EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr L Butler	**v**	Care Success Solutions Limited

Heard at: Bury St Edmunds **On:** 11, 12 & 13 March 2019

Before: Employment Judge Laidler

Appearances
For the Claimant: In person
For the Respondent: Ms C Sketchley, Solicitor

RESERVED JUDGMENT

1. There was no unauthorised deduction from wages in respect of payment for mileage incurred in travelling to and from work and for travel to training there being no contractual entitlement to such and those claims are dismissed.

2. Upon the respondent's concession in submissions judgment is entered for the sum of £8.21 due to the claimant as payment due for undertaking an online training course at home.

3. The claimant was not subjected to a detriment(s) contrary to section 23 National Minimum Wage Act 1998 and such claim is dismissed.

4. The claimant resigned and was not in law dismissed.

5. Further, and/or in the alternative, had it been found that the claimant had been dismissed the dismissal was not automatically unfair contrary to section 104A Employment Rights Act 1996

6. All claims brought by the claimant fail and are dismissed.

RESERVED REASONS

1. The claim in this matter was issued on 26 February 2018 and the response received on 24 May 2018, defending all the claims brought.

2. There was a preliminary hearing on 12 October 2018 before Employment Judge James. This had been scheduled to be the Full Merits Hearing, but on being presented with six witness statements, the Tribunal determined that it could not complete the case in the one day allocated to it and proceeded to case manage the matter and relist it for hearing. The issues were clarified at that hearing as follows:

3. **The issues**

'3.1 Did the claimant suffer a detriment having made a claim under the National Minimum Wage Regulations 2015?

3.2 Was his dismissal as a result of having made that claim?

3.3 Is the claimant entitled to be paid travel expenses for his travel from home to work?

3.4 The claimant also claims he is entitled to be paid for his travel time attending training. This claim amounts to £57.47.'

4. The preliminary hearing recorded there were no other claims outstanding. The claimant had claimed for the National Minimum Wage in respect of sleeping in. The respondent had made a payment to the claimant on the 21 March 2018 following the decision of the Employment Appeal Tribunal after he resigned. Although this decision has subsequently been overturned by the Court of Appeal, the respondent accepted at the previous hearing it was unable to make a claim for the money to be returned on the basis of a counterclaim in these proceedings as no contract claim had been made by the claimant.

5. The claimant had prepared for that hearing, and relied on at this hearing, a document headed 'Updated Particulars of Claim for Hearing 12 October 2018'. The claimant cross refers to it in paragraph 47 of his updated statement for this hearing confirming that the claim for constructive dismissal is as laid out in his ET1 and the 'Updated Particulars of Claim'. At section B of that document the claimant stated his constructive claim as follows:

'the right to not be unfairly dismissed and claims constructive automatic dismissal for the Respondent's infringement of the Claimant's right to receive at least the National Minimum Wage (NMW) for all his working hours after telling the Claimant the Respondent would not be paying the sleep-in money to comply with NMW Act during a phone call between the Respondent's Grievance Hearing chair and investigator Sue Bird and the Claimant on the afternoon of 27th October 2017. As a result of this continuing

infringement the Claimant resigned shortly after with the infringement confirmed in writing by the Respondent a few hours later in their Grievance Outcome letter'

6. The 'Updated Particulars of Claim' also contained claims that:

   6.1 Section C - the respondent failed to handle the claimant's grievance correctly as detailed in the contract or the ACAS Code of Practice and cited section 207 Trade Union & Labour Relations (Consolidation) Act 1992 ('TULCRA') providing for an uplift to an award in certain defined circumstances, and

   6.2 Section D – unpaid mileage expenses (as set out at 3.3 above)

   6.3 Section E – unpaid time to training and unpaid online training.

7. At this hearing, the Tribunal heard from the claimant and from Dawn King on his behalf. On behalf of the respondents, the Tribunal heard from:

   Zamir Lal, Director;

   Andrea Spurr, Manager;

   Ashley Pitcher, Financial Controller and Office Manager;

   Susan Bird (provided a witness statement signed on 8 August 2018 but did not attend to be cross examined).

Claimant's Application to Strike Out the Response due to delay of the Bundle and witness statements.

8. The claimant had written to the Tribunal on 5 March 2019 raising issues with the bundle and witness statements. The Judge had indicated these matters would be dealt with at the outset of the hearing.

9. On 12 October 2018, when the hearing was adjourned, Employment Judge James made the following orders:

   9.1 That the claimant file his final statement of evidence by no later than 26 October 2018;

   9.2 That the respondent file their further statements of evidence by no later than 26 October 2018;

   9.3 By 26 October 2018, the parties to agree which documents are going to be used at the final hearing and the respondent to paginate and index the bundle.

