Case No: 3201206/2018

EMPLOYMENT TRIBUNALS

Claimant: **Eleanor Uchewuakor**

Respondent: **Efficiency-for-Care Limited**

Heard at: **East London Hearing Centre**

On: **18 October 2018**

Before: **Employment Judge Ross (sitting alone)**

Representation
Claimant: In person
Respondent: No appearance

JUDGMENT

1. It is declared that the Respondent has made unlawful deductions from the Claimant's wages contrary to section 13 Employment Rights Act 1996.

2. It is declared that the complaint of unpaid holiday pay is well-founded. The Claimant is entitled to 14 days holiday pay.

3. The Respondent has failed to give the Claimant a statement of particulars contrary to section 1 Employment Rights Act 1996.

4. It is declared that the Respondent failed to give the Claimant any pay statement contrary to section 8 Employment Rights Act 1996.

5. The Claimant is entitled to an award pursuant to section 38 Employment Act 2002. The Claimant is awarded four weeks' pay (as limited by section 227 Employment Rights Act 1996).

6. The Respondent is ordered to pay the Claimant £8,432 (subject to lawful deductions for tax and National Insurance) comprising of:

6.1. Payment of £6,752 gross pay due to unlawful deduction from wages consisting of:

6.1.1. £4,752 gross in respect of normal monthly pay calculated by application of the National Minimum Wage of £7.50 per hour;

6.1.2. £2,000 in respect of night work (at £10 per hour).

6.2. Payment of £1,680 gross in respect of 14 days of accrued but untaken holiday.

7. The Respondent is ordered to pay the Claimant £1,956 under section 38 Employment Act 2002 (to be paid without any deduction for tax or national insurance).

REASONS

1. By a Claim presented on 7 June 2018, the Claimant brought complaints of:

   1.1. Unlawful deduction from wages;

   1.2. Failure to pay the National Minimum Wage ("NMW");

   1.3. Failure to pay holiday pay;

   1.4. Compensation for failure to give rest breaks.

2. The Respondent did not file a Response and did not attend the hearing.

Evidence

3. The Claimant produced a bundle of documents (p1-62), with a supporting statement from the client's mother attached. The Claimant adduced a witness statement and then provided further oral evidence in response to my questions, particularly about how the sums in the Particulars of Loss at paragraph 10 of the particulars of Claim had been arrived at. She confirmed these sums to be correct.

4. The Claimant was an honest witness, whose evidence was generally corroborated by the documentation. She was indignant that money she relied upon and was entitled to had not been paid.

The Facts

5. The Claimant commenced work for the Respondent on 18 September 2017 as a "live in" care worker. She worked exclusively with an elderly client with Multiple System Atrophy, with very high support needs.

6. On 11 September 2018, having accepted the role with the Respondent, the Claimant attended their office. Ms. Bello, whom she understood to be managing director, stated that the pay was £550 per week (after tax). When asked if the role was for a 24 hours "*watch job*", Ms. Bello stated the work was for about 9 hours per day. The Claimant agreed with the Respondent that she would be paid after tax and NI was deducted.

7. The Claimant was told that she would be paid at £10 per hour for overtime, such as night control.

8. When the Claimant first attended the Respondent's office, she was informed that she had a contract of employment. A contract was showed to her, but it had the wrong name on, so the Respondent said it would correct it. Despite assurances, the Claimant was never provided with a copy of the contract, nor of any terms and conditions. She was able to take some photos of the terms by using her mobile phone. Those photos (which do not include every page of the contract) have been of no real use in determining the issues in this case; for example, they do not include anything to do with working hours.

9. The Claimant commenced work on 18 September 2017.

10. The working arrangements were as follows.

11. The Claimant worked 24 hours live-in, providing care as required. There was no other live-in carer. She was awake, attending to and providing care to and waiting to provide care to the client, from 6am until 10pm at night. I find that she both worked and was available for work for 16 hours each day.

12. The working arrangement was that the Claimant worked continuously for 4 weeks, then had 1 week off, but was paid for only 3 weeks at a time. (This is consistent with her claim, insofar as she alleged that the last three weeks of work had not been paid).

13. The Respondent provided a time sheet for overtime hours. The time sheet was to record hours worked during the night (10pm to 6am).

14. During the night, the Claimant would be woken roughly every two hours. At 12 midnight, approximately, she would wake for control of the client. Between 2 and 4am, she would wake again for the same reason. These breaks in sleep would be 30 minutes at a time at least; sometimes they would be longer, such as when it was necessary to speak with the Claimant to settle her and once for the GP to attend. This night time work is represented by the 200 hours of overtime claimed.

15. The client needed special care, so other care workers were required to attend at certain times to help the Claimant bring the client downstairs and to change her position.

16. On occasion, these other care workers did not appear. When the Claimant complained, the Respondent's care manager stated that she had to do this work on her own, and that the Respondent would pay her double for it. The Claimant did not want to, but was told that the client needed it. She agreed because she had no choice. This work is represented by the "double-up" sums claimed.

17. The Claimant took no holidays over the six months prior to her resignation.

18. The Claimant was first paid on 16 October 2017, when she received £1650. The Claimant had requested that the Respondent provide a pay-slip. None was provided; on complaining, the Respondent's manager stated that live-in care workers do not require payslips and that such work was paid tax-free.

19. The Claimant subsequently requested her payslips. None were provided.

20. During a call with the Respondent's manager, Mr. Mayowa, the Claimant was informed that she was self-employed and that £550 was her gross pay.

21. On 9 November, the Claimant filed a grievance complaining of the position with her pay, and that overtime had not been paid, and requesting pay-slips.

22. Documents purported to be payslips were eventually provided to the Claimant by a payroll company. These did not set out the Claimant's name, are undated, appear to be incomplete, and contain incorrect information: see p.34-35. It is clear from these that no overtime has been paid.

23. The payslip type document at p.36 is dated 18/12/17. This records gross pay as £1918.38, which appears to be the monthly wages paid; the purported payslip for 17/1/18 is also for £1918.38. The payslip for 17/2/18 shows the same.

24. The Claimant resigned on 1 March 2018, giving 1 month's notice. By 16 March the Claimant had not been paid for February 2018. The Claimant stopped working for the Respondent on 17 March 2018.

25. The payslip for 17/3/18 is for £1100, equivalent to 2 weeks pay for February 2018.

26. None of the documents from the payroll company suggest any overtime is paid.

27. Given their confusing and inconsistent nature, I placed little reliance on the documents purporting to be accurate payslips as showing how much the Claimant had been paid. I preferred the oral evidence that the Claimant was owed three weeks' pay.

Law

28. I considered the National Minimum Wage Regulations 2015.

29. Regulation 3 defines time work as (a) work paid for under a worker's contract by reference to the time which a worker works and is not salaried hours work and (b) work that is paid 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 and is not salaried hours work.

30. If a worker is paid according to the number of hours, and not paid annual salary, the work is time work.

31. I have directed myself to the relevant law, particularly the recent guidance in Mencap v Tomlinson Blake [2018] EWCA. At paragraphs 17ff, the Court of Appeal provided a useful summary of the meaning and effect of the Regulations as follows, with my emphasis:

"The National Minimum Wage Regulations

…

18 The broad scheme of the Regulations is that in order to ascertain the hourly rate in fact paid in a pay reference period the total number of hours worked in the period is divided by the total remuneration paid in respect of it: see regulation 14 of

the 1999 Regulations and regulation 7 of the 2015 Regulations. We are concerned with the first element in that calculation, i.e. the number of hours worked. That is the subject of Part 5 of the 2015 Regulations, which is headed "Hours Worked for the Purposes of the National Minimum Wage". This is divided into five Chapters. Chapter 1 is essentially introductory. Regulation 17 reads:

> *"In regulation 7 (calculation to determine whether the national minimum wage has been paid), the hours of work in the pay reference period are the hours worked or treated as worked by the worker in the pay reference period as determined –*
>
> *(a) for salaried hours work, in accordance with Chapter 2 ;*
>
> *(b) for time work, in accordance with Chapter 3 ;*
>
> *(c) for output work, in accordance with Chapter 4 ;*
>
> *(d) for unmeasured work, in accordance with Chapter 5 ."*

The organisation of the 1999 Regulations was less elegant, but it used the same fourfold categorisation. The purpose of the categorisation is not, as such, to define what is meant by "work" but to recognise that different kinds of contract require different approaches to measuring the hours worked under them and to provide accordingly.

19 …

Time work

20 "Time work" is defined in regulation 3 of the 1999 Regulations as follows:

> *"In these Regulations 'time work' means –*
>
> *(a) work that is paid for under a worker's contract by reference to the time for which a worker works and is not salaried hours work;*
>
> *(b) work that is paid for under a worker's contract by reference to a measure of the output of the worker per hour or other period of time during the whole of which the worker is required to work, and is not salaried hours work; and*
>
> *(c) work that would fall within paragraph (b) but for the fact that the worker is paid by reference to the length of the period of time alone when his output does not exceed a particular level."*

There is no definition of "work". The corresponding provision of the 2015 Regulations is regulation 30 . I need not set it out because it is in materially identical terms.

…

23 The corresponding provision of the 2015 Regulations is regulation 32 (part of Chapter 3), which reads:

> *"(**1**)* ***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.***
>
> *(2) In paragraph (1), hours when a worker is 'available' only includes hours when the worker is awake for the purposes of working, even if a worker by arrangement sleeps at or near a place of work and the employer provides suitable facilities for sleeping."*

32. Regulation 31 then provides that the hours of time work worked by a worker in a pay reference period are the total number of hours of time work worked by the worker or treated under Chapter 3 as hours of time work in that period.

33. The provisions relating to unmeasured work contain no provision equivalent to the availability provisions as regards time work and salaried hours work, or therefore for workers sleeping in at or near their place of work.

34. In the Mencap case, the Court went on to conclude, with my emphasis added:

> *"34 There are thus two separate kinds of "time work" – namely "work" as referred to in regulation 3 / 30 (to which I will refer as "actual work"), and, by virtue of regulation 15 / 32 , availability for work (in the defined circumstances). How the dividing-line between actual work and availability for work applies in sleep-in cases is the essential question in these appeals.*
>
> *35 Regulation 15 (1) and its successors have sometimes been described as deeming provisions. That may not be strictly accurate, since, as already noted, the formal effect of the provisions is to treat availability for work not as "work" but as a distinct category of "time work"; and it may be for that reason that the draftsman does not use the classic deeming terminology of "treated as" but instead says that time work "includes" time when the worker is required to be available. However, in a loose sense the description is reasonable enough.*
>
> *36 I turn to the substance of regulation 15 (1) and its successors. The provision which they make for availability cases comprises four elements – or, more accurately, two elements, each with a qualification.*
>
> *37 First, the worker must be required to be at or near a place of work ("at work" for short). This element is constant through all three versions, and no issue arises about it for our purposes.*
>
> *38 Second, the "at work" element is qualified, in the original paragraph (1), by the words "other than his home": I call this "the at home exception". The Amendment Regulations substitute more elaborate wording but I can see no difference of substance. That wording is in turn replaced by the more succinct language of paragraph 32 (1) of the 2015 Regulations; and in this case we know for sure that no change in meaning is intended (see para. 17 above). The purpose of the at home exception is evidently to cover the case where the worker's home is at or near his or her place of work: there are of course plenty of residential jobs where that will be so. Its effect is that, where a worker is required to be available for work but is at home, the hours in question (awake or asleep) will not count for the purposes of the NMW. The thinking is understandable: the effect of a*

requirement to be available for work might reasonably be judged to be qualitatively different if the worker can be in his or her own home.

39 Third, the worker must be, and be required to be, available for the purpose of working ("available for work" for short). As we have seen from the report of the Commission, and will see in the authorities, that situation is sometimes referred to as being "on-call". That phrase may be used in ordinary industrial parlance in a variety of circumstances, not all of which are necessarily covered by regulation 15 (1) or its successors; and although I will myself occasionally use it for convenience it is important where accurate analysis is required to stick to the language of the Regulations.

