EMPLOYMENT TRIBUNALS

Claimant: **Mr A Burzynski**

Respondent: **Amara Care Limited**

Heard at: **Lincoln on Thursday 30 August 2018**

Reserved Judgment on: 30 November 2018 at Nottingham

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

Representatives

Claimant: **In Person**
Assisted by: **Ms Ciepiaszuk, Interpreter**

Respondent: **Mr K Wilson of Counsel**

RESERVED JUDGMENT

The Employment Judge gave judgment as follows: -

1. The claim for non- payment of wages for the period of 19 March 2014 until 31 December 2017 fails and is dismissed.

2. The claim for non-payment of holiday pay for the period between 19 March 2014 and 31 December 2017 succeeds and the Respondent is ordered to pay the Claimant the sum of £195.83.

REASONS

Background and Issues

1. The Claimant presented his claim to the Tribunal on 17 October 2017. It is a claim for unlawful deduction of wages pursuant to Section 13 and Section 23 of the Employment Rights Act 1996 ("ERA") and under the Working Time Regulations 1998 ("WTR"). It is a claim for "sleep-in" and shift pay and holiday pay associated with those sleep-ins and the overtime he says that he undertook.

2. The Claimant had commenced his employment with the Respondent on 12 September 2011 and was employed as a Support Worker.

3. I conducted a case management Preliminary Hearing in respect of this matter on 5 February 2018.

4. At that hearing I identified and the Claimant confirmed that he was claiming only in respect of the period 19 March 2014 until 31 December 2017. He said that during those periods he was engaged in "time work" for the purpose of the National Minimum Wage Act 1998 and the regulations made thereunder.

5. I identified that the Respondent in their ET3 denied the allegations and pointed out that the case would be affected by the 2014 Deduction from Wages (Limitation) Regulations.

6. We identified that the issues to be determined were: -

6.1 Whether the "sleep-in" nights the Claimant referred to in his claim were working time for the purposes of the National Minimum Wage Act 1998 and the 1999 and 2015 National Minimum Wage Regulations.

6.2 Whether the scope of the claim is limited by the deduction from wages (Limitation) Regulations 2014.

7. I gave directions to be complied with and listed the matter for hearing on 23 May 2018.

8. At that hearing I heard evidence from the Claimant and from the Respondent's witness Amanda Brock.

9. After hearing the evidence, we agreed that this case would be affected by the decision in the case of **Royal Mencap Society v Tomlinson Blake**. As the case had already been heard by the Court of Appeal and we were awaiting judgment to be handed down it was agreed between the parties and myself that I should delay hearing submissions until after the conclusion of that hearing as it would no doubt give authority and guidance.

10. At the resumed hearing on 30 August 2018 Mr Wilson appeared as Counsel for the Respondent and had prepared written submissions and handed me a bundle of authorities. The Claimant was unrepresented as he had been throughout the proceedings.

11. I gave the Claimant extra time to read the Respondent's submissions and Mrs Burzynski who was assisting her husband asked for further time to discuss the arguments set out in Mr Wilson's submissions with her solicitor. She said that Mr Burzynski's case was different from those referred to in the **Mencap** case and she wanted to adjourn to another date.

12. For the reasons I set out in my notes of the hearing although I was reluctant to agree any postponement I agreed that the Claimant could have more time as the Claimant now said that he had resources to pay for legal advice. I ordered the Claimant to serve on the Tribunal his written submissions and legal argument in respect of the claims that he had made and gave the opportunity for the Respondent's to file a response.

13. I subsequently received a letter from Mr Burzynski dated 24 September 2018. That said:

> "After the hearing on Thursday 30 August 2018 I got all evidence from Respondent in the morning on that day and when I back to home got time to read the bundle of documents and discuss with adviser/solicitor. I do not want/add any more arguments of my side and I agree with everything what I said at the hearing on 23 May 2018.
>
> Yours faithfully
>
> Andrzej Burzynski."

14. The Respondent in the circumstances did not wish to add to the submissions they had made at the hearing and I have convened today to reach my conclusions in respect of the case.

The Evidence

15. I had heard evidence from the Claimant and from Amanda Brock, one of the owners of Amara Care Limited. There was an agreed bundle of documents and where I refer to page numbers it is from that bundle.

The Facts

16. Amara Care Limited provides care for clients with learning disabilities, mental health issues, physical disabilities and for children. They look after 25 individuals.

17. The Claimant first worked for the Respondents in September 2011 but left and returned and commenced his current employment with the Respondents on 19 March 2014. He is well thought of.

18. He is engaged under a contract of employment dated 12 May 2014 (pages A29-A36). His contract provides that his normal working hours are 30 hours per week. Clause 7 of his contract states:

> "All overtime must be authorised by the delegated manager or it will not be paid… You will be required to do overnight cover which will be paid at the rate applicable to the client/s."

19. He worked for the Respondents at various locations in the village of New Holland in North Lincolnshire until October 2017. Since then he has worked for the Respondents in Kirton Lindsey under different arrangements, although he does work one day a fortnight in New Holland.

20. During the period March 2014 until October 2017 which is the relevant period for this case the Claimant worked at one or other of the Respondent's services in New Holland.

The properties can be described as follows: -

Woodbine

Originally these premises were a registered care home for people with learning disabilities and this was acquired by the Respondents in 2004. At that time care was provided by staff around the clock doing everything for the residents. Following the publication of a Government White Paper in 2001 the focus came to be on promoting independence for individuals with learning disabilities.

Over the years changes have been made to Woodbine to reflect this. The care home is now deregulated and has been turned into 3 flats with facilities to provide day services to not just the tenants of the flats but other clients of the Respondent. There is also a staff area with sleeping facilities.

The 3 flats are let under tenancies to 7 individuals each with separate care packages. This is part of what is described as a "independent living model".

Westburn

This is a tenanted 4-bedroom house in New Holland and there is a separate room which can be used for overnight sleeps by support workers.

Coronation Villas and Summercroft Avenue

These were the two other premises in New Holland which are no longer owned by the Respondents.

These were the premises where Mr Burzynski generally worked for the Respondents. They are not care homes. They are private premises, rented by individuals who also buy a limited care package sufficient to enable them to live independently.

Staff sleeping over

21. Staff have slept over on certain of the premises sometimes. This has always been undertaken by the Respondents but it is not something they have to provide and the care packages that they have agreed over time with the various funding providers have not been negotiated on the basis that they would be providing 24-hour care.

22. Some care plans make reference to 24-hour care but there is no requirement that there are members of staff on the premises 24 hours a day. There are times when the care of an individual might require them to be woken up in the night for medication or treatment or perhaps to be "turned". The Respondents do not provide that sort of care at these premises. If a care provider specifically asked the Respondents to provide "24-hour care" they can do this without having anybody on the premises during the night. This is because they have a separate on-call facility. The individuals who the Respondents provide care for are sufficiently independent to be left with a "pendant" that enables them to contact the Respondents if necessary or to simply ring up.

The on-call facility involves a member of the senior management team or a director always being available out of hours on a dedicated mobile telephone number. That person will therefore always respond immediately, whether to a call or notification via a pendant. They will make whatever arrangements are necessary in an emergency.

23. Many staff stay over because it suits them. Mr Burzynski lives in Kirton Lindsey which is about 30 minutes' drive from the premises in New Holland. He could finish late in the evening and he would have the costs of commuting. Especially if he was on shift again the next morning it made sense to sleep over and he would be paid some extra money for it.

24. As Mrs Brock explained to me it was not something that they had thought about a lot. In the old style residential care home, they simply carried on doing it even though it was a new method of providing care. Now though if they provided such care they would have to pay for it themselves because they would not receive any money from the various care providers to provide this service.

25. If they ever had a situation where staff had to get up in the night regularly it would change the basis upon which the Respondents needed to care for their clients and it would follow on from that there would have to be a conversation with the care providers or care funders because it would mean they would no longer be the right agency for that client.

26. In the relevant period Mr Burzynski slept over on a total of 397 nights. During this time, he was disturbed/had to get up on only 17 occasions. Thirteen of those occasions related to a client who had seizures and who was subsequently moved into residential care. The importance of this is that it showed that if Mr Burzynski was having to get up it was because the client was not right for the service that the Respondent's provided and the individual had to be moved.

27. Of the other 4 disturbances one related to a new client being admitted to hospital. That client was only with the Respondent for 6 weeks before being sectioned.

28. It can be seen from this that Mr Burzynski's sleepovers were not because they needed a presence. If someone needed a presence in the middle of the night it was an indication that they were not the right sort of service or care environment to start with.

29. The question never arose but there was no restriction upon Mr Burzynski being required to be on the premises throughout his sleep-in. There is no such requirement in any of the documents that I have seen or in his contract of employment.

30. Mr Burzynski worked a total of 30 core hours per week. This would be supplemented by sleepover payments, overtime, holiday and mileage payments. The summary of hours worked by the Claimant is at pages A300 to A337.

