EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4102463/2019

Final Hearing held at Wick on 10 October 2019

Employment Judge A Kemp

Mrs I Ilett	**Claimant** **In person**
Mrs A McKevitt	**Respondent** **Represented by** **Mr D McKevitt** **Former husband**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

1. **The claimant contracted with the respondent.**

2. **The claimant was not an employee.**

3. **The claimant was a worker.**

4. The claim for notice pay is dismissed.

5. The claim for a statutory redundancy payment is dismissed.

6. The claimant is awarded the sum of ONE THOUSAND TWO HUNDRED AND SEVENTY FOUR POUNDS AND FOUR PENCE (£1,274.04) in respect of the failure to pay her for holidays she took on 22 June - 7 July, 16-18 August, 22-26 October and 9-11 and 16-18 November all in 2018, under the Working Time Regulations 1998, payable by the respondent.

7. The respondent did not pay the sums to which the claimant was entitled under the National Minimum Wage Act 1998 and National Minimum Wage Regulations 2015 for the period 1 January 2018 to 17 March 2018, which is a breach of contract and the amount of the underpayment is the sum of SEVEN HUNDRED AND NINETY TWO POUNDS (£792.00) which sum is awarded to the claimant, payable by the respondent.

REASONS

Introduction

1. Arrangements for the Final Hearing were made following three Preliminary Hearings held on 3 May 2019, 24 June 2019 and 4 October 2019. The claimant attended the Final Hearing itself in person. The respondent was represented by Mr Don McKevitt, her former husband, who is resident in Australia. The intention had been to have his evidence heard if possible by video conference of some kind, but that proved not to be feasible at the location used for the hearing. As an alternative lest it be required, a conference call had been arranged, and that was utilised using a mobile

telephone, which worked sufficiently well to have the evidence heard from both parties. Both parties confirmed at the start of the hearing that they were content to proceed in that manner, as the alternative would have been to have adjourned the hearing, and at the conclusion of proceedings also confirmed that they had been content that the hearing had been conducted in an adequate and fair manner. Whilst it was far from the paradigm, I was satisfied that it was in accordance with the overriding objective to proceed in such a manner.

The issues

2. The Tribunal identified the following issues:

(i) With which party did the claimant contract?
(ii) Was the claimant an employee?
(iii) Was the claimant a worker?
(iv) Was the claimant entitled to notice beyond that which she received?
(v) Was the claimant dismissed for redundancy?
(vi) Was the claimant entitled to paid annual leave?
(vii) If so, for what period or periods of time?
(viii) Was the claimant paid less than her entitlements under the National Minimum Wage Regulations 2015 when attending sleepovers?
(ix) If the claimant succeeds with any claim, what is the appropriate remedy?

The evidence

3. Both the claimant and Mr McKevitt gave evidence. They did so by written witness statement, supplemented by evidence in relation to the witness statement of the other party. Each was cross examined, and questioned by me. Each party had prepared documents which were spoken to during their evidence. The parties had also agreed a document setting out agreed facts, and the claimant had prepared a Schedule of Loss.

4. After the hearing I was sent, by agreement of the parties, documents from each with regard to sleepovers carried out. The claimant also sent documents with regard to the annual leave she had applied for in 2018. The respondent was given an opportunity to comment on the same, and did so, including by commenting on the sum paid for sleepover latterly.

The facts

5. The Tribunal finds the following facts established:

6. The claimant is Mrs Leanne Ilett.

7. The respondent is Mrs Anne McKevitt. She resides in Australia.

8. The respondent's mother became ill in 2003, with a condition that included dementia and physical infirmity, and her condition became progressively worse. By 2008 she required the assistance of carers in order to remain in her home in Thurso. Initially that was funded by Highland Council. The respondent contracted with the carers by a "Self Employed Carer Agreement."

9. That agreement was drafted by the respondent's then husband, Mr Don McKevitt, who used as a basis for that an agreement he personally had worked under when in the music industry. He did so without professional advice. Neither the respondent nor her husband are experienced in the care sector. They were seeking to make arrangements for the care of the respondent's mother, who was elderly and vulnerable, from Australia where they lived.

10. The care arrangements for the respondent's mother required to increase as her condition deteriorated. By 2015 there was a team of normally nine carers who provided 24 hour care for her. The numbers in the team varied from time to time, and increased to 11 on occasion.

11. The claimant joined that team as a carer on 5 July 2015. She had care qualifications including at SVQ level, and over 10 years' practical experience. She attended an interview for the post, not conducted by the respondent, after which a Self Employed Relief Carer Agreement was sent to her. It was made between the claimant and "McKevitt, Level 20, Tower 2, 201 Sussex Street, Sydney, Australia, representing Jenny Sinclair (Client)". That was intended to refer to the respondent. By that time, the large majority of the cost of care was provided by the respondent and her then husband personally. The respondent's mother lacked capacity to contract. The respondent had been granted power of attorney by her.

12. The term of the contract was to commence on 23 July 2015, although work had started on 5 July 2015, and "will continue until terminated by either party". The services were to act as carer to Mrs Sinclair at her home property in Thurso. The hours of work were specified as follows "The Carer will be required to work a variable number of hours every week as designated by representatives of the client. Reasonable notice will be given to the Carer should her hours need to be changed.". The rate provided was £10 per hour, with a sleepover rate of £35 per night. The claimant was to be "responsible for [her] own tax and national insurance contributions and being tax compliant." There was a termination provision that included termination on notice by the Client of 2 weeks. The agreement included a provision that it constituted the entire understanding between the parties, and was governed by Scots law.

13. The claimant had an induction and orientation process before commencing work. The intention was that she work about ten hours per week.

14. When the claimant was sent the said agreement she considered that it was a good arrangement for her as it allowed her to work around her family commitments. She thought that it suited her.

15. She was able to choose when to work by giving notice for the following month or two months of what days were appropriate for her. The respondent or her husband would then prepare a schedule for that period showing which carer was working which shift, and sent that to the carers. Once the shifts had been specified in the schedule, the claimant (and other carers) required then to work them, in order to provide the care required from Mrs Sinclair.

16. The said agreement was not signed by the claimant. She did however work to it. She made her own arrangements for tax and national insurance contributions. She prepared invoices for the work that she carried out and sent them to the respondent. Most of the correspondence in relation to invoices was handled by Mr McKevitt. He replied to the claimant to make provision in the invoice for blocks including date and invoice number.

17. Payments were made to the claimant in accordance with the agreement, and for the hours or sleepovers she worked, and in accordance with invoices she submitted monthly. From time to time the rates for hours or other payments (such as for Christmas Day) were increased.

18. The claimant ceased to work for the respondent on 14 August 2016 when she was pregnant. She did not make any claim for maternity pay or maternity leave at that stage. She made claims for maternity allowance as a state benefit. There was no specific arrangement made with regard to her return to work.

19. In early February 2017 the claimant was approached by one of the other carers, who she had happened to meet, to ask if she would return to the role as the team was short-staffed. The claimant agreed to do so. She returned on 7 February 2017. That return was not documented. No new agreement was concluded.

20. The claimant worked variable shifts. They could be during the day, or a sleepover at night.

21. A sleepover commenced at 10pm, and continued to 9am. During the sleepover the claimant assisted Mrs Sinclair before she fell asleep. The claimant was required to attend to Mrs Sinclair as and when required during the night. There was an audio monitor next to Mrs Sinclair and a speaker in a staff room in which there was a bed. The claimant could spend time in the staff room, and was able to sleep if there were no tasks to perform. If there were sounds of distress or other issue that required attention the claimant was required to attend to Mrs Sinclair. She may have required to be taken to the toilet, or be turned over to avoid bed sores, or otherwise provided with care, companionship or assistance. In light of the need to be alert for such matters, the claimant did not sleep well during the sleepover, but did so to a limited extent normally. The claimant assisted Mrs Sinclair in the morning with personal care before ending the sleepover shift.

22. If the claimant was not able to attend for a shift, or wished not to do so, she was not able to send someone of her own choosing in her place. If there was to be a substitute for her, that required to be arranged from within the team of carers.

23. The respondent provided all products, tools and equipment necessary for the claimant to carry out her duties.

24. The duties were all performed at Mrs Sinclair's property. The work was carried out regularly and within the time periods specified on the rota that was prepared by the respondent, her husband, or the Facilities Manager.

25. Communication between the claimant and respondent was usually by email, either directly or with the respondent's husband. Very rarely, Mr McKevitt telephoned the claimant.

26. The respondent installed CCTV cameras in her mother's house, with a live feed which she could view from her home in Australia by means of wifi. That

enabled her to see her mother, and to monitor to an extent the care that she was receiving. There were a number of cameras in the house, and a screen in the property which displayed the feed from those cameras.

27. In 2016 the connection for the wifi was severed which meant that the respondent was not able to view the live feed from Australia, but the carers were not informed of that.

28. The respondent would visit the house on about three or four occasions per year. She would send emails on occasion with instructions for the care, or commentary on where she felt that the care was under the necessary standard. Such emails were also sent from time to time by Mr McKevitt. Examples of them were on 8 October 2015, 29 March 2016, 11 April 2016, 19 November 2017 which introduced what were described as “new rules”.

29. Emails with instructions were also sent by the Facilities Manager, including on 13 January 2018, 7 July 2018, 28 July 2018, 18 October 2018, 1 and 12 November 2018

30. The team of carers were expected to put the interests of Mrs Sinclair first. On occasion, if a team member was sick the carer on shift may require to remain with Mrs Sinclair until relieved. Team members were able to make arrangements between themselves if they wished to change arrangements for shifts, but could not do so once a shift arrangement was made unless there was alternative cover from another member of the team. The shift arrangements required also to cover holidays such as Christmas and New Year.

31. On 7 June 2017 Mr McKevitt emailed staff following an issue when a team member was taken ill and there was no cover available. He stated that from then on requests for time off would be allocated on a first come first served basis. Issues arose periodically where a team member wished to have time off, and was not able to do so.

32. The claimant's husband sent her an email in relation to that, on the same day, which stated that Mr McKevitt "has to remember that you are ultimately self-employed and only contracted to do 10 hours per week."

33. A long standing member of the team was made Team Leader, or Facilities Manager, on 19 November 2017 and she took over part of the roles performed by the respondent and her husband. She was able to provide care and assistance directly, and lived next door to Mrs Sinclair. She would visit the property very regularly to check on how matters were progressing.

34. Between 1 January 2018 and 8 March 2018 the claimant undertook 18 sleepovers. She was paid for each one at the rate of £38.50 per night. From and after 17 March 2018 the respondent increased the sums paid for sleepovers so as to meet the minimum wage, which at that stage was £7.50 per hour and was later increased.

35. In about July 2018 the claimant had intimated when she could work for the following period, and a schedule of shifts was set after that that included her working on 1 September 2018. She later received an invitation to the wedding of another carer, and asked to change that to go. Another member of staff later agreed to cover for the claimant and the shift was changed to allow her to attend the wedding.

36. If the claimant wished to have time off, a request for that required to be in writing and with at least four weeks' notice following an instruction to that effect.

37. The claimant requested time off for holidays by email to the Facilities Manager on 8 July 2018, seeking 22 – 26 October 2018. That request was accepted on the following day. The claimant took those holidays. If payment was due therefor, that would have been payable by 31 October 2018.

38. The claimant also requested and took as holidays 22 June - 7 July, 16-18 August, 9 – 11 and 16 – 18 November 2018 with the latter dates sought by email of 29 July 2018, accepted by email the following day. The claimant took those holidays. If payment was due therefor, that would have been payable by the end of the month following the holidays taken.

39. None of the holidays taken by the claimant were paid for by the respondent.

40. On 21 November 2018 Mrs Sinclair sadly died, aged 87.

41. On 27 November 2018 Mr McKevitt wrote to the claimant to state that under the agreement she was entitled to be paid two weeks, the average of the last 8 weeks was £318.51 and he paid her two weeks at that amount less an amount paid for two days after she had died. The sum paid was £637 less £282.86, a net amount of £354.14.

42. During the course of her contract with the respondent the claimant did not work for any other person or organisation, although there was no prohibition on her doing so.

43. On average the claimant worked for two days per week, which included one sleepover.

44. The claimant commenced Early Conciliation on 26 January 2019. An Early Conciliation Certificate was issued on 30 January 2019 and the present Claim was presented on 13 February 2019.

Submissions

45. For understandable reasons the parties each made very brief submissions in which they invited me to accept their evidence and make a finding in their favour.

The law

46. The definition of an employee is in section 230 of the Employment Rights Act 1996, under which are provisions as to notice under section 86 and redundancy payments under section 135. The definition in section 230(1) is:

> "In this Act "employee" means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment."

47. The definition of worker is found also in section 230(3) and, in Regulation 2 of the Working Time Regulations 1998 in effect for present purposes in the same terms, as

> " ….. 'worker' means an individual who has entered into or works under (or, where the employment has ceased, worked under) –
> (a) a contract of employment or
> (b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual"

48. The entitlements to paid annual leave for workers are found in the Working Time Regulations 1998. The right to annual leave is to a total of 5.6 weeks per year, in Regulations 13 and 13A. The right to payment for that is found in Regulations 14 (where employment has ended) and 16 (for leave taken). The right to make a claim to a Tribunal is found in Regulation 30.

49. The provisions as to the national minimum wage are found in the National Minimum Wage Act 1998, with more detail provided in the National Minimum Wage Regulations 2015. Chapter 3 of the regulations is in respect of time

work, where the worker is paid by reference to the time worked and related factors (Regulation 30). Regulation 32 has the following provisions:

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

50. There has been case law in relation to all of these issues. In so far as the question of who is an employee is concerned, it is appropriate to consider a number of factors while having regard to the arrangement as a whole, as was established in the leading case of ***Ready Mixed Concrete (South East) Ltd v Minister of Pensions [1968] 2 QB 497.*** That case identified three tests:

> (1) Did the worker undertake to provide their own work and skill in return for remuneration?
>
> (2) Was there a sufficient degree of control to enable the worker fairly to be called an employee?
>
> (3) Were there any other factors inconsistent with the existence of a contract of employment?

51. ***Harvey on Industrial Relations and Employment Law*** gives the following advice on factors to consider at paragraph A11:

> "there is the degree of control: the greater the scope for individual judgment on the part of the worker, the more likely he or she will be an independent contractor. In addition to this traditional indicator, it may be relevant to consider the following factors:
>
> — What was the amount of the remuneration and how was it paid?— a regular wage or salary tends towards a contract of employment;

profit sharing or the submission of invoices for set amounts of work done, towards independence.

— How far, if at all, did the worker invest in his or her own future: who provided the capital and who risked the loss?

— Who provided the tools and equipment?

— Was the worker tied to one employer, or was he or she free to work for others (especially rival enterprises)? Conversely, how strong or otherwise is the obligation on the worker to work for that particular employer, if and when called on to do so?

— Was there a 'traditional structure' of employment in the trade or has it always been a bastion of self-employment

— What were the arrangements for the payment of income tax and National Insurance?

— How was the arrangement terminable?—a power of dismissal smacks of employment"

52. There have also been a series of cases in relation to the category of worker. There have been a number of cases decided recently on the issue. The first is ***Pimlico Plumbers Ltd v Smith [2018] IRLR 872***. The company used as its workforce 125 'contractors', including the claimant. They carried out plumbing work, wore its uniforms, drove its marked vans and were represented to customers as its workforce. They were directed to customers by the company, who invoiced for the work. They were described in an agreement as self-employed, and attended to their own tax and national insurance contributions. The Supreme Court held that they were workers. At an earlier stage the tribunal had held that they were not employees, and that matter was not challenged later on appeal.

53. The second case is the decision of the EAT in ***Uber BV v Aslam [2018] IRLR 97***. This concerned the status of Uber taxi drivers. They operated under agreements said to be for self employment, with no obligation to accept work and no obligation on Uber to give it. The EAT held that they were workers.

54. The width of the application of the term is demonstrated in two other recent cases. In ***Community Based Care Health Ltd v Narayan UKEAT/0162/18*** the EAT held that a GP providing services to an NHS provider through a limited company was still a worker notwithstanding the use of that company. More recently the Supreme Court in ***Gilham v Ministry of Justice [2019] UKSC 44*** held that a district judge was a worker.

55. The issue of whether someone who is at or near a place of work, but able on occasion to sleep, is working for the purposes of the national minimum wage provisions is also a complex one.

56. I consider that I am bound by the Court of Session decision in ***Wright v Scottbridge Construction Ltd [2003] IRLR 21***. In that case the claimant was employed as a night watchman and was required to be present on the employer's premises for a set number of hours per night although he was provided with a mattress in a corner of his office and permitted to sleep during those periods when he did not have any work to do. It was common ground that he was employed on time work. However, the employer, relying upon what is now regulation 32(2) contended that it was only required to remunerate the claimant at the rate of the national minimum wage during those periods when he was awake and performing specific tasks. The employer's contentions were rejected by the Inner House. It held that the entirety of the period during which the night watchman was required to be on the employer's premises fell within the basic definition of time work (in what is now regulation 30), even though at times the claimant had very little to do and actually spent some of his shift sleeping.

57. In coming to this conclusion, the court found that the facts were indistinguishable from those in ***British Nursing Association v Inland Revenue [2002] IRLR 480*** in which the question was whether duty nurses who operated their employer's emergency booking service during the night and from their homes were 'working' throughout their shifts so that all their work amounted to time work within what is now regulation 30 notwithstanding

the fact that, between telephone calls, they could sleep or undertake other activities such as watching television or reading. It was relevant that the telephone service was provided on a 24-hour basis and that the only difference between day shifts and night shifts was that during the day the service was provided from offices around the country, whereas at night it was provided from worker's homes. The Court of Appeal held that in these circumstances the duty nurses were working throughout their shifts.

58. It is appropriate also to refer to ***Focus Care Agency v Roberts, Frudd v The Partington Group Ltd and Royal Mencap Society v Tomlinson-Blake [2017] IRLR 588***, all of which were concerned with time work. The approach adopted by Simler J in the EAT was that, having reviewed the case law, there was no 'single key' which would unlock the answer, no 'bright' dividing line between cases where the worker was regarded as working throughout their shift so as to fall within reg 30 and cases where the deeming provisions in reg 32 were relevant. The solution was to carry out a 'multifactorial evaluation' to determine the matter, with the result that each case was likely to turn on its facts. There were appeals taken and the Court of Appeal, which handed down its decision on 13 July 2018, overturned the EAT's decision in Mencap but rejected the appeal in ***Shannon [2018] IRLR 932***. It held that the worker in question was only entitled to the national minimum wage for periods when she was awake and undertaking a particular task or tasks. She had no entitlement to the national minimum wage for the remainder of the shift.

59. That case has been appealed to the Supreme Court, with argument in February 2020. As a decision of the Court of Appeal that decision is not binding on me, rather the Inner House decision, being from a Scottish court, is. I did consider whether or not to sist the case pending any decision from the Supreme Court, but as that may mean material delay I did not consider it appropriate to do so in the circumstances of this case.

Observations on the evidence

60. Both witnesses gave evidence clearly, candidly, and appropriately. I considered both to be credible and reliable witnesses. There were two matters that required correction from the claimant's witness statement, one relating to the dates when she was not working for the respondent, which she had put one year earlier than did occur, and a statement that she had missed a friend's wedding that Mr McKevitt pointed out from an email she had produced was not factually correct.

61. There was, however, little real difference on matters material to the decision for me between the parties. They had different perspectives. The claimant was working at the house of Mrs Sinclair. Mr McKevitt was in Australia. Their different perspectives was illustrated by the CCTV camera. The claimant thought that that was in effect spying on them. She thought that it was operational throughout as the monitors in the house showed feeds from the cameras. Mr McKevitt spoke to the fact that his wife, as she then was, wishing to watch her mother, and doing so including when she was sleeping. That was an entirely understandable human wish. Mr McKevitt also spoke of the wifi cable becoming severed such that the feed to Australia was lost, but the carers not being informed of that.

62. These different perspectives were I considered understandable and each side was being appropriate in acting as they did. The respondent and her husband were seeking to provide care for Mrs Sinclair, who was elderly and infirm, and vulnerable, in her home. That required 24 hour care by a team of carers. It was important that they be present all the time. Usually that worked perfectly well, but occasionally, including by illness, the plans from the rota schedule did not work and required something done to accommodate that.

63. This case has as the context therefore the requirement to make care arrangements remotely by two private individuals who were not experts either in the care sector, or the law that applies to such matters.

64. Not all of the evidence given was relevant to the issues before me. There was for example discussion about an incident in November 2018 after which a doctor was called where the respondent sought to criticise the claimant, but that had not been pled and was not I considered relevant to any of the issues outlined above. I have therefore confined my findings to those that I considered relevant to arguments that might be made.

Discussion

65. This case raises a series of complex questions, on which the law has not been settled, and may still be developing. Some of the cases have gone to the Supreme Court, or are to do so. Despite its quantification from the Schedule of Loss produced by the claimant being relatively limited, it is I consider necessary to set out in some detail the reasons for the conclusions that I have reached.

66. It was obvious from the terms of the witness statements that neither party was fully aware of the law that applies to the issues. That is entirely understandable, and the comment is not made as a criticism. I have attempted to make a decision based upon the evidence I heard, and my application of the law to that evidence.

(i) Contracting party

67. I am satisfied from the evidence that the claimant contracted with Mrs Anne McKevitt, the respondent. The care was for the respondent's mother. The respondent was involved in the setting up of those arrangements, and monitored them to an extent. The respondent held a power of attorney. She and her husband paid for the large majority of the cost of the care personally. She gave instructions on what to do to an extent.

(ii) Employee

68. I consider that the claimant was not an employee. There are two fundamental reasons for that. Firstly, there was only a limited element of control by the respondent. Whilst there were a measure of instructions as to what had to be done and how, the context is the care, managed remotely, of an elderly and infirm relative. What was more significant in the present case was that the claimant could decide to a large extent when she was not available to work. She gave details of the dates not suitable for her in advance. That was her choice. She did require to work shifts once agreed and set, and that could include working on if the anticipated support was not available, such as in the event of illness, but that was against the background of a need for 24 hour care. In all the circumstances that was not a level of control that I considered was sufficient for a finding of employment.

69. Secondly, and more materially, the claimant did not treat herself as an employee. She did work to the agreement for self employment sent to her. She produced invoices. She paid her own tax and national insurance contributions. Most significantly of all however is what happened when she was pregnant. She did not seek to claim maternity leave or pay, the entitlement of an employee, but rather made a claim for state maternity benefits. These are acts that are inconsistent with her being an employee.

70. There was a period between August 2016 and February 2017 when there were no contractual terms in existence between the parties. The claimant did not at the time seek to claim that there was. She came back to work not under any agreement made before leaving in August 2016, but after happening to meet a colleague who asked her if she could return.

71. Whilst there were some factors which did point towards employment status, such as that the claimant did not take a risk of capital, and did not provide any tools or equipment, together with the nature of the work, they did not I consider displace the contrary evidence.

72. Taking all of the evidence together, it appeared to me that the claimant had not discharged the onus on her of proving that she was an employee, and on the contrary I considered that the evidence was to the effect that she did not meet the statutory test.

73. As a result of that, the claims as to notice and for a statutory redundancy payment, for both of which the claimant must prove that she is an employee, must be dismissed.

(iii) Worker

74. The test for worker is a wider one than that of employee. The first limb of the test is that for employee, and the second limb is different. Taking matters overall, simply from the evidence, I did not consider that it was correct to say that the claimant was in a profession or business undertaking. She was an individual providing care. She did not provide any form of work equipment. She did not offer her services to the market, and although she could have worked for others in fact did not. She provided her services personally, and could not send a substitute of her choosing if she wished to.

75. Whilst I did take account of the fact of the self employment agreement, that is not determinative of the issue. In many of the cases, there has been a finding of worker status whilst the written agreement provided for self-employment.

76. Taking account of all of the evidence, I was satisfied that the claimant had discharged the onus on her of proving that she was a worker. That conclusion was supported by the very fact that in March 2018 the respondent agreed to change the mechanism of payment for sleepovers to meet the requirements of the national minimum wage, where the entitlement arises for workers. The inference from her doing so is an acceptance of entitlement, and in turn an acceptance that the claimant was a worker.

(iv) Annual Leave

77. A worker is entitled to annual leave under the 1998 Regulations, and to payment for that. There was written evidence from emails of the claimant seeking the days for holidays in October and November 2018. Whilst the claimant may have taken holidays earlier she could not recall when that was, and there were no written records to which I was referred to support any claim. Separately, in light of the case of ***Bear Scotland v Fulton [2015] IRLR 15*** by which I am bound, any claim for holiday pay as unlawful deduction from wages must relate to a series where each element of that series is no more than three months from the later element. A claimant therefore requires to prove that each of the holidays taken was no more than three months earlier than the later link in the chain. If the period is greater than three months, the link is broken and earlier holidays cannot be claimed for. The holidays sought by the claimant do meet that requirement.

(v) National Minimum Wage

78. The evidence disclosed that the claimant was at the house of Mrs Sinclair throughout the sleepover shift. She was working both when the shift started at 10pm, in fact it commenced shortly beforehand for a handover, and again before it ended at 9am with again a handover. In the time after Mrs Sinclair went to sleep and woke up in the morning, there was a requirement to attend to her at night when required. That involved being alert to noises from an audio monitor. It meant that the claimant was not able to sleep easily, as she remained alert. I accepted that evidence.

79. The issue as to whether she was working throughout the sleepover shift is not a simple one, as I have set out above. I consider that I am bound as I have described, and on that basis I consider that the claimant has established that she was working for the purposes of Regulation 30. Her circumstances were more clearly indicative of work being carried out than in ***Wright***. She

was working, rather than simply being “available” for work as that term is used in Regulation 32.

80. I noted that the respondent had, as indicated above, accepted that payment should be made at the level of the national minimum wage with effect after 17 March 2018. That indicated an acceptance that there was an entitlement to it for the sleepover. That is not conclusive, and took place before the Court of Appeal decision was issued, which was in July 2018. It is indicative of the respondent’s view at that time.

81. Taking the evidence before me I have concluded that the sleepover is work for the purposes of the Regulations, and that the claimant was entitled to the national minimum wage for doing so.

82. Having so determined, I considered the basis for the claim made. It was for the period to 17 March 2018, and on the face of it was far out of time for a claim as an unlawful deduction from wages under Part II of the Employment Rights Act 1996. The 1998 Act makes provision both for the requirement to pay the national minimum wage, that the onus of proving compliance rests with the employer, and that provisions in a contract purporting to contradict it are void. I concluded that the claimant’s claim was also pursued as one for a breach of contract, and that as that claim was outstanding at the date of termination was one to which the Employment Tribunals (Extension of Jurisdiction) (Scotland) Order 1994 applied. Whilst there was no pleading specifically mentioning breach of contract, there was I consider sufficient within the Claim Form from which that could properly be derived. It attached a legal label to the factual position that was set out.

(vi) Remedy

83. There was limited evidence available to calculate the sums due for the holidays taken to which I have referred. Whilst the dates of the holidays were stated in the emails, it was not clear what work was done before and after the

periods involved. I concluded that in light of the dates, and the evidence that was before me, that it was appropriate to calculate the holidays taken as of the equivalent of four weeks in total. The average week's pay was worked out by the respondent, and accepted by the claimant when notice was given, as well as in her evidence, at £318.51. I therefore calculate that the sum due for annual leave to which the claimant was entitled under the Working Time Regulations 1998 was a total of £1,274.04.

84. I turn to the claim as to the national minimum wage. The period claimed is from 1 January to 17 March 2018. The parties by agreement sent spreadsheets to me after the hearing which were not exactly consistent, and again the evidence before me was rather limited and not as clear as it might be, but I considered overall confirmed that 18 sleepovers had been worked in the period. For 11 hours worked each night, which generally and on average was the position although on occasion it was more or less than that, the sum due per shift was £82.50. The payment made for each shift was £38.50. The difference is £44. For 18 shifts the total paid that was less than the national minimum wage was £792. The respondent's email sent after the hearing referred to payments made at a higher rate for 23 and 24 March 2018 but no claim was made for those dates, and in any event the difference involved was very small.

Conclusion

85. I make the following findings in relation to the issues:

(i) With which party did the claimant contract?
The respondent

(ii) Was the claimant an employee?
No

(iii) Was the claimant a worker?
Yes

(iv) Was the claimant entitled to notice beyond that which she received?

No

(v) Was the claimant dismissed for redundancy?

Not applicable, as the claimant is not an employee

(vi) Was the claimant entitled to paid annual leave?

Yes

(vii) If so, for what period or periods of time?

22 -26 October 2018, and 9 – 11 and 16 – 18 November 2018

(viii) Was the claimant paid less than her entitlements under the National Minimum Wage Regulations 2015 when attending sleepovers?

Yes

(ix) If the claimant succeeds with any claim, what is the appropriate remedy?

The calculations of the sums that I have awarded are as set out above, and in the Judgment.

Employment Judge: **Ian McFatridge**
Date of Judgment: **25 October 2019**
Date sent to parties: **28 October 2019**