EMPLOYMENT TRIBUNALS (SCOTLAND)

Case Nos: S/4100037/16 and S/4105265/16

Held in Glasgow on 1, 2, 3 and 6 March 2017

Employment Judge: Lucy Wiseman

Mr Derek Pryde	**Claimant** **Represented by:** **Mr B McLaughlin - Solicitor**
RGIS Inventory Specialists Ltd	**Respondent** **Represented by:** **Mr B Napier - QC** **Mr R Bradley - Counsel**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Tribunal is:-

(i) The claimant is someone who carries out "*time work*" for the purposes of the National Minimum Wage Regulations (NMWR);

(ii) The claimant's place of work is the store where he carries out his counting duties;

(iii) The claimant is not entitled to be paid for travel time otherwise than in accordance with the provisions of his contract as specified in the Handbook;

(iv) There has been no infringement of the NMWR or an unlawful deduction from pay by reason of the respondent's rules regarding unpaid breaks during the course of a shift, except that any unpaid break (of up to 30 minutes arising after a scheduled start time when the employee was required to be present in the local store in order to start work when permitted to do so) does qualify as time work under Regulation 29 NMWR and is to be paid at the national minimum wage rate;

(v) Attendance at performance review meetings, being work related and not optional for employees who desire a pay increase, is working time and is to be paid at the national minimum wage rate and

(vi) The calculation of the claimant's holiday pay may be subject to recalculation in light of the above conclusions.

(vii) The parties are permitted a period of 28 days from the date of this Judgment to agree whether any payments are due to the claimant, and if so, the calculation of such payment failing which a remedy hearing will be arranged.

REASONS

1. The claimant presented a claim to the Employment Tribunal on 21 October 2016 asserting an unauthorised deduction from wages had been made on each occasion when the respondent failed to pay him for all travel time, breaks, waiting time and for attendance at performance reviews. There was also a complaint that holiday pay had not been paid at the correct rate.

2. The respondent entered a response denying there had been any breach of the National Minimum Wage Regulations or the Working Time Regulations and asserting the claimant had been paid all sums properly payable.

3. A number of Preliminary Hearings took place which culminated in the two claims being consolidated and an agreed list of issues being produced. It was further agreed this Hearing would be limited to determining liability.

4. The issues for this Tribunal to determine are:-

   1. Is the claimant someone who carries out "*time work*" for the purposes of the National Minimum Wage Regulations (NMWR);

   2. What is his "*place of work*" or "*place where an assignment is carried out*" within the meaning of the NMWR Regulation 34(1) when carrying out the claimant's duties as Auditor;

   3. Is the claimant entitled to be paid for all or part of his travel time to and from his place of work and, if so, at what rate of pay (national minimum wage or contractual);

   4. Has there been an infringement of the NMWR or an unlawful deduction from pay by reason of the respondent's rules on when payment for work commences;

   5. Has there been an infringement of the NMWR or an unlawful deduction from pay by reason of the respondent's rules on payment for waiting time;

   6. Has there been an infringement of the NMWR or an unlawful deduction from pay by reason of the respondent's rule that attendance at performance review meetings is unpaid and

   7. Has the claimant's holiday pay been properly calculated by the respondent over the period of the claim.

5. I heard evidence from the claimant; and from Ms Nicola Stevens, Vice President of Operations for Europe; Ms Anne Simmonds, European HR Director and Mr Alan Reilly, Area Manager. I was also referred to a number of documents in the joint bundle of productions. I, on the basis of the evidence before me, made the following material findings of fact.

Findings of fact

6. The respondent provides retail inventory services (stocktakes) for a large variety of businesses. The respondent employs approximately 1700 employees in the United Kingdom and carries out 23,000 stocktakes each year.

7. The respondent has 14 district offices, one of which is based in Glasgow and covers the whole of Scotland. There is a District Manager in the Glasgow office and two Area Managers, one of whom is Mr Alan Reilly.

8. The claimant commenced employment with the respondent on 2 January 2011. The letter of offer of employment was produced at page 50 and noted the claimant was offered the position of Auditor "*at our Glasgow District Office*" which was, at that time, based in Coatbridge.

9. The claimant is employed on a zero hours contract. He was provided with a copy of the respondent's Handbook (page 51 – 99) which sets out the company's policies and procedures and included a section entitled "hourly compensation".

10. Mr Alan Reilly, Area Manager, is tasked with co-ordinating and planning the stocktakes. The company's clients provide an estimate of the number of items to be counted in the stocktake, and from this information Mr Reilly will calculate the number, and mix, of Auditors required. There are grades of auditors, from auditor, specialist, expert and "*top dog*".

11. The employees are required to complete a schedule indicating the days and times they are available for work.

12. All of the above information is entered into a computer programme, which creates a schedule for each stocktake, noting the employees available for the job.

13. Employees are offered work on the basis of their availability and they have the option of accepting or rejecting the offer of work. Once this process has been completed, an individual schedule is created for each employee, showing their work schedule for each week.

14. The respondent's work comprises work in "*local*" stores, that is stores in or within one hour's travel from Glasgow; and "*trave*l" stores, that is stores located more than one hour's travel from Glasgow. The respondent provides transport to travel stores, and employees have the option of using this transport, or making their own way to the store.

15. The claimant lives in Glasgow. He will, if working in a local store, make his own way to the store. The respondent operates a practice of specifying a "*meet time*" and a "*start time*" for local stores. The meet time will usually be 15/30 minutes prior to the start time. The respondent adopts this practice because it takes time for employees to enter through a store's security.

16. Employees are not required to attend at the time specified as the meet time. They are required to be in attendance at the start time specified for the job. An employee who attends at the meet time (say 9.30am) for a start time of 10am, will not receive payment for the half hour between the meet time and the start time.

17. Employees are paid from the start time, if the work starts on time. It is not unusual for the start time to be delayed by up to half an hour, and employees are not paid for this time. An employee is only paid once their

badge is scanned and the contractual pay rate is activated. A briefing will then be delivered to employees prior to starting the count.

18. There are two parts to a stocktake: first, the storeroom items will be counted, and then the shop floor items will be counted. There is always a break between the two areas being counted. This break can be anything between 30 minutes and two hours, which is unpaid. Payment will only be made if the break goes over two hours in length.

19. Employees will be informed by the team leader of the length of the break, and are free to leave the store. The respondent cannot demand employees return early from a break, although employees will often volunteer to do so in order to complete the (paid) work sooner.

20. The respondent does provide a (statutory) 20 minutes paid break in each period of six hours worked.

21. The claimant, when working at a travel store, will travel from his home to a meeting point at the Royal Concert Hall, where he will get picked up by the company van/car and taken to the store. The travel stores can be anywhere in Scotland, but Dundee, Aberdeen and Inverness are common locations.

22. The respondent does not pay employees for the first hour of travel time, which they designate as "*commute time*". The respondent does pay travel time for time spent travelling after the first hour. This payment is paid at the national minimum wage rate.

23. The claimant, once he arrives at the travel store, will be required to go through the store's security process, sign in, change into his RGIS polo shirt and put on the belt which holds the respondent's scanning device. The claimant's badge will be scanned to activate the start of payment of the contractual pay rate, and he will then attend a briefing prior the count starting.

24. Employees working in travel stores are paid, at travel time rates (national minimum wage), if there is a delay to the start time.

25. The claimant will travel back from the store to the Royal Concert Hall in the company van/car. The respondent does not pay for the first hour of "commute time" on that journey, but thereafter travel time is paid at the national minimum wage rate.

26. The claimant, upon returning to the Royal Concert Hall, will make his own way home using either public transport or a taxi depending on the time of the return.

27. The claimant accepted he was not required to travel in the company van/car to travel stores, but considered the economic reality of the situation meant there was no real choice for him.

28. The claimant is free to read or listen to music whilst travelling in the company van. The Handbook makes clear that the respondent's right of search policy, which applies "as soon as an employee enters an RGIS or customer premises for business purposes they are deemed to be at their place of work and therefore covered by the right of search policy" applied to an employee getting into or out of a company vehicle.

29. The respondent operates a performance review procedure whereby employees are invited to meet with the Area Manager to discuss performance, availability and any other relevant issues. The performance review usually lasts 15/20 minutes, and this time is unpaid.

30. The performance review forms the basis of the decision whether to award a pay increase. An employee who does not attend the performance review will not be granted a pay increase.

31. The claimant did not attend the performance reviews during 2012, 2013, 2014 and 2015 because he was not paid for this time. The document produced at page 308 confirmed the claimant's hourly rate during this time remained at £7.00 per hour.

32. The claimant's rate of pay increased to £7.20 per hour when the Living Wage was introduced in April 2016. The claimant subsequently attended the performance reviews in July 2016 and December 2016 and his hourly rate increased to £7.40 and £7.70 respectively.

33. Mr Alan Reilly, Area Manager completed the claimant's performance appraisal, which was produced at page 135. One point noted on the claimant's appraisal was that he was cautioned to "*watch topics of convo in the van*". This was a warning to the claimant not to discuss the issues highlighted in his grievance (concerning payment for travel and breaks) with others.

34. The claimant raised a grievance (page 100) regarding his belief that he was entitled to be paid for travelling time and breaks/waiting time. The grievance was received by Ms Anne Simmonds, European HR Director, who responded to it. The claimant was not satisfied with her response, and requested a formal grievance hearing be arranged.

35. The grievance hearing took place on 21 August 2015, and a note of the hearing was produced at page 111. The grievance was heard by Mr Lee Humphries, Operations Manager. He was accompanied by Mr Alan Reilly, and the claimant attended (but was not paid for the time he attended).

36. The claimant advanced the argument that his "*commute*" was from home to the Royal Concert Hall, and thereafter, he should be paid for all of his travelling time. The claimant also argued that he was entitled to be paid for waiting time prior to the start of a count at local stores, and the break between the storeroom count and the shop floor count.

37. Mr Humphries responded to the grievance by letter of 4 September 2015 (page 116). Mr Humphries did not uphold the grievance.

38. The claimant exercised the right to appeal against the grievance outcome. The grievance appeal was heard by Ms Nicola Stevens, Vice President, Europe, on 25 September 2015. A note of the appeal hearing was produced at page 119. The claimant pursued the same points at the appeal hearing.

39. Ms Stevens did not uphold the appeal and set out her reasons in a letter to the claimant dated 15 October (page 126). Ms Stevens confirmed there was no legal obligation on the respondent to take into account journeys to and from work for the purposes of ensuring compliance with the NMWR.

40. Ms Stevens further confirmed her understanding that regulation 35(3) of the NMWR confirmed that hours a worker spends taking a rest break are not regarded as hours for which the national minimum wage is payable. Ms Stevens noted the claimant objected to being placed on an unpaid rest break prior to the start time at local stores, but confirmed there was no entitlement to payment for this break, and she emphasised the need for the company to be flexible.

41. The claimant had raised an issue regarding the time it took to change into the company "*uniform*" at the start of a shift. Ms Stevens dismissed this complaint on the basis that getting ready for work was not regarded as working time for the purposes of the NMWR.

42. Ms Stevens also rejected the claimant's claim for payment when attending performance reviews, on the basis that attending at work was not the same as working time.

Claimant's submissions

43. Mr McLaughlin referred the tribunal to the terms of the claimant's contract of employment (page 50) which provided that the claimant was employed at the Glasgow District Office, which was now based in Glasgow. The claimant lived in Glasgow. He noted that all of the respondent's employees are employed at the Glasgow office. The claimant organised his affairs so that he lived in close proximity, and within the limit of his means, to the Glasgow District Office.

44. The claimant carried out work for the respondent at local stores and travel stores, which are defined as over 15 miles, or one hour travel, from Glasgow.