40 Fourth, the availability element is qualified, in the original paragraph (1), by the exception for workers who by arrangement sleep at work. In their case the only hours that count for NMW purposes are those when they are "awake for the purpose for working": I call this "the sleep-in exception". This provision is modified in the Amendment Regulations so that employers can only take advantage of the exception if they provide suitable sleeping facilities. The phrase "is permitted to sleep" is also changed to "by arrangement sleeps". The amended language seems to me clearly to connote a situation where the worker is positively expected to sleep and thus to perform no substantive activities: the only obligation is to be available to work if called on. [4] The previous phrase – "is permitted to sleep" – is more ambiguous, because it could if taken literally apply to any kind of work, at any time of day or night, when there is no objection to an employee taking a nap between tasks. I doubt if it was ever the intention that it should have so broad a meaning, but the amended wording puts the position beyond doubt. This element is much more radically re-cast in regulation 32 (2) of the 2015 Regulations, but the essential language remains the same and, again, we know that no substantive change is intended. [5]

41 In summary, the effect of all three versions of the Regulations is that a worker who is, and is required to be, (a) available for the purpose of working (b) at or near his or her place of work is entitled to have the time in question counted as time work for NMW purposes unless

(i) he or she is at home; or

(ii) the arrangement is that they will sleep (and be given facilities for doing so), in which case only those hours will count when they are, and are required to be, awake for the purpose of working."

Conclusions

35. Applying the above law to the facts found, I have reached the following conclusions.

A. Unlawful deduction from Wages: Failure to pay the NMW

36. From the above findings and the guidance in Mencap v Tomlinson-Blake, the work done by the Claimant is likely to be time work. Her working time included hours when she was required to be available.

37. The arrangement was that the Claimant would sleep 10pm-6am (but was required to be up in the night as a standard feature of her work). I infer that there were facilities for her to sleep-in.

38. During weeks when she was working, the Claimant worked 16 hours per day, on each day of the week, plus extra time during the night.

39. This pattern continued from 18th September 2017 to 17 March 2018. She worked 21 out of those 26 weeks.

40. Having considered Regulation 7 of the NMW Regs 2015, the pay reference period is 1 week. The Claimant's working hours over the reference period are:16 x 7 = 112 hours

41. On the face of the findings of fact, the Claimant was paid the equivalent of £716 gross for each week that she worked.

42. The Claimant was not paid at the National Minimum Wage for the 26 week period identified. Applying the applicable NMW over this period, the Claimant should have been paid: 112 x 21 x £7.50 = £17,640.

43. The Claimant was in fact paid (on the basis that she was not paid for three weeks work): £716 x 18 weeks = £12,888.

44. In conclusion, the Respondent deducted wages of £4,752 gross from the Claimant in respect of work done during her normal working hours of 6am to 10pm over the period identified.

45. The claim for "double-up" pay is not a claim for overtime; it is an enhanced rate agreed for work done over 4 days. It would not affect the above calculation, so I make no separate award, because the Claimant could do no better that the figure assessed above.

"*Overtime"*

46. The work that the Claimant performed at night was to be paid at an agreed overtime rate. I assess this loss as £2,000 gross, assessed as claimed: 200 hours x £10 per hour.

B. Working Time Regulations 1998: Holiday Pay

47. The Claimant worked exactly 6 months. She is entitled to 14 days of holiday pay. This amounts to: £7.50 x 16 x 14 = £1,680 gross.

48. The Claimant also complained that she was not given rest breaks. It is true that she was working or available for work for 16 hours during her working days; and I saw no contractual term permitting her rest breaks. But the claim for compensation for rest breaks cannot succeed in my view because:

    48.1. The inference is that the Claimant may have been able to take rest during the 16 hours. There was no complaint that she could not do so, and my understanding was that there were periods when the client did not need attention, such as if sleeping.

48.2. There was no evidence that the Claimant requested rest breaks, and no evidence that the Respondent refused rest breaks.

C. Section 38 Employment Act 2002

49. This case demonstrates why it is important for employees to receive a statement of terms and conditions.

50. The Respondent has been cavalier in its disregard of the statutory requirement to provide such a statement. This is in addition to its cavalier disregard of its obligations not to make unlawful deductions from wages, to pay the Claimant the National Minimum Wage, and to provide a proper pay statement.

51. I have no doubt that it would be appropriate to award the maximum penalty of 4 weeks' pay under section 38 EA 2002, assessed at £489 per week. There is no evidence of any mitigating factors.

Employment Judge Ross

Date 27 November 2018