



EMPLOYMENT TRIBUNALS

Claimant: Miss L Wren

Respondent: Red Supported Living CIC

Heard at: Newcastle (CVP) **On:** 8 & 9 April 2021

Before: Employment Judge A.M.S. Green

Representation

Claimant: In person

Respondent: Mr J Morgan - Counsel

JUDGMENT

The Tribunal finds as follows:

1. The claimant was entitled to be paid £9 per hour. Her employment was regulated by her contract of employment which she signed on 15 August 2019. Her contractual hours were 30 per week.
2. The hours that the claimant worked during her employment are as set out in the table reproduced below as per the respondent's account (column 3).
3. The claimant performed time work as per her contract of employment. She was paid £9 per hour for that work. Although there were errors in her payslips, she was paid for 5 hours on a normal day and 1.5 hours for each evening that she performed welfare checks.
4. The claimant was not required to be on call. Her work was time work. The total number of hours that she worked is set out in the table reproduced below as per the respondent's account (column 3).

REASONS

Introduction

1. For ease of reading, I have referred to the claimant as “Miss Wren” and the respondent as “Red”.
2. I conducted a remote public preliminary hearing using the CVP platform which had originally been part heard on 25 January 2021. We had to abandon that hearing because of insurmountable technical problems with the CVP platform.
3. We worked from a digital bundle. The following people adopted their witness statements and gave oral evidence:
 - a. Miss Wren
 - b. Ms Dianne Pennock (a friend of Miss Wren)
 - c. Mrs Susan Nicholson (Miss Wren’s mother)
 - d. Mr Simon Poulter (Miss Wren’s former partner)
 - e. Mrs Yvonne Cherrington (a director of Red)

Mr Morgan and Miss Wren made closing oral submissions.

The claims

4. Miss Wren presented her claim form to the Tribunal on 12 January 2020. This followed a period of early conciliation with ACAS which started on 2 December 2019 and ended on 2 January 2020.
5. Miss Wren says that she was employed by Red between 19 August 2019 and 30 November 2019. She is claiming arrears of pay and "other payments".
6. Miss Wren’s case is as follows:
 - a. She says that she has not been paid the amount to which she was entitled under the terms of her contract with Red in respect of what might be called her ‘basic’ hours of work. She says that Red agreed that she would work 34 hours per week (i.e. 30 hours per week from 9am to 3pm on 5 days per week, Monday to Friday) plus 2 hours on a Wednesday evening and 2 hours on a Sunday evening. She says that it was agreed she would be paid £9 per hour for those 34 hours per week but Red did not in fact pay her for those hours. Red’s position is that the agreed hourly rate was £9 but it does not accept that Miss Wren was entitled to be paid for, or worked, 34 basic hours per week. Red says that the agreement was that Miss Wren would be paid for 30 hours work per week.
 - b. She says that she has not been paid the amount to which she was

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entitled under the terms of her contract with Red in respect of what she has referred to as 'on-call' time. She says that she was told, after she had started work for Red, that she was expected to be on call at home for an additional period on Sunday and Wednesday evenings/nights, which she said was usually from 6pm until around 9am the following morning, during which she was required to respond to calls. She said nothing was said about pay for those hours, but she assumed she would be paid. Her case is that it was implied that she would be paid £9 per hour for the 'on call' hours. Red denies Miss Wren was required to be on call at all.

- c. She says that she has not been paid for overtime worked. She says that she is entitled to be paid for those extra hours at £9 per hour.
- d. Further and alternatively, even if Miss Wren was not entitled to be paid £9 per hour for all of the hours worked, Red failed to pay her the amount she was entitled to under the National Minimum Wage Act 1998 ("NMWA").

The issues

- 7. At a private preliminary hearing on 25 August 2020, Employment Judge Aspden identified the following issues to be determined at this public preliminary hearing:
 - a. Under the terms of Miss Wren's contract with Red, and without regard to any terms implied by virtue of the NMWA, what were the express or implied terms about the hours she was required to work and the pay she was entitled to receive?
 - b. What hours did Miss Wren work, for which she was entitled to be paid under those terms?
 - c. Under the National Minimum Wage Regulations 2015 (the "2015 Regulations"), was the work done by Miss Wren 'time work' or 'unmeasured work'?
 - d. For the purposes of Regulation 7 of the 2015 Regulations, in each of Miss Wren's pay reference periods, what was the total number of hours of time work or unmeasured work worked by her or treated under the 2015 regulations as hours of time work or unmeasured work?

Findings of fact

- 8. Red is a Community Interest Company based in Ferryhill, County Durham. It is a not-for-profit organisation providing shared accommodation to adults aged 18 years and over with mental health difficulties, in a supported living setting.
- 9. Red provides shared accommodation to vulnerable adults in the community as assessed by professionally qualified Social Workers under the Care Act 2014. It lets properties owned by landlords under licence

agreements to its customers. The properties are either two or three bedroomed houses. Its customers are low need and do not require constant supervision. Most of them normally reside in County Durham. Some of them may have a criminal background. All of the customers are fully vetted by the police. Red prioritises local people where possible and presently 60% of its customers are from the Ferryhill area. Red is in the process of becoming a registered social landlord.