31. In respect of those sleep-ins the Claimant was paid £35.00 as a flat rate which rose to £45.00 in April 2017.

The Relevant Law

Sleepovers and National Minimum Wage

32. Regulation 30 of the National Minimum Wage Regulations 2015 ("NMW Regs") provides:

"Time work is work, other than salaried hours work, in respect of which a worker is entitled under their contract to be paid: -

(a) By reference to the time worked by the worker;

(b) by reference to a measure of output in a period of time where the worker is required to work for the whole of that period; or

(c) the work that would fall within sub paragraph (b) but for the worker having an entitlement to be paid by reference to the period of time alone when the output does not exceed a particular level."

33. Regulation 32 NMW Regs provide:

> "(1) Time work includes hours when a worker is available, and required to be available, at or near a place of work for the purpose of working unless the worker is at home.
>
> (2) In paragraph (1), hours when a worker is "available" only include hours when the worker is awake for the purpose of working, even if a worker by arrangement sleeps at or near a place of work and the employer provides suitable facilities for sleeping."

34. Mr Wilson relies on the decision of the Court of Appeal in **Royal Mencap Society v Tomlinson Blake** [2018] EWCA 1641. This deals with the entitlement to NMW for workers performing sleep-in shifts. The factual matrix of this case is almost the same as that in the **Mencap** case. Underhill LJ said in that:

> "It is very common in the care sector for workers to agree to "sleep-in" overnight at premises where elderly, disabled or otherwise vulnerable people live, on the basis that they can be called on if assistance is required in the night but otherwise have no duties. The agreement may be either freestanding or an add on to a contract of employment involving other duties and will typically be in return for a fixed amount, with an entitlement to further pay if the worker is in fact called on. Residential staff, both in the care sector and elsewhere, may also be required to be "on-call" overnight. The broad issue in both these appeals is whether the entirety of the period spent on the premises under such arrangements must be taken into account in calculating an employer's obligations under the National Minimum Wage Regulations or only such time as is spent actually performing some specific activity."

35. Lord Justice Underhill then went on to say that having regard to Regulation 32 NMW Regs at paragraph 43:

> "The self-evident intention of the relevant provisions is to deal comprehensively with the position of sleep-in workers. The fact that their case is dealt with as part of the availability provisions necessarily means that the draftsman regarded them as being available for work rather than actually working. That is hardly surprising; it would not be a natural use of language, in a context which distinguishes between (actually) working and being available for work to describe someone as "working" when they are positively expected to be asleep throughout all or most of the relevant period."

36. He then went on to find at paragraph 49:

> "Workers sleeping in under arrangements of the kind identified above will only be entitled to have their sleep-in hours counted for NMW purposes where they are, and are required to be, awake for the purpose of performing some specific activity."

37. He then went on to find at paragraph 86:

> "For the reasons which I have given I believe that sleepers-in, in the sense explained at paragraph 6 above, are to be characterised for the purpose of the regulations as available for work, within the meaning of Regulation 15(1)/32, rather than actually working, within the meaning of Regulation 3/30 and so fall within the terms of the sleep-in exception in Regulation 15(1A/32(2): and we are not bound by authority to come to any different conclusion. The result is that the only time that counts for NMW purposes is time when the worker is required to be awake for the purposes of working."

38. As Mr Wilson pointed out to me Lord Justice Underhill gave short shrift to the idea that the requirement to keep a "listening ear" affected the legal analysis which applied. He focussed on the reality that a sleeper-in was "expected to, and almost always did, get an uninterrupted night's sleep".

My conclusions re sleepovers and NNW

39. As Mr Wilson points out and I have no hesitation in respect thereof I am bound by the decision in **Mencap**. It is on all fours with the case of Mr Burzynski. He is entitled to be paid National Minimum Wage for the time actually spent working during sleep-in shifts and that is what his legal entitlement is. The only time that counts for NMW purposes is time when he is required to be awake for the purposes of working.

40. In this case Mr Burzynski accepts that his role was reactive. He only helped if he was needed. He was there as a precaution only. He could sleep and in general he was undisturbed. He would go to bed and get up in the morning and simply be available in case of an emergency.

41. Although he might have been required to sleep with a monitor in his room so that he could keep an ear on tenants with epilepsy it did not affect that legal analysis. He was not required to be awake for the purpose of working so he was

not performing time work.

42. If he did get awoken during his sleep-in shifts and he reported at that time he would be paid for the time that he worked as normal.

43. For these reasons the Claimant was not performing time worked when carrying out sleep-in shifts and was not entitled to be paid National Minimum Wage during that time. That claim fails and is dismissed.