10. It was clear from the chronology given by both parties that these deadlines were not kept to. The claimant objected to the respondent's witness statement stating it now appeared different. It appeared to the Employment Judge however, that this was because Mr Pitcher in particular, had previously prepared two witness statements and had now consolidated his statement into one. That might mean that words had been changed and the order of the statement altered. The respondent's representative did not believe that the witness statements were different in any material respect.

11. Having heard all the submissions the Tribunal was satisfied that the response should not be struck out. It was unfortunate that Orders had not been complied with, but this seemed to be due to delay on both sides. The Tribunal had to determine whether a fair trial was still possible and was satisfied that it was. The parties were present and ready to proceed. Any changes in the witness statements in so far as they were relevant to the issues could be raised with the witnesses in cross examination by the claimant. Whilst the Judge was reading the witness statements, the claimant would have further time to consider the bundle. The fact was that when the parties attended last October they had believed that to be the full hearing and the claimant must be well aware of his case and how he wishes to present it from that time. The Tribunal also considered the fact that if the matter were postponed (although neither party had asked for that), it would probably not be re-listed until 2020 and it was not in the interests of either party or in accordance with the overriding objective for there to be that delay. The Judge would read for the morning and start the afternoon with the claimant's evidence.

12. There had been a witness statement served on behalf of the respondent by Susan Bird. She was not attending to be cross examined. The claimant had wished to call her. The Judge explained that it was up to the respondent who it called. Had the claimant applied for a witness order for her, it would have been explained that he would not have been able to cross examine her as she would have been his witness. Limited weight would be given by the Tribunal to the statement as the witness was not here to be cross examined on it.

13. It was emphasised to the parties that the Tribunal must conclude the case in its entirety within the three days listed. It transpired this was not possible and the matter was adjourned after submissions hence these reserved reasons.

14. From the evidence heard, the Tribunal finds the following facts.

The Facts

15. The claimant had worked for the respondents since February 2017, but via an agency. He was directly employed from 19 April to 27 October 2017.

16. On 7 March 2017, he was made an offer of employment as a Residential Care Worker. This letter had attached to it the job description for that role. The offer was conditional upon the respondent receiving satisfactory references and an enhanced DBS check.

17. When the claimant started employment on the 19 April 2017 he attended 3 days training. He submitted an invoice for payment dated the 21 April 2017 (page 58) This included 27 hours at the training and his mileage to the training. It also included travel expenses for work in Marigold Way, Bedford for 21 – 23 March and 28 – 30 March, before the claimant started work as an employee and whilst he was still paid by an agency. That invoice was paid. Ashley Pitcher who gave evidence had not been involved in payment of it and did not know why that mileage for March had been paid other than to state that it was for the period before the claimant worked for the respondent direct. Andrea Spurr, who heard the claimants appeal against the findings of his grievance told the tribunal she could not remember seeing this particular invoice from the claimant. She had looked into the payment of this invoice but never got to the bottom of why the payment of £54 had been made for mileage in March. That was however, as Mr Pitcher had stated, for a time before the claimant worked directly for the respondent.

18. The respondent issued a contract of employment to the claimant (page 40 of the bundle), this was signed on the 9 May 2017 by the respondent and the 6 June 2017 by the claimant. When he signed it, however, the claimant had made various alterations to it which were not accepted by the respondents. The alterations he had made were as follows:

    18.1 Probationary Period – the contract as written provided the employee to give 4 weeks' notice and the employer only 1 week and the claimant had added *"for misconduct / poor performance otherwise providing for 4 weeks' written notice";*

    18.2 Holiday Entitlement – the claimant had deleted the section headed 'C. Compulsory Holiday';

    18.3 Ending Employment – the claimant had again amended the notice provisions;

19. What the claimant did not delete or amend were the following:

    19.1 That there would be a probationary period of 6 months ending 19 October 2017;

    19.2 That the claimant's regular hours would be:

        "varied to suit the needs of the business. Work hours will include minimum 3 sleep-in duties on a regular basis. Typical shifts can be from 3 days from 0800 hours until 2200 hours followed by a sleep-in, payment equates to £8.21 per hour and those hours could be varied by mutual agreement";

16.3 Additional hourly rates and methods of payment:

£20 overnight sleep-in rate, the weekend rate and bank holidays were at the usual rate of £8.21.

20. Of relevance to the claims brought to this Tribunal is that there is nothing in the standard form of contract in relation to the reimbursement of travelling to and from work, neither did the claimant add in handwriting his desire to have a clause dealing with that. The tribunal is therefore satisfied it had not been agreed between the parties that such would be paid.