10. Mrs Cherrington is a director of Red. She is a qualified social worker and worked within a local authority for most of her career as a social worker or social work manager managing children's services teams. Her husband, Mr Michael Cherrington, is also a director of Red. He is a social worker. Their son, Jacob Cherrington, works for Red as a part-time administrator. Red employs eight staff.
11. Mr and Mrs Cherrington are Housing Managers. She has Children and Families Social Work/Management experience. Mr Cherrington has expertise in Mental Health Social Work and Youth and Community Work/Management. Both of them are qualified Managers to postgraduate level 7 awarded by The Chartered Management Institute. Mr Cherrington leads operations. Mrs Cherrington occasionally provides input if she has something to say or if she is asked to join meetings. She is office based.
12. When Miss Wren was employed, Mrs Cherrington was responsible for administering Red's payroll. At the time, Red used Sage One software for that purpose. Mrs Cherrington received some training on how to use and operate the payroll software. Red now outsources payroll to an external service provider.
13. Mrs Cherrington does not have any formal qualifications in HR management. However, Red is a member of the Federation of Small Businesses ("FSB"). The FSB has a helpline which members can call for legal advice. Red uses a template contract of employment downloaded from a share portal which is adapted and used for its employees. Mrs Cherrington is responsible for issuing contracts of employment.
14. Red is under contract to Durham County Council (the "Council") and is remunerated on a monthly basis for the services that it provides. Remuneration is based on the level of room occupancies. Remuneration is not linked in any way to the hours worked by any of Red's employees providing the service.
15. Typically, the Council will refer potential customers to Red and Mrs Cherrington will screen them to determine whether they are suitable to benefit from the service. The majority of customers are homeless. Red takes rough sleepers, homeless people and individuals who have suffered a life crisis such as a relationship breakdown with their parents or their partner or where they have lost their job. This process entails the Council sending a potential customer to Red's office where Mrs Cherrington conducts an assessment interview. This involves explaining the rules and expectations to the potential customer looking into criminal record and other issues and whether the person being assessed has any medical problems. If Mrs Cherrington is satisfied that the individual is suitable for the service, and they are happy to abide by the rules, she will complete a

licence agreement and tenancy documents. The individual then be placed in one of several properties which they share with other customers.

16. Red provides its customers with up to 3 hours support per week to access benefits. It supports their customers with professional appointments such as at a Job Centre or a GP. They visit each of their customers every day in their homes to provide additional support. They support their customers to claim Personal Independence Payments, where relevant.
17. Red has never provided 24-hour support. When Miss Wren was employed, Red provided support from 9 AM to 5 PM together with a welfare check seven evenings per week. Red does not have the resources or the staff to provide 24-hour support. All of its customers sign a licence agreement to live in the properties. They are quickly moved on if the evidence points to their needs being too high to be in Red's service.
18. On 1 July 2019, Miss Wren emailed Mrs Cherrington seeking a position at Red [48]. The position was for a Senior Support Worker. She explained that she had worked in Health and Social Care for more than seven years and was experienced with working with people with learning disabilities, challenging behaviour etc. Mrs Cherrington replied on the same day inviting Miss Wren to come and see her on 2 July 2019 [48].
19. Mrs Cherrington and Miss Wren met at Red's offices on 2 July 2019. In her witness statement, Mrs Cherrington says that her initial impressions of Miss Wren were that she met the criteria and seemed suitable for a support worker role. She offered Miss Wren a full-time position working 37 hours per week. She sent a link to complete a Disclosure and Barring Service ("DBS") check and started to obtain references [50].
20. On 4 July 2019, Miss Wren responded to Mrs Cherrington with concerns about proposed working hours and how this would fit in with her childcare commitments. It was agreed that the two would meet again at 1 PM on 8 July 2019 to discuss her hours.
21. Miss Wren and Mrs Cherrington met on 8 July 2019 to discuss Miss Wren's proposed hours. During that meeting, she told Mrs Cherrington that she would not be able to work more than 30 hours per week because of her childcare commitments. Miss Wren emailed Mrs Cherrington on the same day. She confirmed that she had completed the online DBS and had attached her completed application for her to review. She asked Mrs Cherrington to confirm the rate of pay via email because it was difficult for Miss Wren to come and see her at times because of her working hours. She also stated her recollection that Mrs Cherrington had suggested that Miss Wren should inform of her availability as she could provide flexible working. She stated that her ideal working hours would be 9 AM to 3 PM, Monday to Friday with a couple of hours each evening. She would be unable to commit to long hours over the weekend, but she would be able to work a small number of hours during the week as required. She calculated that this would work out at 30 hours for the 9 AM to 3 PM, Monday to Friday with further hours on an evening/weekend where required. If that was feasible for the business, she would be delighted to start working as soon as possible [53].