Holiday pay

44. This claim again relates to the period from 19 March 2014. The claim that is left is for holiday pay which factors in the overtime that the Claimant undertook. In view of my finding in respect of the sleep-ins this relates to the payments he received in respect of the sleep-ins which were not factored into the holiday payments.

45. I noted that it was conceded by the Respondents following the decisions in **Bear Scotland v Fulton** [2015] ICR 221 and **Dudley Metropolitan Borough Council v Willets** [2018] ICR 31 that both non voluntary and voluntary overtime normally work counts for the purposes of calculating holiday pay under Regulation 13 of the Working Time Regulations 1998. This is in relation to the 4 weeks paid annual leave guaranteed by EU law.

46. In respect of the other 1.6 additional weeks' holiday provided by UK law, as per the **Dudley Metropolitan Borough Council** case, overtime is only included if it is contractually guaranteed by the employer and compulsory for the employee for it to count for the purposes of "normal working hours" within the meaning of Section 234 ERA.

Temporal limits on claims under WTR

47. Regulation 30(2) of the WTR provides:

> "Subject to Regulations 30A and 30B, an Employment Tribunal shall not consider a complaint under this Regulation unless it is presented:
>
> (a) Before the end of the period of 3 months (or, in a case in which Regulation 38(2) applies 6 months) beginning with the date on which it is alleged that the exercise of the right shall have been permitted (or in the case of a rest period or leave extending over more than one day, the day on which it should have been permitted to begin) or, as the case may be, the payment should have been made;
>
> (b) within such further period as the Tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of 3, as the case maybe, 6 months."

48. Regulation 13(9) WTR provides:

> "Leave to which a worker is entitled under this Regulation may be taken in instalments but:
>
> (a) It may only be taken in the leave year in respect of which it is due,

and;

(b) it may not be replaced by a payment in lieu except where the worker's employment is terminated."

This is known as the "use it or lose it" principle.

49. Mr Wilson referred me to the case of **King v Sash Window Workshop [2018] ICR 693.** The decision applied only in relation to paid annual leave under Regulation 13 WTR not Regulation 13A of the WTR.

Calculating holiday pay

50. Regulation 16(1) WTR provides that a week's pay for the purpose of holiday is to be determined in accordance with the provisions of Sections 221-224 ERA. In this case the National Minimum Wage claim has been unsuccessful and there are normal working hours. All that needs to be taken into account is the additional payments made for the sleep-ins.

51. Regulation 16(3)(c) WTR provides that the "calculation date" is to be taken to be the first day of the period of leave in question.

Out of time point

52. I am satisfied that any claim under the WTR for annual leave proceeding the period of annual leave from 27 May 2017 to 11 June 2017 is out of time. This is because the period of annual leave which the Claimant took prior to the May/June 2017 was in December 2016. As Regulation 30(2) WTR makes no provision for a claim for a series of underpayments of holiday pay unless the claim is brought within 3 months of the deduction in question the right to a remedy is lost. The only underpaid holiday claim that can therefore proceed under the WTR is for the May/June 2017 period of leave.

53. I have already said that I do not consider that the **King v Sash Windows** case has any relevance to the current case.

Quantum re Holiday pay

54. I have seen the calculations made by the Respondent in respect of the value of the underpayment in holiday pay for the leave in May/June 2017. I have looked at the time sheets and pay tabs that are on the Respondent's spreadsheet and I am satisfied as follows: -

54.1 The total number of hours worked between 27 February 2017 and 21 May 2017 (12 weeks) is 374.

54.2 Of these 143 were worked at £7.50 per hour and 231 at £8.00 per hour.

54.3 The total number of sleep-ins completed during this period was 27.

54.4 Eleven of these were at £35.00 and 16 were at £45.00.

54.5 The total pay for that 12-week period was (143 x £7.50), plus (231 x £8.00), plus (11 x £35.00), plus (16 x £45.00) equals £4,025.50.

54.6 The average weekly remuneration is therefore £335.46 (£4,025.50 divided by 12).

54.7 The Claimant took 9 days' holiday in May/June 2017.

54.8 The amount of holiday pay he was entitled to for this period was £603.83 at (1.8 x £335.46).

54.9 The Claimant has been paid £408.00 holiday pay for this period i.e.-

£128.00 on 28 June 2017 and;

£280.00 on 28 July 2017.

54.10 The Claimant is therefore owed £195.83.

55. The Respondent is therefore ordered to pay this sum to the Claimant in respect of holiday pay due.

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Employment Judge Hutchinson

Date 16 January 2019

JUDGMENT SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE