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EMPLOYMENT TRIBUNALS

Claimant

Respondents

Ms Ilkay Cetin

AND

Steve Griffiths & Mrs Melanie Griffiths

HELD AT: London Central

ON: 28 November 2018 and
10 January 2019

BEFORE: Employment Judge Walker (Sitting alone)

Representation:

For Claimant: In person

For Respondents: Mr Dawson of Counsel on 28 November 2018 and Mr Harwood-Ferreira, of Counsel on 10 January 2019.

JUDGMENT

The judgement of the Tribunal is that the Respondents must pay to the Claimant the sum of £296.90 gross, less only any sum by way of tax and Employee's national insurance on this sum which is properly due and is deducted and paid to HMRC in relation to this award. Evidence of any deduction and payment to HMRC must be provided to the Claimant to demonstrate compliance with this judgment.

REASONS

The Claim

1. The claim in this case was brought by Ms Ilkay Cetin who was a nanny for the Respondents who are parents of two small children at the relevant time. Ms Cetin brought the proceedings and the essence of her claim which was identified at the Case Management Preliminary Hearing was that she believed she had been underpaid wages because the Respondent had failed to pay the national minimum wage. Ms Cetin may have made other assertions in her ET1 but this is the only claim that was pursued after the Preliminary Hearing.

Issues

2. The issue before me therefore on 28 November 2018 was whether Regulation 57 of the National Minimum Wage Regulations 2015 applied. This is called the Family Exception. Regulation 57(1) provides that work does not include any work done by the worker in relation to an employer's family household if the requirements of paragraph 2 or 3 are met. Paragraph 2 is not applicable. Paragraph 3 provides that the requirements are all of the following:

(a) *The worker resides in the family home of the worker's employer.*

It is undisputed that that was the case.

(b) *The worker is not the member of that family but is treated as such, in particular as regards to the provision of living accommodation and meals and the sharing of tasks and leisure activities.*

(c) *The worker is neither liable to any deduction or to make any payment to the employer or any other person as respects the provision of the living accommodation or meals.*

This was not an issue.

(d) If the work had been done by a member of the employer's family it would not be treated as work or performed under the worker's contract because the requirements in paragraph two have been met.

3. The requirements in paragraph 2 are all of the following: (ignoring the reference to the member being a member of the employer's family) *that the worker resides in the family home of the employer and shares in the tasks and activities of the family.*
4. The issue before me therefore was whether the Claimant was treated at a member of the Respondents family, particularly as regards the provision of living accommodation and meals and the sharing of tasks and leisure activities.
5. The Respondents contention was that, by virtue of this provision, the need to meet the national minimum wage regulations was not engaged and therefore the Claimant's claim should fail.

Background

6. When the claim was before me on 28 November, the Claimant gave me a long letter which understood raised various concerns. I explained to her that I had only had about two and a half hours to determine the claim and in that time, I could either address her letter, in which case, I did not think it would be possible to hear the case that day and I would adjourn it to a future date, or she could elect not to pursue the letter and I would start the hearing. She chose to do the latter and so I made no enquiry about whether the letter had been given to the Respondents and I did not place it on the file. Counsel for the Respondents did not ask for a copy or indicate that he did not have it.
7. In practice the claim was not concluded on 28 November 2018 and had to be adjourned to 10 January 2019. Before the hearing on 10 January 2019, I learned that the Respondents were concerned about this letter, although their

Counsel had not expressed any concern at the hearing on 28 November 2018. Therefore, on 10 January 2019 before I gave the judgment, I asked the new Counsel for the Respondents whether he wished to address the Claimant's letter and I explained that I had not read it properly but had located it amongst the bundle of documents.

8. Counsel did not regard that as a matter of concern at all but I asked him to take instructions as his clients were not present. He took some time and took a copy of the letter but he was unable to contact his clients. Eventually we resumed the hearing on the basis that Counsel confirmed he was entirely satisfied that the course of action I had adopted was proper and satisfactory. It was only after the Respondents' Counsel assured me he was content for me to reach my judgment without any further representations or procedure that I then went ahead.

Evidence

9. The evidence I heard was from the Claimant herself and also from Mr Griffiths who was one of the two Respondents. I had a bundle of documents and some additional documents were provided. Among the evidence, there were extensive copies of WhatsApp messages. Shortly after the Claimant started work the Respondents created a family group to communicate with the Claimant using WhatsApp, and those messages appear in the bundle.

Facts

10. The Claimant was employed as a nanny by the Respondent who located her through a website called childcare.co.uk. The Claimant was engaged to provide live in care to the Respondents' two small children.

11. The Claimant started work earlier than originally intended. I was told by the parties that the Claimant had wanted to start early since she was living with relatives while looking for a position, but on looking through the WhatsApp

messages and the correspondence it appears that there was also some discussion that it suited the Respondents.

12. At that time the Respondents were renovating and extending their home and had fairly extensive building work underway. That impacted on the living accommodation quite significantly so that the room which would have been occupied by the Claimant was unavailable. Initially the Claimant used a guest room. She then moved to an en-suite room as soon as soon as that building work allowed but it was some time after she had started work.

13. The Claimant's duties were to work twelve hours per day from 7:30am to 7:30pm Monday to Friday. The primary responsibility she had was to care for the two children. This was largely done while the two parents were at work, although one day a week I understand Mrs Griffiths was not at work.

14. There was a contractual document which was dated 4 December 2017. The Claimant complained that this was not the original version. She said that she was provided with a document but the one that she eventually signed had some provisions changed and she believed a different one had been substituted for the original one. I am not in any position to determine whether that was in fact the case but I have had a careful look at the provisions of the contract which the Claimant signed. It contained numerous relatively detailed provisions addressing how the Claimant should behave and what she could and could not do.

15. Examples are as follows:

7.1 No visitors should be allowed in the house without prior consent from the employer.

7.2 The employee shall not enter in to any private areas of the house without any due reason. For instance, the employee is not to enter any bedrooms other than the children's and his [sic] own.

7.3 The employee is expected to report any and all breakage.

7.4 The employer expects the employee to show due consideration for the costs of running a household, treating the household as s/he would

his/her own. Due consideration to the household costs include for instance: -

Switching lights off when no one is using a room/corridor

Running washing machines and dishwasher near or at full capacity

Showing appropriate “fridge management” including awareness of “Use by Dates” to avoid wherever possible throwing food away

Hanging clothes to dry rather than defaulting to dryer

Where the employer shows repeated and excessive lack of consideration to household costs, the employer reserves the right to deduct an appropriate amount from wages as compensation. No such deduction will take place without several verbal conversation and a written notice.”

16. The contract also provided at clause 7.6,
“Live-in accommodation is provided by the employer for the sole purpose of allowing the employee to perform his/her duties to look after the children. It does not form part of the employee’s remuneration and would cease if the employee was no longer able or required to perform his/her duties. -e.g.: long term sickness, maternity leave, pay in lieu of notice.”

17. Additional provisions include at 7.7 a provision that the employer would not enter the employee’s bedroom without due reason and would give notice whenever possible before entering and shall give due consideration to the employee’s right to privacy outside working hours. But it also provided at 7.8, that access to the room would be provided to the employer as necessary (e.g.: for maintenance and repair). It also provided at 7.9, that the room shall be kept clean and at 7.10, that any damage to the room or content e.g. bedlinen, TV, furniture etc.) must be reported to the employer, and at 7.11, that the room should be returned in the same condition as taken.

18. The contract included at 7.15 that requests for guests will be considered under the following conditions. They would only be considered past the

probation period. The probation period in this contract was the first twelve weeks of the employment. It also provided that it is expected that requests for guests would be occasional, no guests would be allowed without prior consent from the employer including when the employer is away for an extended period of time, no guests of the employee should be allowed to stay in the house when the employee is not present (other than running a very quick errand). The employee had to be accountable for guests at all times and ensure that they abide to the same standards as the employee regarding safety, smoking, household costs, confidentiality, privacy and any medical or other conditions making them unsuitable to be in close contact with children including infectious diseases, mental health issues and criminal records. The communal areas of the house were not be used to entertain guests of the employee and the employee was never to organise parties and large gatherings at the house.

19. Additionally, there were provisions for technology which included provision at 19.7

“we have security cameras in communal rooms and the children’s room. The cameras are a “live feed”, we do not record the information. However, it is possible to record the information - should we decide to do so, the employee will be informed in writing.”

20. There were a number of schedules to the contract. Schedule one was headed “Duties and responsibilities” and listed, at some length, daily responsibilities, weekly responsibilities, ad hoc responsibilities and also listed some light household work defined as emptying and loading the dishwasher, emptying the bins, hanging household clothes to dry, putting groceries away, buying the odd food item or anything else required for the household, children, (e.g. nappies) from local shops. In addition, it provided that where the children were not under the employees care but the employee was working or otherwise had time, the employee was expected to undertake the following and it listed deep cleaning of pram, play pen, toys, children’s bedroom, car seats, high chair etc, sorting out clothes and toys no longer appropriate for the

children's age group, repairing and mending broken toys, books, clothes etc and cooking and freezing meals for the children.

21. There was a provision about holidays when the employer might be away but the employee was not. The contract listed additional duties for such a period so the employee could be asked to clean the fridge and windows, water plants and undertake some research, book appointments and events, drop off unwanted toys and clothes to charity, plan specifically events such as birthdays, school holidays, Halloween and so forth and prepare for the family return including food and shopping.

22. There were then detailed provisions around the responsibilities for food preparation and the diet of the children, when they should eat and what they should eat, food hygiene and also provisions about one of the children who had severe food allergies.

23. The contract also had another schedule on duties and responsibilities for medication and a section on household etiquette which provided that while it did not form part of the contract it was guidelines to ensure that we live happily together. That listed a series of things such as when finishing items from the larder or other goods please either replace with petty cash or inform us that it needs replacing, use wooden, plastic utensils when using the household pots and pans. If you have been offered something by us e.g. chocolate or a glass or wine it does not mean you can help yourself at will to that item. If in doubt ask. If you require an item which does not belong in your room e.g. land line phone, Hoover etc return it promptly and if you need to keep it for some time please mention it so that the employer does not have to look for it.

24. There was an express prohibition of borrowing anything of a personal nature such as clothing, handbag, luggage, toiletries etc without asking the employer.

25. It made it clear that the Claimant would be sharing everyday crockery which she might use and take to her room, but if she chose to use more

expensive and usually fragile crockery she was told that she would be expected to pay for any breakage.

26. It was noted that the Claimant had no obligation to tell the Respondent her whereabouts but they would appreciate if she could tell them when she would not be sleeping at home or coming home late so that they did not worry about her and could secure the house and alarm.

27. It then made it clear that she was not authorised to give instructions to the other employees such as the cleaner or contractors, she was not to open any sealed unopened item that was not part of the usual general weekly shop and she may not help herself to home cooked food unless either offered or she had first enquired whether she may and they requested that coffee, tea and any other beverages which stain are drunk in the kitchen to avoid staining carpets, sofas etc. Finally, there was provision about disciplinary and grievance procedures.

28. The Respondent used a payroll agency to assist with their tax payments and payroll for the Claimant. On 14 December 2017 Mr Griffiths signed a statement headed "my nanny lives in my main family home as part of my family". Parts of that document in the bundle are thoroughly illegible due to poor copying, particularly the introduction which details the criteria for that statement and so it is of no assistance to me whatsoever. Moreover, it is a document which was not provided to the Claimant and she had no knowledge about it, so she could not have commented and certainly did not agree to it

29. Nowhere in the document provided to the Claimant was it indicated that she was to be treated as part of the family.

30. In terms of her leisure time, I was told that outside her normal working hours, the Claimant would go for a walk in the evenings, and she would talk to Mrs Griffiths after her working hours. I note that the Claimant said she did so reluctantly, and the Claimant indicated in her evidence that she had no choice but to stay on chatting with Mrs Griffiths, if Mrs Griffiths talked to her. I do not find that plausible nor credible. It is always possible to say politely that you

need to leave after your working hours and I therefore do not accept the Claimant's suggestion that she did not wish to talk to Mrs Griffiths on those occasions.

31. The Respondents did invite the Claimant to go on holiday with them once to Marrakesh but it is not clear if that had anything to do with the Claimant being part of the family. Rather it seems they wanted her to continue to assist with the children through that holiday. The Respondents did not invite her to participate in other trips they took. I understand from the Claimant, and it was not challenged, that there were also family trips at Christmas to France, to a cousin at New Year, to Barcelona, Devon, Wales and Paris to the Marathon and a family tradition that they would watch the France Wales Six Nations together. Perhaps not surprisingly, the Claimant was not asked to join the family at Christmas or at New Year because she had only just started work and there was very little time for the Respondents to arrange for that, but there were other occasions when there were family events to which she clearly was not invited.

32. The Respondents do not have a television which they watch together in their living area. Instead they had a television in their bedroom and the Claimant was not expected to enter that room or share in any times when they were watching television in that room.

33. The Respondent did go out with the children mainly at weekends and did visit family as I have noted on occasions and also it is clear that Mrs Griffiths mother visited them. As I noted the Claimant was not invited to family trips to visit other family. She was around when Mrs Griffiths' mother visited on occasions because that was during her working hours.

34. In summary, there is no evidence that the Respondents included the Claimant in their leisure activities outside her working hours. I acknowledge that position is somewhat complicated because the Claimant chose on occasions to go to her room or to go to another relative at weekends. However, there is in the bundle, a statement from the following au pair who replaced the Claimant who overlapped with her slightly. That individual did not

attend to give evidence and there was no opportunity to test her statement, but she said she was included in trips to the museum and other towns. There was no suggestion that the Claimant was ever invited to do such things.

35. In terms of meals, the Claimant ate with the children or in her room. The food was very largely provided by the Respondent in terms of raw ingredients which the Claimant was able to cook for herself. When she ate was her own choice and where she did so was also her own choice. I note that on occasions she cooked for the family. The Claimant followed a strict diet of a sort. I understand that she was not a meat eater and that her chosen food was slightly different to that which the family might eat, although on occasions when she did make a meal for them they clearly enjoyed it and there is amongst the WhatsApp messages a discussion trail showing they confirmed that they had enjoyed something she had made very much and she provided the recipe for it and the cooking instructions.

36. My attention was drawn to several WhatsApp messages. Many of the communications are about the children and their food, sometimes about shopping and deliveries.

37. There was additional evidence about the keys to the house. The Claimant complained she did not have any and was told that these were special and could not be replicated. The Respondent appeared to think she had her own keys but some of the WhatsApp indicate that at certain times the Claimant was making requests to be let in and I note on one occasion when that was responded to, she said she was already in because the builder had let her in. The next au pair's statement said that they both had keys. I was not able to test that evidence but it is my view that the Claimant did not always have her own individual key. The evidence shows that she did have to share keys with the Respondents for some time. That made her no different from the parents who also were sharing the same key but nevertheless it clearly made life a bit awkward.

38. As regards meals, both Respondents worked long hours hence the need for the Claimant to work from 7:30am to 7:30pm. The children's food was

regularly prepared by the Claimant. Mr and Mrs Griffiths usually ate together at a later time once they returned from work. The Claimant was, as I have noted, free to make her own food and choose when she ate but there was no suggestion at all that either Mr or Mrs Griffiths encouraged the Claimant to eat with them.

39. In terms of household chores, there was a cleaner so that the household chores were largely done by her although it is clear that there was an expectation that the Claimant would do light cleaning which is reflected by the contract. The Claimant devoted her week day time to the children and she describes being reluctant to spend her free time with the family for fear of being drawn in to caring for the children outside her working hours.

40. It was clear that by the stage of this Hearing the position had become acrimonious and some evidence that was put before me amounted to criticism of the Respondents. I have ignored all irrelevant matters. The case law makes it clear that there are specific issues which need evaluation for the statutory test and those matters go to the extent to which the Claimant was treated as part of the family. That is the focus of my analysis of the evidence. Further, it is not clear that the situation was so bad when the Claimant worked for the Respondents. When the Claimant left she professed in the WhatsApp messages that she missed the children. On 11 May 2018, Mrs Griffiths wrote "we have really enjoyed having you in our household and will miss you". Therefore, it is clear that there was, much of the time, a relatively friendly relationship. Certainly, the relationship which was created for the benefit of the children was one in which the children would feel that they were in a happy home.

41. The Claimant complained that she was called "noo noo", not by her choice but by the Respondents. That was apparently a term for a sort of nana or nanny. In the WhatsApp that is what she was described as, rather than her own name. I cannot particularly draw any inference from that. I understand that the Respondents were trying to create a degree of continuity and chose to use that name to try to make the children less conscious of individual changes of nanny.

42. Having gone through all the facts carefully I heard the parties' submissions and I considered the law.

Submissions

The Respondents submissions

43. The Respondents effectively reminded me of the case law and specifically drew my attention to the case of **Nambalat v Taher and Udin v Chamsi-Pasha [2012] EWCA Civ 1249**. which is a Court of Appeal case when two cases were heard together to consider the impact of the requirements of the relevant regulations. That case predated the current National Minimum Wage Regulations but nevertheless it appears that the regulation in question was absolutely identical and therefore the case is highly relevant.

44. I also had my attention drawn to the facts. The Respondents' submission was that the Claimant formed part of their household and she shared accommodation, shared activities, was invited on holiday, had food provided and was very much part of the family.

The Claimant's submissions

45. The Claimant submitted that she was not part of the family, did not share in their leisure activities.

The Law

46. I have referred to regulation 57 of National Minimum Wage Regulations 2015 above and I will not repeat it again.

47. However, s.28 of the National Minimum Wage Regulations 1998 is relevant.

28.1 where in any civil proceedings any question arises as to whether an individual qualifies or qualified at any time for the National Minimum Wage it shall be presumed that the individual qualifies or as the case may be qualified and at that time unless the contrary is established.

28.2 it shall be presumed that the worker was remunerated at less than the National Minimum Wage unless the contrary is established.

48. The case of **Nambalat v Taher** as I will refer to it was highly relevant. There are large parts of that case which are of relevance and I have read it in some particular detail. It concludes as follows:

“In each case, it is for the Employment Tribunal to assess, having regard in particular to the factors stated in (a)(ii), whether the worker is treated as a member of the family. The Tribunal must keep in mind that it is for the employer to establish that the conditions in regulation 2(2) are satisfied and that onerous duties may be inconsistent with treatment as a member of the family. Tribunals will need to be astute when assessing whether an exemption designed for the mutual benefit of employer and worker is, or is not, being used as a device for obtaining cheap domestic labour.

49. The test requires an overall approach to family membership, accommodation being only one of several relevant factors:

“the test is whether, in the provision and allocation of accommodation, the worker was treated as a member of the family and not whether a particular standard of accommodation was provided.”

“what matters is whether the work is done in a context in which the worker is treated as a member of the family. The way in which household tasks are shared is, as the regulation recognises, an important indicator of whether the worker is treated as a member of the family. The way in which accommodation is allocated, meals taken and leisure activities are organised are other indicators. It is for the Tribunal to

decide whether, on the evidence, it is established that the worker is being treated as a member of the family and not as a domestic servant.”

Conclusions

46. As I have noted, the important thing I had to consider was whether the Claimant was treated as a member of the family and I had to take particular regard of the provision of accommodation, meals and the sharing of tasks and leisure activities.

47. In terms of the accommodation it was clear that the Claimant had use of the guest room initially and later an ensuite room.

48. The Claimant had food provided for her meals, I accept that she sometimes brought her own food and she indicated that she became concerned about the problems with buying food and that she began to buy her own, but largely it seemed that the Respondents provided the ingredients that she required and she could eat what she wanted. There is no evidence she was expected to eat with the adults, or was asked to join them. She either ate alone or with the children. She was eating different foods to the others, but for her personal reasons.

49. The Claimant's tasks were very largely to take responsibility for childcare all day in the week but outside that there was no evidence that she was expected to do more household tasks than the rest of the family did. One of the WhatsApp refers to the cleaner complaining about the dishwasher but it seems that Mrs Griffiths' reply indicates that was not a core activity which the Claimant did alone and she did not particularly complain about that. The Claimant did say she did not do laundry because Mrs Griffiths had a complex system of laundry and she did not touch that.

50. There was very little evidence of sharing of leisure activities apart from the one holiday to Marrakesh which I have noted, and it is far from clear that was because the Claimant was part of the family, rather because her presence would provide continued care for the children.

51. Overall in terms of being treated as part of the family the employment contract suggests otherwise. It is clear that the Claimant was living in the Respondents' home and looking after their children and everyone wanted the children to feel happy and comfortable with those arrangements. It is also clear that some parts of the employment contract and the detailed schedules were an effort to provide clear instructions to the Claimant which she could follow, which would mean that she understood the way in which the household tended to operate. However, the contract goes well beyond that, so that while the Claimant's role was hoped to be one where she could be loving and affectionate with the children as well as caring for them, which indeed she clearly was, and from the children's perspective she was expected to be part of the family environment, the Claimant was given long and detailed lists of instructions and restrictions on her behaviour which are not consistent with being as treated as part of the family.

52. One example is the fact that not only was there a requirement that the lights should not be left on, but the Respondent reserved the right to deduct money from the Claimant's earnings if she did and that strikes a note which is not consistent with the way in which you would treat part of your family, even if you do not want them to operate in that manner. Another example is the contractual reference to the use of security cameras. That is not something one would ever do to a family member, other than to protect a vulnerable person. In this case it was clearly a provision to allow the Respondents, if they wished, to check on the Claimant.

53. I balance that against the fact that it is also clear that the relationship was one where Mrs Griffiths talked to the Claimant quite openly about various personal views. I note that the Claimant complains Mrs Griffiths did not disclose her pregnancy to her and that caused her some distress, but it is nevertheless clear that Mrs Griffiths did talk to the Claimant in an open and personal manner.

54. There was a lack of family style social integration between the Claimant and the Respondents, but I note that this was possibly because the Claimant

did not see that as her role and because she herself also wanted some privacy. That combined with her dietary choices and the families view that TV was not a family activity so there was no TV in a communal room, meant that this was a difficult case.

55. However, my overall conclusion is that the Claimant was not treated as part of the family. Importantly, the burden of proof falls on the Respondent to prove that the Claimant was treated as part of the family. It is my firm conclusion that the Respondent has failed to do this. The Claimant might not have engaged in family life on every occasion she could have done, but the Respondent set out stringent and detailed procedures expecting the Claimant to behave in certain ways which go beyond that which one might reasonably do to a family member, even so far as having the option, whether or not used in practice, of having security cameras in place.

56. As the burden falls on the Respondent to prove that the Claimant was treated as the family, I have concluded that this case is one where they have failed to tip the burden of proof to satisfy me. Accordingly, I am required to treat the National Minimum Wage as applicable in this case.

Award

57. Having delivered the judgement we then went on to consider the amount of the award which followed from the judgement. I was referred to the provisions of the National Minimum Wage Regulations 2015, and in particular at Regulation 16, which provide that where the Claimant is provided with accommodation, the national minimum wage is reduced by the amount of £6.40 per day and that this sum must be taken into account in reaching a final calculation.

58. After a discussion with the Claimant and the Respondents' counsel, I proposed that the amount I understood to be due according to the Respondent's schedules was £296.90 gross. The Claimant found the

deduction of the allowance for accommodation difficult to accept, but this is the law. The figures were agreed by the Respondents' counsel.

59. Accordingly, I awarded the Claimant the sum of £296.90.

Employment Judge Walker

Dated: 7 March 2019

Judgment and Reasons sent to the parties on:

13 March 2019

For the Tribunal Office
