant had worked 8 days' notice and provided details of the claimant's work schedule during the 15 weeks of her employment. While she stated that she was unsure of overtime paid, she attached a copy of the *"only ever email exchange we had regarding overtime".*

17. The exchange took place on Tuesday 30 May 2017, when Ms Bradley emailed members of her team, including the claimant *"to let me know if you completed any overtime this past weekend/Bank Holiday so I can log for you-thanks!"* The claimant responded: *"I did 3 hour (sic) on Sunday and 4 on Monday – I just assume that's part of the programme for newbie ... although the systems problem did really add significant time!"* It was noted that by Friday 6 May 2017 the claimant had carried out a total of 11 assessments and had submitted 5 reports on 24 May 2017. She submitted 1 report on Sunday 29 May 2017 and 2 reports on 30 May 2017. There was no evidence that any of these reports was returned to the claimant for amendment.

18. The respondent entered its response on 1 December 2017 confirming that the claimant's mileage expenses were not disputed and indeed had been approved for payment, if not already paid, but disputing the claimant's claim for overtime payments on the basis that she was not offered overtime during her employment as she never submitted the minimum of 2.5 reports per day and due to the number of reports outstanding. It was confirmed by the claimant that her mileage expenses had been paid and she therefore was no longer pursuing that part of her claim.

19. During the hearing the claimant referred to a table of overtime hours, compiled for the purposes of the hearing, amounting to £5484.88 which was broken down as 167 hours Monday to Friday at an hourly rate of £26.16 and 32 hours on Bank Holidays and weekends at a rate of £34.88. She told the tribunal that this table was compiled from records which she said she had made on her old mobile phone which had "died" and which were not therefore available to the tribunal.

20. The tribunal noted that this table includes 31.5 hours overtime worked by the claimant during the initial training course. During this time the claimant was not required to carry out any assessments. Her explanation that these arose due to "*reading and continuing professional development"* lacked credibility. Similarly the tribunal found the claimant's evidence that she worked 23 overtime hours during her notice period to be unreliable, given that all of her appointments were cancelled in this period so that she did not have to carry out any assessments.

LAW

21. The Court of Appeal considered what overtime is and whether it should be remunerated in the case of ***Driver v. Air India Ltd [2011] IRLR 992*****:**

> *"'Overtime' is not a defined term in the employment legislation nor is it a term of art at common law. Its meaning and its financial implications will depend on the way the parties have defined it contractually or, in the absence of an express agreement, on the particular circumstances leading to a claim that overtime has been worked and should be remunerated.*
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> *The general idea of overtime is obvious: extra time spent working more than the contracted normal working hours. A contract may make express provision about it and about how it is to be remunerated. It may be expressly agreed that the contractual wage or salary covers work done by the employee, even if done in excess of, or out of, the contracted hours of work, and whether that extra work has been done unilaterally by the employee or at the express or implied request of the employer. That would make sense where it was contemplated in the workplace that the employee should be able to complete the contracted work within a contracted time. In those cases the employee will not usually be entitled to any extra pay. He will be entitled to receive what it has been agreed he should be paid for his work, whenever he does it and however long it takes him to do it. For example, overtime would not normally be paid to a pieceworker, who is paid by results on the basis of the amount done or produced, and not by reference to an hourly rate and the number of hours that the employee takes to do that work.*
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> *In some cases, however, it may be expressly or impliedly agreed that the employee should be paid for overtime which the employer has required, requested or authorised should be done in addition to the contracted hours of work. It may be agreed that overtime pay should be at the same rate as applies to work done in contracted hours; but in other cases there may be an express agreement that work done in excess of contracted hours at the employer's request will be paid at a higher agreed rate, such as double time for additional working in unsocial hours".* [Per Lord Justice Mummery paras 128-130].

22. In summary, in the absence of an express or implied contractual term, there is generally speaking no obligation on employees to work overtime and no general implied right on the part of employees to be paid for overtime when worked voluntarily.

CONCLUSIONS

23. In the present case the respondent disputes both the actual hours claimed as overtime by the claimant or that she was contractually entitled to payment. The contract of employment makes specific provision for the payment of overtime in certain circumstances. I am satisfied that the circumstances in which authorisation of overtime will be made reflected in the email in March 2017. The terms of the contract specifically exclude the possibility of overtime during the training.

24. I do not consider that it is possible from the evidence before me to find that the claimant has discharged her burden of showing on a balance of probabilities that she has in fact worked additional hours as is itemised in the claimant's table.

25. The claimant's evidence was both lacking in credibility and was contradictory. I take into account the discrepancy in the amount of overtime claimed on the originating claim form and in the table of hours produced for the hearing. I am not satisfied that the claimant worked any overtime hours during the first five weeks and last two weeks of her employment. The claimant accepted that she did not have to carry out assessments during the training period and her own evidence was that she was not prepared to work additional hours during her notice period. My view is that the unreliability of the claimant's evidence in this regard calls into question the veracity of her claim in relation to overtime allegedly worked by her in the intervening weeks.

26. I do not accept that the claimant raised the issue of overtime with her line manager during her employment, given the contradictory nature of her own evidence. Consequently I conclude that the only occasion that the claimant raised the issue of overtime was in the email exchange with Ms Bradley on 30 May 2017.

27. It would appear that in accordance the her contract and the policy and practice of the respondent, that the claimant was both eligible and authorised by her line manager to work overtime hours at the second May Bank Holiday weekend in 2017. I do not accept the claimant's evidence that she worked 3 and 4 hours' overtime respectively on these dates which means it would have taken her 3 hours to produce 1 report on Sunday 28 May 2017 and 2 hours for each report that she submitted on 29 May 2017. I do not accept this. However it is evident that she write three reports which were submitted over those two dates, in time additional to her normal contractual hours.

28. I therefore determine, adopting the formula used by the respondent, that the claimant worked the equivalent of one hour's overtime for each report submitted by her on those dates. She is contractually entitled to be awarded payment for 3 hours' overtime at twice the basic hourly rate @ £34.87 which amounts to £104.61.

29. This is a relevant decision for the purposes of the Industrial Tribunals (Interest) Order (Northern Ireland) 1990.

Employment Judge:

Date and place of hearing: **21 June 2018 Belfast**

Date decision recorded in register and issued to parties: