EMPLOYMENT TRIBUNALS

Claimant:		**Respondent:**
Mr R Roll	**v**	The Governing Body of Binfield C of E Primary School

Heard at: Reading **On:** 23 February 2017

Before: Employment Judge Hawksworth

Appearances
For the Claimant: In person
For the Respondent: Mr J Milford (Counsel)

RESERVED JUDGMENT ON REMEDY

1. The claimant's hourly rate of pay met the National Minimum Wage liability in each reference period and his claim under the National Minimum Wage Regulations fails. There is no additional remuneration payable to the claimant.

2. The claimant is entitled to compensation in the sum of £8,500 in respect of the respondent's breaches of his rights to daily rest periods (Regulation 10 Working Time Regulations 1998) and rest breaks (Regulation 12 Working Time Regulations 1998).

REASONS

1. The claimant's complaints, presented on 13 March 2014, were for breach of the Working Time Regulations 1998 ("WTR") and the National Minimum Wage Regulations 1999 ("NMWR").

2. The claim arose from the claimant's work as a site controller for the respondent, a primary school. The claimant lived in a bungalow on the school site. The main issues in the claim were whether the claimant was required to remain on site out of hours, and whether during that time he was working for the purposes of the WTR and the NMWR.

3. In my judgment of 8 January 2015, I determined that:-

   3.1 The claimant's complaint of breach of the Working Time Regulations was well founded;

   3.2 The claimant's complaint of breach of the NMWR was well founded; and

   3.3 The claimant had suffered unauthorised deductions from his wages because, when all of his working hours were computed, he was paid less than the relevant National Minimum Wage ("NMW") as calculated by the NMWR.

4. I awarded arrears of pay in respect of the unauthorised deductions. I held that it would not be just and equitable to award any additional compensation in respect of compensation for breaches of the WTR over and above the NMWR arrears.

5. The respondent appealed the judgment in respect of the NMWR complaint and the arrears of pay awarded. The judgment in respect of the WTR complaint was not subject to appeal. In its order of 18 January 2016, the Employment Appeal Tribunal remitted to me for reconsideration the NMWR complaint and the award of arrears of pay.

6. The hearing on remission took place on 30 June 2016. I determined that:-

   6.1 My judgment in respect of the claimant's complaint of breach of the NMWR, and the award of arrears of pay was set aside;

   6.2 The claimant was only working for the purposes of Regulation 4 of the NMWR when actually working his shifts or undertaking work activities outside his shift times such as dealing with emergency call outs;

   6.3 A remedy hearing would be listed:

   (a) to assess whether the claimant's hourly rate of pay met the NMW liability in each reference period and whether any additional remuneration is payable to the claimant; and

   (b) to determine the compensation payable to the claimant for breach of the WTR, the Employment Appeal Tribunal having ordered at paragraph 5 of its order dated 18 January 2016 that I may reconsider my conclusion on compensation for breach of the WTR if I consider such reconsideration appropriate in light of any alteration to my conclusions on the claimant's entitlement to the NMW.

Preliminary

7. The remedy hearing took place before me on 23 February 2017.

8. At the start of the hearing, I outlined to the parties that the issues for me to determine were:

> (a) to assess whether the claimant's hourly rate of pay met the National Minimum Wage liability in each reference period and whether any additional remuneration was payable to the claimant; and
>
> (b) to determine the compensation payable to the claimant for breach of the WTR.

9. I had directed at paragraph 94 of my judgment of 27 September 2016 that the parties should disclose any documents relevant to remedy six weeks before the remedy hearing and should serve any witness statements as to remedy 14 days before the remedy hearing. Neither party had disclosed any additional documents or served any additional witness statements and both confirmed that they did not seek to rely on any additional evidence.

10. The respondent had, in accordance with paragraph 94.1 of my judgment of 27 September 2016, prepared a schedule showing the number of hours worked by the claimant in each reference period, the remuneration received by him in each reference period, and any entitlement to additional remuneration under the NMWR in each reference period.

11. The respondent's schedule had been served on the claimant who did not dispute it other than to query why the NMW hourly rate had been used rather than his contractual hourly rate. I explained that the purpose of the schedule was to assist me to assess whether for each hour that he had worked, the claimant had been paid at the rate of (at least) the NMW and therefore the schedule included both his contractual hourly rate and the NMW. I return to this schedule below.

12. The respondent also provided a skeleton argument and a bundle of authorities containing the following:

> The Corps of Commissionaires Management Ltd v Hughes [2008] UKEAT/196/08;
> Santos Gomes v Higher Level Care Ltd [2016] UKEAT 17/16;
> Rowe v London Underground Ltd [2016] UKEAT 0125/16.

13. The parties were agreed that it was not necessary for me to hear any witness evidence on remedy. The claimant said that he had nothing to add to what he had already said in his previous evidence.

14. We moved therefore to oral submissions on remedy. The parties agreed that the respondent would make its submissions first and that the claimant

who was unrepresented would then have the opportunity to comment on any points arising from the respondent's submission, which he did. The claimant did not wish to make any other submissions.

National Minimum Wage Regulations

15. As directed, the respondent had produced a schedule setting out for each pay reference period the number of hours the claimant had worked, the pay he received, the NMW applicable to the hours worked, and any NMW shortfall.

16. The schedule had been prepared on the assumption that in each reference period the claimant had worked the full number of additional hours' unpaid overtime which he was required to work under his contract. This assumption had been made because of the respondent's failure to keep any records of hours worked as required by the NMWR. To the assumed full contractual hours worked, actual paid overtime hours as set out in the claimant's pay slips were added.

17. The schedule then set out the actual pay received by the claimant and compares this to the NMW in force at the time and applicable to the hours worked. It showed that in respect of each reference period, the claimant was paid more than the NMW liability and in most cases substantially more.

18. I conclude that the respondent has discharged the burden of proof on it to show that the claimant was remunerated at a rate at least equivalent to the NMW under section 28(2) of the National Minimum Wage Act 1998. The claimant's complaint of breach of the NMWR therefore fails.

Working Time Regulations

19. In the light of the alteration of my conclusions in respect of the claimant's entitlement to additional remuneration under the NMW, I consider it appropriate to reconsider my conclusion on compensation for breach of the WTR. I set out the relevant findings and conclusions from my previous judgment, the law and my conclusions on compensation for breach of the WTR.

Judgment of 8 January 2015

20. My findings of fact and conclusions in relation to the respondent's breaches of the WTR were set out in my judgment of 8 January 2015. The paragraph numbers referred to here are paragraphs in that judgment.

21. I found that the claimant did not know whether he would be required to work during his rest breaks between his morning and afternoon shifts. He was frequently asked to carry out tasks in the time between his shifts (paragraph 25) This was not time he could fully call his own, he was to remain contactable and available to his employer. I found that he was not

permitted rest breaks and there was a breach of Regulation 12 of the WTR (paragraphs 82-83).

22. I also found that the claimant was not permitted periods of daily rest, as he was required to be available to his employer and at his employer's disposal overnight and at weekends (unless he was on annual leave or cover had been arranged) (paragraph 90). He was required to deal with security issues and emergencies. I found that the claimant was called on to deal with alarm incidents at least twice a month and there were other matters over and above that (paragraph 24).

23. The whole period during which the claimant was required to remain on or near the school site therefore constituted working time for the purposes of the WTR and amounted to a requirement to work permanently other than periods during which the claimant was on annual leave or when he made arrangements for cover (paragraph 87). This was a breach of Regulation 10 of the WTR (paragraph 90).

24. The effect of these breaches of the WTR on the claimant was significant. I concluded that the restrictions which were placed on the claimant meant that his time was less his own and more under the control of his employer. He had little relief from his employment and its stresses. He had to give up his hobbies, and his health and personal life suffered as a result of the working arrangements required of him (paragraph 89). His social life was curtailed. He stayed overnight with friends on only a very few occasions. His mental and physical health suffered and his relationship with his partner deteriorated and ended in December 2011 (paragraph 27).

25. There was (other than annual leave and periods in which he had arranged cover) no time outside his shifts during which the claimant could be sure that he could not be disturbed. These working arrangements clearly had health and safety implications (paragraph 89).

The Law

26. Regulation 30 of the WTR deals with remedies. It states:

> "(1) A worker may present a complaint to an employment tribunal that his employer-
>
> (a) has refused to permit him to exercise any right he has under-
>
> (i) Regulation 10(1) or (2), 11(1), (2) or (3), 12(1) or (4), 13 or 13A…
>
> (2) Subject to regulations 30A and 30B, an employment tribunal shall not consider a complaint under this regulation unless it is presented-
>
> (a) before the end of the period of three months (or in a case to which regulation 38(2) applies, six months) beginning with the date on which it is alleged that the exercise of the right should have been permitted (or in the

case of a rest period or leave extending over more than one day, the date on which it should have been permitted to begin), or, as the case may be, payment should have been made;

(b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three or, as the case may be, six months…

(3) Where an employment tribunal finds a complaint under paragraph 1(a) well-founded, the tribunal –

(a) shall make a declaration to that effect; and

(b) may make an award of compensation to be paid by the employer to the worker

(4) The amount of the compensation shall be such as the tribunal considers just and equitable in all the circumstances having regard to -

(a) the employer's default in refusing to permit the worker to exercise his right; and

(b) any loss sustained by the worker which is attributable to the matters complained of."

Conclusions on WTR compensation

27. The respondent accepted that the claimant should be compensated for the breaches of the Working Time Regulations. I need to consider what award of compensation it would be just and equitable for me to make in all the circumstances of this case. There are a number of preliminary matters to take into account.

28. First, the respondent confirmed that it did not seek to argue that the entitlement to compensation was dependent on the worker having made an attempt to exercise the WTR rights followed by a refusal to permit the exercise of those rights.

29. Next, I need to consider what period the compensation should reflect. In Corps of Commissionaires Management Ltd v Hughes, the Employment Appeal Tribunal accepted that compensation for an employer's failure to provide compensatory rest could only be awarded in respect of the period three months prior to the commencement of his claim. This reflects the time limit for bringing the claim.

30. In the claimant's case, that period is limited to a very short period from 14 December 2013 to 15 December 2013. This is because the claim was presented on 13 March 2014, and the claimant made no claim in respect of the period after 16 December 2013 when a commercial alarm company was engaged.

31. However, the respondent's representative conceded, rightly in my view, that it was open to me to consider the full history when deciding what compensation is just and equitable in respect of the period three months prior to the commencement of the claim; it would be artificial to ignore what had gone before that period. The full history would be relevant to the question of the period of time of the employer's default which I am to consider under Regulation 30(4)(a) when deciding what is just and equitable in respect of the prescribed period.

32. I also need to consider the type of loss to which I may have regard. In the case of Santos Gomes v Higher Level Care Ltd, the Employment Appeal Tribunal concluded that compensation within regulation 30(4)(a) of the WTR could not include injury to feelings. The EAT reached this conclusion after recording that the position adopted by counsel for the Appellant in the case was that 'loss' within regulation 30(4)(b) cannot include injury to feelings:

> "In my judgment the position adopted by [counsel for the Appellant] that on its domestic law construction 'loss' within regulation 30(4)(b) cannot include injury to feelings, does not justify its inclusion in regulation 30(4)(a)"

33. However the EAT commented in paragraph 70 of the judgment that 'loss' within regulation 30(4)(b) may include non-financial loss:

> "If an employer repeatedly refused rest breaks, an employee may become exhausted and ill. In my judgment it may be argued that the loss to which an employment judge may have regard under regulation 30(4)(b) in awarding compensation could include compensation for injury to health caused by the employer's default."

34. I have considered the question of compensation under the WTR in the light of these principles and the findings set out in my earlier judgments and summarised above. I have reached the following conclusions.

35. I first considered the employer's default under regulation 30(4)(a). This requires consideration of the period of time during which the employer was in default, the degree of default, and the "amount" of the default in terms of the number of hours the employee was required to work and was to be given as rest periods (Miles v Linkage Community Trust [2008] EAT).

36. The respondent was in default of its WTR obligations for a period of over two and a half years, covering the major part of the claimant's employment, from the start of his employment on 4 April 2011 to 16 December 2013 when a commercial alarm company was engaged.

37. In considering what is just and equitable, I have focused on the position on 14/15 December 2013, at the end of the period during which the Respondent was in breach of its obligations, immediately prior to the instruction of the commercial alarm company on 16 December 2013.

However, I have, done so against the background of the full history of the breaches of the WTR, as the respondent accepted it was open to me to do.

38. In terms of the degree of default, there was no evidence that the respondent's default was deliberate or that it knew it was acting unlawfully. However, this was a serious breach as it resulted in the claimant being required to work on a permanent basis without proper rest and relief from his work. The claimant did raise concerns about his treatment and the respondent might have considered at any stage whether the demands it was placing on the claimant were appropriate and lawful.

39. The amount of the default was also significant in that the claimant was required to work on a permanent basis and was denied both his rest breaks and daily rest periods. However in considering this factor, I have taken into account my findings as to the number of times the claimant's breaks were interrupted. I found that he was required to attend to emergencies or other matters at least twice a month, and there were other matters he dealt with as well, but certainly not all of the claimant's rest breaks and daily rest periods were interrupted.

40. I have next considered the losses sustained by the claimant in accordance with regulation 30(4)(b). The claimant did not suffer any financial loss. He was paid for all of his hours of work and the proper provision of rest breaks and daily rest would not have made any difference to him financially. However, I conclude in the light of the comments of the EAT in paragraph 70 of Santos Gomes that I am entitled to have regard to non-financial loss when considering regulation 30(4)(b).

41. I have found that the claimant did suffer significant non-financial loss as a result of the breaches of the WTR. He suffered loss of his hobbies and damage to his social life, personal life and his health. These losses had reached their peak by 14-15 December 2013.

42. Taking all these factors into account, I conclude that it would be just and equitable to award the claimant compensation in the sum of £8,500.

_____
Employment Judge Hawksworth

Date: 17 March 2017

Judgment and Reasons

Sent to the parties on: .....

.....
For the Tribunal Office