21. The claimant attempted to negotiate his contract with Ashley Pitcher. He wrote a detailed letter to him on 29 June 2017 setting out how it had been,

"a challenge for me to negotiate any working conditions with your company as you say that Care Success Solutions does not participate in any negotiations when it comes to employment contracts as they are the same across the board for every employee".

22. He set out the matters that he had not agreed with in the contract as set out earlier. He also stated that there was the further point about mileage from his home to work in Bedford. He stated it had been agreed with Gabi, his previous line manager when he started, that his financial expense would be reimbursed.

23. By letter of 3 August Mr Pitcher replied to the claimant sending another two copies of the standard form contract for the claimant to sign. He confirmed that the contracts remained the same as before and that the company did not accept amended contracts. This document was not signed by the claimant. The tribunal is however satisfied that by continuing to work for the respondent it represented the terms of the contract between the parties.

24. By letter of 4 August, the claimant sent his hours to the respondent. In this he included his mileage from 13 May to 4 August.

25. By letter of 7 August, Ashley Pitcher confirmed that the hours had been forwarded to him by Adrian. He stated that as previously confirmed to the claimant, they do not pay mileage from the claimant's home address to his place of work, they only paid mileage on work related matters.

26. The claimant replied on 8 August regarding the number of 'sleep-ins' there had been and stated it had been agreed with him that he would be paid for his mileage when he took the job on. He believed it was "therefore, part of our current agreement". He stated this had been agreed with Gabi when he started.

27. The claimant continued to argue with Mr Pitcher by email that he was entitled to mileage and Mr Pitcher continued to make it clear that the company did not pay mileage to the employee's place of work. By email of 11 August Mr Pitcher agreed the company owed the claimant 9.75 hours and would arrange for that to be paid in the claimant's next pay.

28. The claimant did not accept that he was owed 9.75 hours and set out in a detailed letter of 13 August 2017 what he believed he was entitled to. Of note is that the claimant stated that 'I appreciate you said you were unable accept those suggested/amended terms and so our working agreement remains as it has been since I began working for you'.

29. In this letter the claimant reiterated the points he had already made about compulsory holiday and the notice period during the probation. He also pursued his argument about mileage. In an email of 17 August, the claimant pursued these arguments and stated that when he had worked in Grafton Way, through the agency, mileage had not been paid because he was working in Northampton where he lived. When he worked at Marigold Way in Bedford, through the agency, mileage was paid because the placement was in Bedford some distance from where he lived. In reply, Mr Pitcher stated again that he had never agreed mileage with the claimant. Moving forward the respondent would be paying the additional 9.75 hours as already stated. The tribunal is satisfied that the position of what was paid whilst the claimant worked for the agency is not relevant to the terms of his employment contract with the respondent.

The claimant's email to Zamir Lal, 24 August 2017.

30. The claimant forwarded an email to Mr Lal, copied to Adrian Pitcher on 24 August 2017. It is this which the claimant states should have been treated as a grievance. In this the claimant submitted that since working for the company, his pay slips had been incorrect and his attempts to correct them had failed. This had partly been due to errors made by Gabi in her submitted time sheets and *"*partly due to breaches of agreement made when he began working at Marigold Way*"*.

31. The claimant stated he had taken some advice and it had become apparent that as a company the respondent was not paying all his hours correctly and he had been advised that was a breach of the company's statutory obligations. Travelling to and from training he stated is considered working hours as being mandatory and therefore part of the employee's duties to attend. In addition, the claimant stated the associated travelling time should also be compensated for. The claimant also stated in this email that he would be prepared for Mr Lal to treat the correspondence as an application "for any further managerial / trouble shooting positions that may work alongside*"* his current role. The claimant set out the amounts which he believed he was due:

    Period 2 – 1 hour from online training at home, £8.21;

6 hours travel time to and from training,	£49.26;
Period 3 – 27 hours and 1 sleep,	£241.67;
Period 4 – 3.75 hours,	£30.79;
Period 5 – 2 sleeps,	£40;
Mileage from 13 May to 4 August,	£233.50;
Total claim	£603.43.

32. In an email of 25 August 2017, Mr Pitcher thanked the claimant for the information given and stressed that the claimant's previous manager Gabi (no longer employed by that time by the respondent) had provided timesheets to payroll which had been processed for payment. He had given consideration to all the hours submitted by the claimant and confirmed that the company would pay him an additional 22.75 hours in his next pay. He again reiterated that mileage would not be paid to the claimant's place of work, it would only be paid in relation to business related activities, for example, transporting a young person to a meeting or for attending training courses.

33. In a letter of 14 September, the claimant stated he did not understand Mr Pitcher's figures but was prepared to accept the figures that had been put forward. This was an affirmation of the contract. He continued however, to assert his entitlement to mileage.

34. With a letter of 28 September, the claimant emailed Adrian Mundle, stating that Zamir Lal had suggested he forward to him the original letter to Mr Lal of 24 August. What he now did, however, was assert that that had been a grievance and that he now believed the company was in breach of its grievance procedure. Under a heading '*Mutual Trust and Confidence*' he asserted that the company had refused to properly investigate his claim that Gabi agreed to continue paying mileage and that this continued to destroy or seriously damage trust and confidence.

35. Under a heading, '*Discrimination'*, the claimant stated he had been discriminated against when he had been informed by other staff that mileage was paid when they must work somewhere which was not considered their place of work.

36. The claimant also stated under a heading, '*Bullying*', that there had been attempted intimidation of being threatened with disciplinary action for not signing the contract, that management had not carried out the investigations properly, they had asked him questions about his line manager without explanation and while he was off work and at home and management had ignored his pay issues and he believed this amounted to

a breach of the company's common law duty of care. The claimant stated he had involved ACAS to help resolve these issues and *"hopefully restore a working relationship"*. He hoped this would be possible without the necessity of going to an Employment Tribunal.

37. Following on from that email, on 28 September, the claimant wrote to Adrian Pitcher setting out what he considered were unresolved issues. He asserted that time spent training or travelling to training and work when workers can sleep, amounted to working time. This was the first time that this was stated in this way by the claimant. Prior to this letter it was queries about the hours paid rather than the rate that the claimant had been raising. He believed that all his pay periods since working at Marigold had not been compliant with the statutory requirement. He maintained that his manager had agreed he would be paid mileage to and from Bedford as part of his agreement to carry out work at Marigold.

38. The claimant's correspondence was acknowledged by Shauna Bradshaw, Office Administrator, with an email of 28 September stating it would be dealt with under the company's grievance procedure and that Adrian Pitcher would like to meet with the claimant on 3 October 2017. Adrian Mundle, Regional Manager, would also be present and the claimant had the right to be accompanied by a work colleague or an accredited trade union official.

39. In an email of 2 October, the claimant stated he had raised a grievance firstly on 24 August and had had to now involve ACAS to help resolve the issues. He was waiting to hear back from Graham Young, the conciliator. When he had heard back from him would be better informed as to how to proceed with the grievance hearing. Shauna Bradshaw advised that the grievance hearing would go ahead as previously advised. The claimant responded that his original letter to Zamir Lal had been a grievance and he was expecting the company to investigate all matters and then invite him to a meeting for discussion with a view to finding ways to resolve the problems. As some of the grievance concerned Adrian Pitcher, he did not feel it appropriate that he hold the meeting. Also, the claimant would like to be accompanied by a personal friend, who was based in Coventry and therefore he asked for a mutually convenient venue between Northampton and Coventry and wherever may be a suitable location for whoever else would chair the meeting.

40. Shauna Bradshaw replied scheduling the meeting for 12 October at the Holiday Inn in Northampton to discuss the claimant's grievance. By email of 6 October, the claimant attached highlighted parts of his grievance letter sent to the company on 24 August and set out extracts from a document headed 'How to Prepare for and Conduct a Grievance Hearing', which the claimant stated contained "commonly accepted practice for preparing for a grievance hearing and along the lines of what I am expecting from the company". In a further email of 11 October, Shauna Bradshaw confirmed the meeting on 17 October and that it would be conducted by Susan Bird, company trainer.

41. On 16 October, the claimant emailed Sue Bird stating that he was expecting a full investigation to have been completed before the meeting. He stated that he now required answers to questions he was submitting in a three page PDF file. He went on:

> "Answers must be provided prior to commencement of the grievance hearing tomorrow morning and in time for me to prepare for the hearing. I would prefer to have the answers by close of business today but appreciate you are doing some training today and others may be busy and so it may take a few hours longer so I will be available to prepare for the meeting from 8 am tomorrow morning".

42. The questions were seen at page 184 of the bundle. There were 36 questions under the following headings – Mutual Trust and Confidence (26 questions), Mileage (8 questions), Working Hours (2 questions) and a quote from the case of Dattani v Chief Constable of West Mercia about the drawing of inferences in discrimination cases from 'evasive or equivocal replies to any questions from complainants.'

43. Under the heading 'Mutual Trust and Confidence' the questions revolved around what conversations Mr Pitcher had with Gabi, the claimant's previous manager on 26 June 2017, whether he sent her an email then and if so what the content was and what actions did he then take to ensure the claimant was paid correctly. The claimant then asked questions about what action Adrian Pitcher had carried out when Dawn King conveyed the claimant's frustrations about his pay in week of 24 July and the claimant raised this on 4 August. He questioned Mr Pitcher's email to him of the 10 August and asked why Mr Pitcher had stated what he had in that document. The claimant then raised questions about what action had been taken by Zamir Lal after their telephone call on the 24 August and what actions Mr Pitcher had then taken. He questioned why he had not been called to a grievance hearing.

44. Under the heading 'mileage' the claimant's questions included whether the respondent had paid his mileage when he was working for the agency, whether it denied that Gabi ever agreed that the claimant would continue to receive mileage and questions around where he had been working

45. Under 'working hours' the claimant's questions included what actions had been taken to ensure that the respondent was compliant with all statutory obligations about working hours.

Grievance hearing 17 October 2017.

46. The respondents took some minutes of the meeting. The claimant covertly recorded it even though it was stated at the outset that the company was not giving permission for the meeting to be recorded. A transcript of the claimant's recording was in the bundle at page 197. It notes that Miss Bird commenced the meeting by stating that there had not been time to answer all the questions prior to the meeting and that she would like to establish what the claimant's grievance was and how he would like it resolved.

Gabi was no longer with the company. The claimant confirmed that Gabi had never put anything in writing about his mileage but that he 'considered a verbal agreement to be sufficient'.

47. The claimant stated at this meeting that since raising his grievance he had 'since added discrimination and bullying but needed answers to my questions first before we could address that properly in more detail'.

48. The meeting concluded with it being agreed that the claimant would email his questions to Shauna Bradshaw and she would pass them onto the relevant people so that Ms Bird could get answers to the claimant in time for him to respond by the 26 October.

Meeting 23 October 2017 conducted by Gary Moffatt, new Manager for the house in which the claimant was working.

49. Mr Moffatt, the new manager, expressed his concern that he had not been able to find various files in the house, he was disappointed at the state of the premises and wanted help with decoration. He explained the rota needed to be fair for everyone. Notes of the meeting were seen at page 200 of the bundle.

50. Mr Moffat stated that he had been disappointed on his first visit to the house 'to see the state of the bedroom which was empty after young person had moved on.' He had explained to staff that he would get the materials required to decorate the bedroom. It is specifically noted that 'you have not all been supporting in this which I explained is not acceptable as I had asked for this to be done'. He made specific reference to the claimant, Lee who had stated that the staff were not happy with this and that it was not part of their roles. The notes record 'I explained that in our roles it is our responsibility to keep the home to best standard and also in your job specifications it states tasks or jobs asked by the manager or company…' A further dialogue between the claimant and Mr Moffat was noted:

> 'Lee, went on to say next you will be having us do the guttering, I replied no that is not safe and you have not been asked to do that I explained to Lee that I feel you are being difficult and Lee said no just sarcastic. I explained that I am the manager and need to ask staff to do things.'

51. There was then a discussion about rotas and staffing. Dawn had said that Magdalena could only work Tuesday and Wednesday and is not flexible and needs a weeks notice to work and there were days when the claimant worked:

> 'I asked if this is the case that Lee has set days to work he said well these are days I can work due to having my children half the week. I said I will have to look into this to see if it is agreed you have set days as this is hard for the rota and also if it is not agreed then it would not be set in stone and you are all saying that these are the day you work'

He explained that he may bring in a rolling rota as they needed everyone to work a set pattern and for the rota to meet the needs of the home and young people.

52. Mr Moffat concluded the meeting by stating how really worried he was about the home and would be arranging supervision sessions with each member of staff to discuss the issues.

53. By letter of 24 October, Sue Bird advised the claimant that his grievance was taking longer than anticipated to investigate, partly due to what she referred to as the 32 questions he had raised.

The claimant's resignation.

54. On 27 October the claimant had a telephone conversation with Sue Bird. The claimant's evidence to this tribunal was that he resigned because of this conversation. What he states was said he set out in his appeal against the grievance outcome (page 234) Sue Bird told him that they were still having difficulty getting answers to all of the claimant's questions. With regard to sleep ins that this was 'a problem because there was no enforcement of payments' and because it had not actually gone on the bill and was 'vague'. Having not heard from Sue Bird it is not clear what this meant.

55. By email of 27 October at 16:25, the claimant submitted his resignation to Ashley Pitcher stating he regarded himself as constructively unfairly dismissed without notice.

56. After that had been sent at 18:39 hours, Sue Bird sent out her grievance hearing outcome. She found the grievances to be unfounded.

57. The claimant then submitted his reasons for resigning in a separate document dated 30 October 2017. This was seen at page 217. The following were the stated reasons for resignation:

57.1 not meeting my legal statutory right to receive National Minimum Wage – that following case law the care worker on a sleep-in shift should be classed as working and entitled to the NMW.

57.2 Further breaches of the company's mutual trust and confidence – this related to the claimant's grievance and that 'despite assurances from Sue Bird and apologies for not dealing with my grievances properly in the past the Company has not complied and as a result further breached the Company's mutual trust and confidence

57.3 Unilateral cut in hours – that Mr Lal had removed 10 hours from the claimant's shift scheduled for 31 October and said that another member of staff would be given priority for the November rota.

57.4 Further bullying – that Gary Moffat had bullied the claimant at and following the 23 October meeting with regard to decorating.

Grievance appeal

58. The claimant submitted his appeal against the grievance outcome on 8 November 2017, page 222.

59. The grievance appeal hearing was conducted on 5 December 2017 by Andrea Spurr and present was Zamir Lal. Again, the claimant recorded the meeting without the consent of the respondent.

60. By letter of 17 January 2018, the claimant was given the grievance appeal outcome confirming the decision reached by Sue Bird.

61. With regard to the sleep-in allowance and changes in the law, an amount was now paid to the claimant in respect of the sleep-ins. The figure of £1,593.72 gross was set out in that letter.

62. By letter of 30 January 2018, the claimant sent his settlement proposals.

63. Mr Pitcher revisited the figures and confirmed to the claimant in a letter of 22 February 2018, that the company would be paying £3,155.48 gross. The claimant rejected that offer by letter of 23 February 2018, although the Tribunal understands that that sum was paid to him.

Covert recording by the claimant

64. The tribunal had a bundle of transcripts of recordings covertly recorded by the claimant. These included telephone calls as early as May 2017 as well as the various grievance meetings. The claimant did not disclose these prior to these proceedings even when he appealed. In evidence the claimant made it clear that one of his reasons for resigning was the lack of answers to his questions submitted as part of his grievance. The first set of questions relates to a conversation between Gabi and Adrian on the morning of the 26 June. That is one of the conversations recorded by the claimant (page 8 of his bundle of transcripts). He accepted in evidence that he knew the answer to the questions he had posed from his transcript. He asked questions knowing the answers. He wasn't going to disclose the transcripts in his answers but had them in case he needed them for proceedings. The tribunal can only conclude from this that from May 2017 the claimant had in mind proceedings and rather than being open and transparent with the respondent was intent on collecting evidence which he did not intend to disclose to the respondent unless and until he took proceedings.

Relevant Law

65. The claimant, who had not accrued two years continuous service relies on the provisions against detriment and automatically unfair dismissal.

66. Section 23 of the National Minimum Wage Act 1998 provides:

The right not to suffer detriment.

(1) A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer, done on the ground that—

(a) any action was taken, or was proposed to be taken, by or on behalf of the worker with a view to enforcing, or otherwise securing the benefit of, a right of the worker's to which this section applies; or

(b) the employer was prosecuted for an offence under section 31 below as a result of action taken by or on behalf of the worker for the purpose of enforcing, or otherwise securing the benefit of, a right of the worker's to which this section applies; or

(c) the worker qualifies, or will or might qualify, for the national minimum wage or for a particular rate of national minimum wage.

(2) It is immaterial for the purposes of paragraph (a) or (b) of subsection (1) above—

(a) whether or not the worker has the right, or

(b) whether or not the right has been infringed,

but, for that subsection to apply, the claim to the right and, if applicable, the claim that it has been infringed must be made in good faith.

(3) The following are the rights to which this section applies—

(a) any right conferred by, or by virtue of, any provision of this Act for which the remedy for its infringement is by way of a complaint to an employment tribunal; and

(b) any right conferred by section 17 above.

(4) This section does not apply where the detriment in question amounts to dismissal within the meaning of—

(a) Part X of the Employment Rights Act 1996 (unfair dismissal) …'

67. 104A Employment Rights Act 1996 provides:

The national minimum wage.

(1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that—

(a) any action was taken, or was proposed to be taken, by or on behalf of the employee with a view to enforcing, or otherwise securing the benefit of, a right of the employee's to which this section applies; or

(b) the employer was prosecuted for an offence under section 31 of the National Minimum Wage Act 1998 as a result of action taken by or on behalf of the employee for the purpose of enforcing, or otherwise securing the benefit of, a right of the employee's to which this section applies; or

(c) the employee qualifies, or will or might qualify, for the national minimum wage or for a particular rate of national minimum wage.

(2) It is immaterial for the purposes of paragraph (a) or (b) of subsection (1) above—

(a) whether or not the employee has the right, or

(b) whether or not the right has been infringed,

but, for that subsection to apply, the claim to the right and, if applicable, the claim that it has been infringed must be made in good faith.

(3) The following are the rights to which this section applies—

(a) any right conferred by, or by virtue of, any provision of the National Minimum Wage Act 1998 for which the remedy for its infringement is by way of a complaint to an employment tribunal; and

(b) any right conferred by section 17 of the National Minimum Wage Act 1998 (worker receiving less than national minimum wage entitled to additional remuneration).

68. It is not necessary for the purposes of this decision to deal with the detail of the reported cases on 'sleep-ins' but what is relevant is the time line. The decision of three consolidated cases including Royal Mencap Society v Tomlinson-Blake [2017] ICR 1186 was handed down by the then Simler P (as she then was) on the 21 April 2017. She found in each case in favour of the claimant, though only in the Mencap case was her decision directly decisive of the national minimum wage issue. The employers appealed and when the matter reached the Court of Appeal it was heard with Shannon v Rampersad [2015] IRLR 982 another sleep-in case though on rather untypical facts. Lord Justice Underhill gave the judgment of the Court of Appeal on 13 July 2018 ([2018] EWCA Civ 1641). In summary it was held that the workers were not entitled to have their entire 'sleeping in' time taken into account in calculating their NMW entitlement.

69. The claimant also relies on section 207A TULCRA which provides as follows:

Effect of failure to comply with Code: adjustment of awards

(1) This section applies to proceedings before an employment tribunal relating to a claim by an employee under any of the jurisdictions listed in Schedule A2.

(2) If, in the case of proceedings to which this section applies, it appears to the employment tribunal that—

(a) the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies,

(b) the employer has failed to comply with that Code in relation to that matter, and

(c) that failure was unreasonable,

the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 25%.

70. Schedule A2 includes:

Section 23 of the Employment Rights Act 1996 (c. 18) (unauthorised deductions and payments)

Section 111 of that Act (unfair dismissal)

Section 24 of the National Minimum Wage Act 1998 (c. 39) (detriment in relation to national minimum wage)

71. The claimant claims constructive dismissal and must show that he was in law dismissed within section 95 ERA:

Circumstances in which an employee is dismissed.

(1) For the purposes of this Part an employee is dismissed by his employer if …

(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.

72. The law on constructive dismissal is still as set out in Western Excavation (ECC) Ltd v Sharp [1978]:

'If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed. The employee is entitled in those circumstances to leave at the instant without giving any notice at all or, alternatively, he may give notice and say he is leaving at the end of the notice. But the conduct must in either case be sufficiently serious to entitle him to leave at once. Moreover, he must make up his mind soon after the conduct of which he complains: for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract.'

73. It is now well established that the breach may be of the express or implied terms of the contract. Mahmud v Bank of Credit and Commerce International SA [1997] [IRLR 462 HL made it clear that the employer must not;

> "Without reasonable and proper cause conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee."

74. In London Borough of Waltham Forest v Omilaju [2004] EWCA (Civ) 1493 the court set out various basis propositions of law that can be derived from the authorities including:

> The test of whether there has been a breach of the implied term of trust and confidence is objective. As Lord Nicholls said in Malik at page 35C, the conduct relied on as constituting the breach must "impinge on the relationship in the sense that, looked at **objectively** it is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in his employer" (emphasis added).

Submissions

For the Respondent

75. The claimant who does not have 2 years continuous service must establish that his dismissal was automatically unfair. The Mencap decision caused a lot of confusion within the care sector with some organisations thinking they would go out of business.

76. The respondent thought it was doing the right thing about sleep-ins. On advice from Croner consultants they made a payment to the claimant in March 2018 but they had been waiting for the Court of Appeal decision as they believed it would be overturned.

77. What is the detriment the claimant has suffered? He asserts it is a reduction in hours. This involves the answer to two questions. Was there a reduction or only something that was mooted and never came to fruition as the respondent asserts. If there was a reduction, was that due to the assertion of a statutory right.

78. The claimant jumped the gun before his hours were reduced or set. The new manager made it clear at the meeting he wasn't looking to fix anything that wasn't broken. The contract states that hours can be varied to suit the needs of the business. Mr Lal just made a suggestion that there be some form of parity between the staff.

79. If the tribunal is not with the respondent and found there was a reduction was that due to the claimant asserting he was not being paid the NMW? By commercial necessity the respondent needed to provide cover for the house, was able to change hours to ensure that was accomplished and it was not safe for one employee to be doing a greater share of the available hours.

80. At the hearing before E J James the claimant had said that the detriment was not being paid the NMW for sleep ins. That cannot be the detriment

as that is what the claimant was complaining about. It could not therefore be the detriment to which he was subject.

81. The claim that the claimant was not paid mileage to and from work cannot be a detriment. It pre-dates the assertion which was not made until September. The respondent submitted that the first actual indication that the claimant was claiming the NMW wasn't being paid for sleep ins was the email in September into which he cut and paste the NMW sections about sleep ins.

82. Dealing then with the individual claims, the 29 June 2017 was the earliest date the claimant was aware he was not going to be paid mileage to and from work. It was never agreed.

83. With regard to the invoice that was paid it was submitted that the respondent did not have work for the claimant at that point as the Northampton house was not live. The claimant offered still to do the training and it was agreed to pay him. It is not clear though whether at that point the claimant was actually still with the agency or not.

84. The respondent would normally pay the employee for doing online training but does not agree with the time taken. It was submitted that the respondent would pay £8 for that training.

85. The travel time to training is never paid. Insofar as it appears Dawn King was paid for this there was some confusion over her time sheets and if she was paid that shouldn't have happened.

86. The claimant's grievance was investigated by Sue Bird and a fair process followed.

For the claimant

87. The claimant relied on his update particulars of claim referred to above.

88. It was submitted that the respondent failed to appropriately handle his grievance in accordance with their policy. The judge specifically questioned what aspect of the ACAS Code the respondent is alleged to have failed to follow. The only point made by the claimant is that they did not treat his grievance of 24 August as a grievance.

89. The mileage to and from work was agreed with the then manager and the claimant considered it a continuation of the expenses agreed with the same manager when he was employed by the agency.

90. The claimant stated he was claiming two detriments. The continued detriment of unauthorised deductions in not paying for the sleep ins and the detriment of having his hours cut.

91. The claimant submitted he first raised the failure to pay the NMW

expressly in his 24 August letter to Mr Lal but conceded that it was not very clear and it was clearer in his September grievance.

Conclusions

92. There is no evidence of any agreement to pay mileage to and from work. The claimant made various additions to the respondent's standard form of contract but this was not one of them. They made it clear to him that mileage was not being paid. The claimant carried on working on that basis. The terms of the contract between the parties were as set out in the respondent's standard terms re sent to the claimant on the under which he carried on working.

93. There was no detriment to the claimant for raising the question of payment of the NMW for sleep ins. He did not raise it as a minimum wage issue until 28 September 2017. He has not established any causative link between anything that occurred after raising this. The detriment cannot be the non payment for sleep ins as that is the very matter the claimant was raising. The statutory language is clear that the detriment is something 'done on the ground that' the worker has taken action or acted otherwise to secure payment of the NMW. It cannot be the very thing that the claimant was seeking.

94. There is no evidence of an actual reduction of hours. Even if there was then the tribunal is satisfied that was to achieve parity between the staff and to ensure adequate cover of the house to accord with the obligations on the respondent, not because of the raising of issues about sleep ins.

95. The non payment of mileage expenses cannot be a detriment as that is something the claimant had been raising from before he made his assertions about sleep ins.

96. There was no fundamental breach of the express or implied terms of the contract of employment such as to entitle the claimant to resign and claim constructive dismissal. As the claimant had not accrued two years continuous service the burden of proof falls on him to establish that the resignation came within the provisions of section 104A. The fundamental breach must therefore relate to the seeking of the NMW as set out in that section. The claimant must establish the fundamental breach and has failed to do so. The state of the law was unclear. It took a Court of Appeal decision in July 2018 to resolve it. The respondent was not acting in fundamental breach of contract in applying the contract as it believed the law to be. It did not act in a manner which demonstrated it no longer intended to be bound by the contract. The claimant chose to resign but was not in law dismissed and his claim for unfair dismissal must fail and is dismissed.

97. The claimant has never been able to state what aspect of the ACAS code the respondent failed to follow in relation to his grievance. It is however

irrelevant as any uplift would only be applicable if the claims had succeeded and all of the provisions of section 207A been met which they have not been. There is no stand alone claim in relation to the grievance.

98. The tribunal must however record that the claimant was not acting in accordance with the concept of mutual trust and confidence in recording telephone conversations and meetings covertly from May 2017 and then even when he appealed not disclosing those to the respondent.

99. In closing submissions, the respondent conceded the claim for payment for the online training course the claimant undertook. An award therefore is made for that admitted sum of £8.21.

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Employment Judge Laidler

Date:5/6/2019

Sent to the parties on: .....

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For the Tribunal Office