45. The claimant has a regular commute to his place of work from his home in Glasgow. If the claimant is working at a travel store, he will travel from his home, by bus, to a place of work (being the Royal Concert Hall pick up point). The claimant undertakes this journey again when he finishes work. If he is working at a local event, he will mostly make his own way to the store and be responsible for his travel costs.

46. The respondent calls upon the claimant to meet and be available at a location/meet site that is near to the Glasgow office. The Royal Concert Hall is where the company arranges to pick up employees in a company van to facilitate travel to travel stores.

47. Mr McLaughlin referred to Mr Reilly's evidence regarding the planning and programming work involved in arranging stocktakes, and invited the Tribunal to find that it was crucial for the respondent to have employees travel in company transport in order to have them arrive on site on time, in order to provide the service the customer expects.

48. Mr McLaughlin submitted the claimant was entitled to regard his place of work, as a matter of contract and fact, as the Glasgow District office and/or the Royal Concert Hall, because that was where he was required to present himself for the purposes of working.

49. It was further submitted that the company vehicle was a place of work because the respondent, in the Handbook, designated the company vehicle to be a place of work for the purposes of the right to search. Further, the claimant was required to conform to the behavioural standards of the respondent whilst in the van and such matters could influence an employee's performance review. Mr McLaughlin submitted that none of the control which the company sought to exercise whilst employees were in the company vehicle would be possible unless the vehicle was a place of work.

50. Mr McLaughlin submitted, in the alternative, that if the Tribunal did not find the district office or company vehicle to be a place of work, then in terms of Regulation 34(1) of the NMWR the hours spent by the claimant travelling for the purposes of time work, where the claimant would otherwise be working, should be treated as hours of time work and thus paid.

51. Mr McLaughlin invited the tribunal to have regard to the context and nature of the travelling done by the claimant. He submitted that programming of work undertaken by Mr Reilly was contingent upon a dedicated and organised grouping of workers arriving as one cohesive unit at the same time to carry out auditing at the store. The claimant was obliged to carry out the respondent's instructions whilst travelling and was subject to the organisational power of the respondent.

52. The respondent, throughout the case, emphasised that employees have the right to choose how to travel, and could make their own way to travel stores. It was submitted the economic reality of the situation meant there was in effect no choice. Further, if there was genuinely a choice, the respondent would pay travel costs for employees working away from home: the fact

they did not do so undermined their reliance on employees having a real right of choice.

53. Mr McLaughlin referred to the respondent's Handbook and noted employees are not paid for what the respondent defines as "*commute time*", and travel time is paid for at the minimum wage. Mr McLaughlin submitted that in reality they were the same thing, except one was paid and one was not and there was no real explanation or justification for this.

54. It was submitted that if the Tribunal determined the claimant was at his place of work or travelling for the purposes of time work (rather than the place of work being each travel store, as contended by the respondent), then all travel time should be paid.

55. Mr McLaughlin submitted, with regards to the respondent's practice of having an unpaid break between the storeroom count and shopfloor count, that the claimant was entitled to be paid for this break because he was at work and required to be available for work.

56. Mr McLaughlin referred to the case of ***Whittlestone v BJP Home Support Ltd [2014] ICR 275*** and in particular to paragraphs 55 – 58. He also referred to the Department of Business and Energy and Industrial Strategy National Minimum Wage guidance dated October 2016 which was produced at pages 27 and 28 of the bundle of authorities.

57. Mr McLaughlin also referred to ***British Nursing Association v Inland Revenue [2002] EWCA Civ 494*** and in particular to paragraph 19.

58. With regards to local stores, Mr McLaughlin referred to the respondent's practice of specifying a meet time and a start time, so that employees can go through a store's security measures and be ready to start on time. Mr McLaughlin submitted that as soon as the claimant enters the store and signs in, he comes under the control of the store and the respondent: he is

at work and carrying out work integral to the job. The unpaid break at the start of the shift is not a rest break. The claimant is ready and willing and available for work, but there is no work for him to do. It was submitted the claimant was entitled to be paid from the meet time, including any break prior to the start of the shift.

59. Mr McLaughlin submitted an employee who attends for a performance review is at work and working. It was not credible for the respondent's witnesses to suggest this was not working time.

60. Mr McLaughlin submitted that should all/any element of the claim succeed, then the additional payments should be included in the calculation of holiday pay for the period of the claim.

Respondent's submissions

61. Mr Napier noted the claimant was seeking a finding that he had suffered unlawful deductions from pay by reason of breaches of the NMWR 2015. The claimant maintained that the system of payment operated by the respondent did not properly account for the payments that should have been made to him in respect of travel time when working at locations outside Glasgow and making use of company transport to these locations.

62. The claimant also maintained that there had been breaches of his contract by reason of failure to pay contractual rates for all time spent at the locations where he carried out his job duties, and additionally, that by reason of these failures, he had been paid less than his full entitlement to holiday pay.

63. The various shortfalls were said to give rise to unlawful deductions from pay in terms of Section 13 Employment Rights Act 1996. The claimant accepted the respondent had, save for the failures alleged above, properly applied the rules contained in the Handbook. The claim was, accordingly, wholly

dependent upon the interpretation of the relevant parts of the NMWR and the application of those provisions to the fact of the case.

64. Mr Napier noted the claimant had placed a lot of emphasis on the unfairness of the payment system operated by the respondent, and stated in the ET1 that the system operated by the respondent towards employees on zero hours contracts appeared to make a mockery of the whole system of the minimum wage. The respondent strenuously denied it was acting improperly in how it dealt with employees, and in its interpretation of the NMWR. The system of zero hours contracts is one which offers flexibility to many employees and allows individuals to work as and when they want to. Further, it was not the case that the respondent gave only the minimum required by law: there were many areas where the respondent provided more than the minimum.

65. Mr Napier emphasised that with regard to pay, the extent to which the hourly rate of pay exceeds the National Minimum Wage (or, since April 2016, the Living Wage) is a factor that will have to be taken into account should any part of the claimant's claim be upheld. If there are any periods of time which should have attracted payment of the NMW but have not been paid, then any actual shortfall in earnings must be calculated by reference to the overall earnings of the claimant in the relevant payment period. This could lead to a situation where part of the claim was successful, but no monetary award was due to the claimant.

66. The respondent accepted, prior to the Hearing, that the time taken to put on "*kit*" at the start of his work at a store should be classed as working time for the purposes of the NMWR. However, it was submitted, this did not give rise to any overall shortfall because the level of pay for time spent working in – store was higher than the NMW and this cancelled out any non-payment for the time taken to put on kit.

67. Mr Napier referred to the evidence of Ms Simmonds to the effect that attendance at the performance review meeting was not a "*work related event*". He clarified that he did not take that position in these submissions. It was accepted that these review meetings are work-related. It was not however accepted that time taken in attending these meetings qualified as "*working time*" for the purposes of the NMWR. "*Work-related*" was not the same as "*work*" and in any event it would appear that the total time spent by the claimant in such meetings was no more than about one hour.

68. Mr Napier noted there was no significant dispute regarding the facts relevant for the determination of the issues. He invited the Tribunal to find the respondent's witnesses had given their evidence in a straightforward, honest and direct way, and there was no attempt on the part of the respondent's witnesses to hide or disguise the position they endorsed. The claimant described the respondent's payments system as harsh and unfair, but he accepted that, apart from the matters in dispute, he was generally happy with the job he had held for six years.

69. The claimant had, generally, been straightforward in giving his evidence, although he did not readily acknowledge the significant element of choice that he had in deciding where he would work. It was only in cross examination that he accepted that he had the choice whether or not to accept work outside Glasgow and whether to use the respondent's travel regime. The claimant in fact had the choice where and when to work and to exercise control over his travel arrangements. Mr Napier acknowledged the job opportunities for work would have been more limited if the claimant had restricted his working to local stores, but there was no suggestion the claimant would have been denied work or dismissed if he had limited his availability in this way.

70. The focus of the submissions made on behalf of the claimant was that there was no real choice but to travel in the company vehicle. Mr Napier invited the Tribunal to reject this submission for the reasons set out above. The

claimant was, fundamentally, not obliged to accept the offer of work. This was a crucial difference between this case and the authorities referred to by Mr McLaughlin.

71. There had also been a suggestion that the claimant's autonomy was restricted whilst travelling in the company vehicle. Mr Napier referred to the claimant's evidence that he usually read or listened to music on the journey. He acknowledged the company's right of search and the fact the claimant had been told to watch what was discussed in the van (in terms of the grievance), but submitted these matters did not amount to a substantial impact on autonomy and did not make the vehicle a place of work.

72. Mr Napier noted there had been a suggestion in Mr McLaughlin's submissions that the claimant had moved to be close to the district office. Mr Napier submitted there had been no evidence of this.

73. Mr Napier submitted that the payment system operated by the respondent meant that the work undertaken by the claimant was properly categorised as "*time work*" in terms of the NMWR. Regulation 30 provides that time work is work, other than salaried hours of work, in respect of which a worker is entitled under their contract to be paid .. by reference to the time worked by the worker.

74. The DBEIS Guidance (National Minimum Wage) (page 30 of the authorities) states that "*if you pay a worker according to the number of hours they are at work, the work is time work*".

Travel Time

75. The respondent's Handbook provides that the first hour of travel time (measured from the meet point at which employees wanting to use the transport offered gather) is unpaid, and the same rule applies to the return journey.

76. The provisions governing travelling time are found at Regulation 34, which provides that:-

> "(*1) The hours when a worker is travelling for the purposes of time work, where the worker would otherwise be working, are treated as hours of time work unless the travelling is between –*
>
> *(a) The worker's home, or a place where the worker is temporarily residing other than for the purposes of working, and*
>
> *(b) A place of work or a place where an assignment is carried out.*
>
> *(2) In paragraph (1), hours treated as hours when the worker would "otherwise by working" include –*
>
> *(a) Hours when the worker is travelling for the purposes of carrying out assignments to be carried out at different places between which the worker is obliged to travel, and which are not places occupied by the employer;*
>
> (b) *Hours when the worker is travelling where it is uncertain whether the worker would otherwise be working because the worker's hours of work vary either as to their length or in respect of the time at which they are performed*."

77. Mr Napier submitted the words of the NMWR recognise that "*travelling for the purposes of time work*" is only to be treated as hours of time work when the circumstances specified by Regulation 34 are met. There can be no suggestion that time spent travelling to work should be treated as in the

same category as time spent at work itself, and that conclusion is one that also accords with common sense. Accordingly, the time spent by the claimant in travelling from home to work only counts for calculating hours of time work if Regulation 34 is met. It was submitted that the period of "*time work*" for the claimant only begins when he is scanned in at the beginning of each stocktake, and that his "*work*" takes place at the store where he carried out the functions of auditor.

78. Mr Napier referred to the EAT judgment in the **British Nursing Association** case (supra) where it was stated that:-

> "*we have come to the conclusion, on all the evidence and argument that we have heard, that the essential task of a tribunal, or indeed the respondents in seeking to apply these Regulations, or an employer in seeking to adhere to them, is to look at the ingredients of the particular case and the type of work that is involved, and the different elements to see if they can properly be described as work.".*

79. Mr Napier submitted that, applying that test to the facts of this case, the conclusion had to be that, given the tasks as an inventory-taker that the claimant was employed to carry out, his "*work*" for the purposes of the NMWR began at the store where he carried out his counting duties, and also that this work began at the point when his badge was scanned at the beginning of the working shift.

80. The cross examination and submissions of the claimant suggested the claimant sought to argue that the place of work was the Glasgow District Office. However, the evidence did not show this to be the place where the claimant carried out his work. The fact the contract of employment referred to him being offered the position of Auditor "*at our Glasgow District Office*" did not make any difference to that conclusion. The claimant, save for occasional attendance at the performance review and grievance hearings,

had nothing to do with the office and he did not ever carry out the stocktaking duties there.

81. The claimant's case is that all time spent travelling from the meet site to the place of work (and return) is working time for which he should be paid. The respondent denies this for the reasons set out above, and the fact the respondent chooses to make payment for travel in terms of its rules, does not undermine that position.

82. Mr Napier noted the claimant made much of being "*required*" to travel together. He invited the Tribunal to reject the claimant's evidence because there was no obligation to use the company vehicle to travel to stores.

83. Mr Napier referred to the terms of Regulation 34 and that fact that while time spent "*travelling for the purpose of time work*" is to be treated as hours of time work, that general provisions is subject to important qualifications. The most important qualification is the one that excludes travelling between "the worker's home and a place of work or a place where an assignment is carried out". The store where the stocktake is carried out is the claimant's place of work. Alternatively, the store is "*a place where an assignment is carried out.*" On either analysis, the claimant's travel time to and from the store is excluded from calculation. The claimant is not obliged to use the transport provided by the respondent, and Mr Napier noted that if no transport was provided, the claimant would not be able to claim in respect of hours of travel which he would have to fund himself.

84. In addition to the above, Mr Napier submitted that for any hours of travel to count, they must be "*where the worker would otherwise be working*". The definition of such hours (Regulation 34(2)) is said to include "*hours when the worker is travelling for the purpose of carrying out assignments to be carried out at different places between which the worker is obliged to travel*". That situation does not apply here: the reference to "*assignments*" is appropriate to cover, for example, the situation of a care worker who is

obliged to travel between appointments with different clients in the course of a single shift. It was submitted that work at different stores could not be seen as different "*assignments*": furthermore the claimant was not obliged to travel between the different stores at which he worked on different days. The claimant's situation was that he went from home to his place of work (the store) and then returned home. He was not, it was submitted, in the situation addressed in the ***Whittlestone*** case referred to be Mr McLaughlin.

85. Mr Napier invited the Tribunal to reject the submission made by Mr McLaughlin to the effect the company vehicle constituted the claimant's "*place of work*". The fact the respondent's rules extended to conduct while travelling in the company vehicle and the right to search also applied to employees when they were travelling in the vehicle, did not mean the vehicle was their "*place of work*" for the purposes of the NMWR, or that they were working when travelling.

Breaks

86. Mr Napier referred to the evidence the Tribunal had heard regarding unpaid breaks before and during stocktakes at both local and travel stores. The main point of dispute concerned long unpaid breaks between the storeroom counting and the shop floor. The claimant regarded as unfair, the fact there could be an unpaid break of up to two hours. Mr Napier submitted that during these breaks, the evidence of the respondent's witnesses, which was unchallenged, was that employees were free to do as they wished. They could leave the store and not return until the time they had been given for resumption of work. The claimant accepted that once a time for a break had been given, the respondent was not entitled to call employees back to work early. In these circumstances, it was submitted that the time spent on these breaks was not time at which the claimant was "*available and required to be available at or near a place of work*" within the meaning of Regulation 32. Since, during the break, the claimant was not working, then the time spent

on these breaks did not count for the purposes of calculating his hours of working time.

87. Mr Napier acknowledged there had also been evidence regarding breaks that might arise at the start of work at a store, when employees were delayed from starting work. In those circumstances, unless the employee was being paid for travel time, the break could be unpaid for a period of up to 30 minutes: if the delay continued beyond 30 minutes, the employees would be paid at national minimum wage rate.

88. Mr Napier confirmed the respondent accepted that any such unpaid break would qualify as working time under Regulation 29, being time when the employee was available and required to be available at the place of work for the purposes of working. The rate of payment would be national minimum wage rate.

89. Mr Napier next referred to the respondent's practice of asking employees to turn up at the store 15 minutes in advance of their scheduled start time in order to be processed through the store's security measures. Mr Napier submitted the evidence had been clear and to the effect that employees were not obliged to comply with this request and, provided they turned up for the scheduled start time, they would not be disciplined (by losing payment for the late start).

90. Mr Napier referred to the list of agreed issues before the Tribunal and answered them as follows:-

    1. *Is the claimant someone who carries out "time work" for the purposes of the NMWR?* Yes

    2. *What is his "place of work" or "place where an assignment is carried out" within the meaning of NMWR Regulation 34(1) when carrying out his duties as an Auditor?* His place of work or place where an

assignment is carried out is the store where he carries out his counting duties.

3. *Is he entitled to be paid for all or part of his travel time to and from his place of work and, if so, at what rate of pay (NMWR or contractual)?* He is not entitled to be paid for travel time otherwise than in accordance with the provisions of his contract, and these are contained within the rules of the company Handbook.

4. *Has there been an infringement of the NMW or an unlawful deduction from pay by reason of the respondent's rules on when payment for work commences?* Any time arising from the breaks or delays at the start of a shift should be paid at the NMWR. Whether that gives rise to any claim under Section 13 of the Employment Rights Act will depend on whether there has been any shortfall in payments over the relevant payments periods. This is a matter that can be determined be agreement between the parties, failing which a ruling by the Tribunal.

5. *Has there been an infringement of the NMW or an unlawful deduction from pay by reason of the respondent's rules on payment for waiting time?* Any time arising from the breaks or delays at the start of a shift should be paid at NMWR. Whether that gives rise to any claim under Section 13 Employment Rights Act will depend on whether there has been any shortfall in payments over the relevant payment periods. This is a matter that can be determined be agreement between the parties, failing which a ruling by the Tribunal.

6. *Has there been an infringement of the NMW or an unlawful deduction from pay by reason of the respondent's rule that attendance at performance review meetings is unpaid?* No. Attendance at such meetings is voluntary and, being concerned with the claimant's position in the company and possible future pay increases, is not part

of the work that the claimant is employed to do. For both (or either) of these reasons time spent at such reviews is not to be counted under the NMWR.

7. *Has the claimant's holiday pay been properly calculated by the respondent over the period?* It is not possible to answer this question until the extent of any underpayments (if any) has been determined. If there are underpayments and if the parties are unable to agree on the quantification of any holiday pay claim, the matter will have to return for decision to the Tribunal.

Discussion and Decision

91. The dispute in this case is focussed on the number of hours the claimant has worked: the claimant argues that travel time, waiting time, breaks and attendance at performance reviews all count as working time for which he should be paid. The respondent, whilst acknowledging the claimant spends time travelling, waiting, on breaks and attending performance reviews, disputes that time is working time for which the claimant should be paid. I noted that under the NMWR, the hours in respect of which a worker is entitled to be paid the NMW depends on the type of work done. Accordingly, the first question to be determined is the type of work being carried out by the claimant: was the claimant someone who carried out "time work" for the purposes of the NMWR.

92. I had regard to Regulation 30 of the NMWR 2015, which defines "*time work*" as work that is not salaried hours work and is (a) work that is paid for under a worker's contract by reference to the time for which a worker works, or (b) work that is paid for under a worker's contract by reference to a measure of output per hour or other period of time during which the worker is required to work. In short, if a worker is paid according to the number of hours s/he is at work, and s/he is not paid an annual salary, the work is treated as time work.

93. The claimant was paid according to the number of hours he worked, and he was not paid an annual salary. I decided the claimant was someone who carried out "*time work*" for the purposes of the NMWR.

94. The next question relates to the claimant's "*place of work*" or "*place where an assignment is carried out*" within the meaning of regulation 34 NMWR, when carrying out his duties as an auditor. The claimant sought to argue that his place of work was either the District Office, or the Royal Concert Hall (meeting point) or the company vehicle. Mr McLaughlin relied on Regulation 32 NMWR which provides that:-

> *"Time work includes hours when a worker is available, and required to be available, at or near a place of work for the purposes of working unless the worker is at home."*

95. The claimant's letter of offer of employment (page 50) offered him the position of Auditor "*at our Glasgow District Office*", which was, at that time, in Coatbridge. The District Office subsequently moved to Glasgow. The evidence clearly demonstrated the claimant was not required to attend the District Office on a weekly or monthly basis, and there was no suggestion he had to attend at the District Office before travelling to a store to commence work. The District Office is an administrative office which the claimant attended, on occasion, for a performance review (or for the grievance hearing). The District Office was not a place of work or a place where an assignment was carried out.

96. I could not accept the submission that the letter of offer of employment, stating the claimant was offered the position of Auditor "*at our Glasgow office*" meant, as a matter of contract, that this was the claimant's place of work. The evidence did not support that submission. The evidence supported the position that the Glasgow office was the office to which the claimant was administratively attached insofar as that office (rather than any

of the other district offices) planned his work and processed his pay and holidays.

97. There was no dispute regarding the fact the claimant used the transport provided by the respondent to get to and from travel stores. The arrangement was for employees using the transport to meet at designated meeting places to be picked up, and the claimant met at the Royal Concert Hall. Mr McLaughlin submitted this was a place of work because it was "*near a place of work*". The facts did not support this submission. The Royal Concert Hall was no more than a convenient meeting place for employees to be picked up and dropped off. The claimant was not required to attend at the Royal Concert Hall and he did not carry out any work there.

98. Mr McLaughlin also argued that the company vehicle was a place of work because the Handbook deemed an employee to be at his place of work at the point he entered a company vehicle for the purposes of the company right of search; and the claimant was subject to the behavioural standards imposed by the company.

99. I, in considering that submission had regard to the terms of the company Handbook which provide (page 61) that:-

> *"Any employee of RGIS may be requested to comply with an employee search, as per company policy, at any time at any work location. This includes working time and when employees are leaving RGIS or customer premises or going home. As soon as an employee enters an RGIS or customer premises for business purposes they are deemed to be at their place of work and therefore covered by the right of search policy. Instances where this would apply – an employee getting into or out of a company vehicle or vehicle being used for business purposes."*

100. I accepted that, for the purposes of the right of search, the respondent deemed the company vehicle to be a place of work. However, I considered the deeming of the company vehicle as a place of work was restricted to the right of search. I reached this conclusion primarily because there was no suggestion that any work was done on the company vehicle. The claimant's evidence was that employees were free to do as they chose whilst travelling, and he made reference to chatting, sleeping or listening to music.

101. I also accepted the claimant was, to some extent, subject to the behavioural standards imposed by the respondent, whilst travelling in the company vehicle. The occupants of the vehicle would not, for example, as a matter of health and safety, be permitted to do anything which distracted the driver. The claimant had also been cautioned not to discuss the subject matter of his grievance whilst travelling in the company vehicle. I, whilst accepting there was some degree of control exercised by the respondent over the occupants in the company vehicle, could not accept this demonstrated the vehicle was a place of work. I could not accept Mr McLaughlin's submission principally because it was not supported by the evidence: the company vehicle was not a place where the claimant carried out any work.

102. The claimant was employed as an Auditor: his job involved counting items in a store where a stocktake was being undertaken. I concluded the claimant's place of work, or place where an assignment is carried out, was the store where he carried out his counting duties as part of the stocktake.

103. The third issue to be determined related to the question of travel time: the claimant argued he was entitled to be paid for all or part of his travel time to and from his place of work. I, in considering this matter, had regard to the provisions set out in the respondent's Handbook, which governed payments for travel time. The Handbook (page 85) designated the first hour of the journey from the meeting point, as "*commute time*" and this was unpaid. The same applied on the return journey. Thereafter, travel time was paid at the national minimum wage rate.

104. I next had regard to the provisions of Regulation 34, which provide as follows:-

> *"(1) The hours when a worker is travelling for the purposes of time work, where the worker would otherwise be working, are treated as hours of time work unless the travelling is between –*
>
> *(a) the worker's home, or a place where the worker is temporarily residing other than for the purposes of working, and*
>
> *(b) a place of work or a place where an assignment is carried out.*
>
> *(2) In paragraph (1) hours treated as hours when the worker would "otherwise be working" include –*
>
> *(a) hours when the worker is travelling for the purposes of carrying out assignments to be carried out at different places between which the worker is obliged to travel, and which are not places occupied by the employer;*
>
> *(b) hours when the worker is travelling where it is uncertain whether the worker would otherwise be working because the worker's hours of work vary either as to their length or in respect of the time at which they are performed."*

105. Mr McLaughlin invited me to accept his submission that the context and nature of the travelling the claimant undertook for the respondent, was travelling for the purposes of time work. Mr McLaughlin submitted the respondent's programme of work was contingent upon a dedicated and

organising grouping of workers with a common purpose and common activities to carry out on behalf of a customer, arriving as one cohesive unit at the same time to carry out the auditing component of their work at the store. He further submitted the respondent's labour intensive operation necessitated that employees were corralled together at the same time in one van under the full control of the respondent.

106. I could not accept Mr McLaughlin's submission because it was not supported by the facts in this case. Mr Reilly gave very clear evidence, and answers in response to Mr McLaughlin's cross examination regarding this matter. I accepted Mr Reilly's evidence and I found the key facts to be:-

- employees are not required to travel in the company vehicle to travel stores,

- employees can make their own way to travel stores, but must arrive for the start time;

- the programme of work was not contingent upon a group of employees arriving as a cohesive unit at the same time and

- the respondent did not "*corral*" employees into a company vehicle.

107. I acknowledged the fact there is an economic reality for employees which means travelling in the company vehicle may, in effect, be the only realistic option: however, that does not alter the material fact that employees are not obliged to travel in the company vehicle and can make their own way to stores should they wish to do so.

108. I could not accept Mr McLaughlin's submission regarding the respondent's preference for a "*cohesive unit*" arriving for work at the same time because this simply did not reflect the evidence before this Tribunal. Mr Reilly was asked a number of questions in cross examination regarding this matter,

and he clearly and consistently rejected Mr McLaughlin's suggestions regarding a cohesive unit. I acknowledged it may be of assistance to the respondent to know all of the Auditors on a particular job had been at the meeting point and were travelling together to the store; however, there was no evidence to suggest the respondent encouraged employees to travel in the company vehicle to achieve that objective. All of the evidence pointed to the fact employees could, and did, exercise a choice in how they travelled to a travel store, and the claimant himself accepted he had control over how he travelled to a travel store.

109. Mr McLaughlin made reference to the case of ***British Nursing Association v Inland Revenue [2002] EWCA Civ 494***. The case involved workers employed to answer the telephone and assign bank nurses to work. The issue for the Tribunal was to determine whether the workers were engaged in time work at times when they were awake and awaiting calls at home. Mr McLaughlin referred me to paragraph 19 of the Court of Appeal judgment where it was noted that the respondent's contention that employees were only working when they were actually dealing with phone calls with all the periods spent waiting for calls excluded, effectively made a mockery of the whole system of the minimum wage. Mr McLaughlin drew a parallel with the present case where, he submitted, the respondent's distinction between commute time (unpaid) and travel time (paid at NMW rate) made a mockery of the system in circumstances where the claimant was carrying out the same activity.

110. There was no dispute in this case regarding the fact the respondent differentiated between what it termed "*commute time*" and "*travel time*". I, however, could not accept Mr McLaughlin's submission that this distinction made a mockery of the system, in circumstances where the claimant was not obliged to use the company vehicle for transport. I acknowledged that if no transport was provided, then the claimant would not be able to claim in respect of hours of travel and would have to fund his own travel (if he accepted work in travel stores). The fact the respondent chose to offer the

facility of free transport and payment after one hour could not be described as a mockery of the system (particularly when – see below – the respondent was not obliged, in terms of Regulation 34, to pay travel time).

111. Mr Napier referred me to the judgments of both the Court of Appeal and the EAT (2001 IRLR 659) in the *British Nursing Association* case and drew my attention to paragraph 19 of the EAT judgment where it was stated:-

> "*We have come to the conclusion, on all the evidence and argument that we have heard, that the essential task of a tribunal, or indeed the respondents in seeking to apply these Regulations, or an employer in seeking to adhere to them, is to look at the ingredients of the particular case and the type of work that is involved, and the different elements to see if they can properly be described as work.*"

112. Mr Napier noted that the fundamental difference between that case and this case was that the bank nurses were required to be available to answer calls during the night, whereas the claimant had the choice whether to accept work. Further, the claimant was not obliged to travel between the different stores at which he worked on different days: the claimant travelled from home to his place of work at the store and then returned. Mr Napier submitted that applying that test to the facts of this case, the conclusion had to be that given the claimant's work as an inventory-taker, his "*work*" for the purposes of the NMWR began at the store where he carried out his counting duties, and began at the point his badge was scanned at the start of the shift.

113. I, having had regard to these matters, returned to the wording of Regulation 34. I noted that whilst "time spent travelling for the purposes of time work" is to be treated as hours of time work, this is subject to the qualification that it excludes travelling between "*the worker's home .. and .. a place of work or a place where an assignment is carried out*." I concluded, above, that the claimant's place of work was the store where he carried out his duties of

counting stock. I accordingly further concluded that the travel time from the claimant's home to his place of work was not to be treated as hours of time work.

114. Regulation 34 provides that travelling time shall be counted as work if the worker would otherwise be working, except where the travel is between the worker's home and the workplace or place where an assignment is carried out. The hours when the work would "otherwise be working" is defined in Regulation 34(2) to include *"hours when the worker is travelling for the purpose of carrying out assignments in different places between which the worker is obliged to travel*". I noted there was no suggestion by Mr McLaughlin that the claimant was travelling between assignments: the facts demonstrated the claimant travelled from home to his place of work (the store), completed his work and travelled home again. In any event, the claimant was not obliged to travel between the different stores at which he worked on different days. I was accordingly satisfied that the hours the claimant spent travelling were not hours where he would otherwise be working.

115. I concluded, for all of the above reasons, and in response to question 3, that the claimant was not entitled to be paid for travel time otherwise than in accordance with the provisions of his contract, as set out in the company handbook.

116. The fourth issue to be determined is whether there has been an infringement of the NWMR or an unlawful deduction from wages by reason of the respondent's rules on when payment for work commences. The respondent, prior to the commencement of this Hearing, accepted that the time taken to put "*kit*" on was working time. I understood the reference to "*kit*" to be putting on a polo shirt with the company logo, and putting on a belt which carried the respondent's counting machine. I also understood the time involved in putting on this kit was minimal.

117. The respondent also accepted that the start of a shift may be delayed and, as a consequence of this, employees might be delayed from starting work. These delays may be of up to half an hour in duration, during which time the employees are not paid. Delays of more than half an hour are paid at NMW rate. Further, delays in travel stores are paid at the NMW rate. The respondent accepted that any unpaid break of up to 30 minutes, arising after a schedule start time when the employee was required to be present in the (local) store in order to start work when permitted to do so, would qualify as time work under Regulation 29, being time when the employee was available and required to be available at the place of work for the purposes of working. Payment for this time would be at NMW rate.

118. The claimant also sought payment from the meet time at local stores. However, the evidence of Mr Reilly, which I accepted, was to the effect that although a "*meet time*" may be given, employees are not obliged to attend at the meet time. The only obligation on an employee was to attend for the start of the shift. Mr Reilly confirmed no penalty would be imposed on an employee who did not attend at the meet time: however, an employee who was late for the start time, would be penalised by losing money. In those circumstances I could not accept the submission that attendance at the meet time was work for which the employee should be paid.

119. I, in determining the response to question 4, noted the respondent had made the above concessions. I cannot determine whether there has been an unlawful deduction from wages because this will depend on whether there has been any shortfall in payments over the relevant payments period. I understand the parties will require to discuss this matter and, if agreement cannot be reached, they may seek a determination by the tribunal at a remedies hearing.

120. The fifth issue to be determined is whether there has been any infringement of the NMWR or an unlawful deduction from pay by reason of the respondent's rules on payment for waiting time. I noted there was no

dispute regarding the fact that between counting in the store room and the shop floor there is always a break; this break may be of any duration; breaks of up to two hours are not paid but breaks of more than two hours are paid at the NMW rate. There was also no dispute regarding the fact employees would be told, at the start of a break, how long the break would be and were free to do as they wished during this time: employees could, for example, leave the premises. The claimant accepted employees were not obliged to return early from a break, although employees would often agree in order to start paid work again and complete the work. The claimant sought payment for these breaks.

121. I, in considering this issue, had regard to Regulation 32, which provides that time work includes hours when a worker is available, and required to be available, at or near a place of work for the purposes of working unless the worker is at home. The claimant, in his evidence, accepted the respondent had no right to insist an employee return during his/her break to re-start work, and that should an employee refuse such a request, there would be no adverse consequences for them. I concluded, based on this evidence, that the time spent on a break was not time when the claimant was "*available, and required to be available at or near a place of work*" and accordingly the time spent on such breaks did not count for the purposes of calculating working time.

122. I, in response to question 5, concluded there had been no infringement of the NMWR or an unlawful deduction from pay by reason of the respondent's rules on payment for waiting time.

123. The sixth issue to be determined is whether there has been an infringement of the NMWR or an unlawful deduction from pay by reason of the respondent's rule that attendance at performance review meetings is unpaid. Mr Napier, in his submissions, made clear that he distanced himself from the evidence of Ms Simmonds when she told the Tribunal that attendance at the performance review meeting was not "*work related*". Mr

Napier accepted such attendance was work related, but did not qualify as working time for the purposes of the NMWR.

124. The evidence regarding performance review meetings was clear: the purpose of the performance review meeting was to allow an opportunity for the respondent to raise with the employee any issues regarding availability, or performance and to discuss whether a pay increase should be awarded. An employee who did not attend the performance review meeting would not be awarded a pay increase: put another way, in order to obtain a pay increase (all other things being equal) an employee had to attend a performance review meeting.

125. The respondent's witnesses all described attendance at the performance review meeting as "*optional*": I considered that description sought to play down the disadvantage to the employee should s/he not attend. The claimant did not attend the performance review meeting for 3 years, and he did not receive a pay increase in that time. He has attended the recent two performance review meetings, and has achieved a pay increase on each occasion.

126. I concluded, given the fact there is a clear detriment to an employee who does not attend a performance review meeting, that these meetings could not properly be described as optional. An employee who wished to achieve a pay increase (all other things being equal) must attend the performance review meeting.

127. I accepted the time spent at the performance review meeting (approximately 15/20 minutes) was not time spent by the claimant counting. However, given the fact an employee must attend the performance review in order (all other things being equal) to achieve a pay increase, and given the performance review is work related, I concluded the time spent at a performance review was time when the claimant was "*at work*" and that he should be paid for this time at NMW rate.

128. The parties will require to enter into discussions regarding whether there has been any shortfall in payments over the relevant payment periods.

129. The final issue to be determined is whether the claimant's holiday pay has been correctly calculated by the respondent over the period of the claim. The respondent has agreed that waiting time at the start of a shift in a local store (up to 30 minutes to be paid at NMW rate) and I have concluded time spent attending a performance review should be paid at NMW rate. These matters may impact upon the calculation of holiday pay. The parties, if they are unable to agree on the quantification of any holiday pay claim, will require to return to the Tribunal to have the matter determined at a remedies hearing.

Employment Judge: Lucy Wiseman
Date of Judgment: 13 April 2017
Entered in register: 18 April 2017
and copied to parties