22. On 8 July 2019, Mrs Cherrington replied to Miss Wren by email [54]. She stated, amongst other things, that she had not received her completed application form and she needed her proof of identity to process her DBS check. She confirmed that a working day of 9 AM to 3 PM was acceptable and she would be entitled to an unpaid break after 6 hours. The rate of pay would be £8.21 per hour.
23. On 18 July 2019, Miss Wren withdrew her application and notified Mrs Cherrington of that fact by email [54]. She said that the position would not be feasible for her. Mrs Cherrington responded by email on 18 July 2019 asking Miss Wren to explain why she did not think it would be feasible [56]. The position of Senior Support Worker was given to Mr Dean Batey.
24. Miss Wren changed her mind and attended a meeting with Mrs Cherrington on 14 August 2019. There is disputed evidence about what was agreed at that meeting.
25. Mrs Cherrington's evidence was that it was agreed that Miss Wren would work as a Concierge/Housing Support Worker on a 30-hour week. In support of that, Mrs Cherrington relies upon two documents: a "Welcome letter" dated 14 August 2019 [61-62] which set out the proposed terms of Miss Wren's employment and was signed by both parties. Mrs Cherrington says that Miss Wren signed the document on 14 August 2019. Mrs Cherrington also relies upon a written contract of employment between Red and Miss Wren signed on 15 August 2019.
26. Miss Wren says that it was agreed that she would work a 34-hour week. She says that she never received a contract of employment during her employment. The contract was only disclosed to her as part of this litigation and the signature on that document purporting to be hers is a fabrication. She also denies that she signed the "Welcome letter".
27. I prefer Mrs Cherrington's evidence for the following reasons. She was an impressive witness. When I asked questions about the circumstances of both documents, she answered these without any hint of evasiveness. Her answers were precise, detailed and were not vague. She recalled the details of the circumstances of signing both documents. The overwhelming impression that I gained was that she painted a realistic picture of what happened. There was no sense of embellishment at all. In particular, I find as follows:
 - a. The contract of employment was a template document used for all of Red's employees. Mrs Cherrington, who had responsibility for HR matters, had taken the document and adapted it to Miss Wren's particular circumstances. That is entirely plausible and common practice adopted by many employers. That is the point of having a template document.
 - b. There was a meeting on 15 August 2019 between Mrs Cherrington and Miss Wren. The meeting was in Mrs Cherrington's office. It commenced at approximately 09:45 hours. Mrs Cherrington said that they were very pleased to have Miss Wren. They shook hands and Mrs Cherrington handed the contract of employment to her to sign. The document already had Mrs Cherrington's electronic

signature. Miss Wren signed it in Mrs Cherrington's presence. Mrs Cherrington had dated the contract of employment the previous day when she had met Miss Wren because she knew that the terms of employment had been agreed and it had been agreed that Miss Wren would come into the office the following day. After Miss Wren signed the contract of employment, Mrs Cherrington copied it on her desktop photo copier which she keeps in her office. She folded one copy and gave it to Miss Wren. She retained the other copy for the office file. This was scanned into the system and a hard copy was filed.

- c. Mrs Cherrington stated that at no stage during her employment or after it ended did Miss Wren ask Mrs Cherrington for a copy of her contract of employment. I have no reason to doubt this.
- d. Mrs Cherrington also prepared the "Welcome letter". This was handed to Miss Wren at the meeting on 14 August 2019. This was largely a bespoke document. It already had Mrs Cherrington's electronic signature and she witnessed Miss Wren counter signing it. One copy was taken and given to Miss Wren and the other copy was retained by Mrs Cherrington for scanning and filing. I note that whilst the "Welcome letter" is dated 14 August 2019, the date next to Miss Wren's signature is 14 September 2019. This is clearly a typographical error.
- e. Under cross-examination, Miss Wren said that she had no recollection of seeing or receiving the "Welcome letter". She denied signing it. She also maintained that she did not sign the contract of employment and had never seen it during her employment. She alleges that someone at Red forged her signature on both documents. This is a very serious allegation which only emerged during cross examination. It is not mentioned in Miss Wren's claim form and particulars of claim. It is not mentioned in her witness statement. In her particulars of claim she states that she was not given a section 1 statement of particulars of employment and she is making a claim against Red "for failing to provide a Contract of Employment or Particulars". In paragraph 1 of her witness statement she states, amongst other things "no written statement or contract of employment was provided". Her witness statement is dated 12 April 2020. I asked Miss Wren to clarify when she claimed she first received the contract of employment. She replied that she received it as part of the evidence disclosed by Red in early 2020. Although she was unable to give me a date, but she said that it was before April 2020. She also confirmed to me that she received the "Welcome letter" at the same time. She admitted that she had not referred to the allegation of her signature being fabricated in her witness statement. Her witness statement postdates the time when she claims she received the contract of employment and the "Welcome letter" for the first time. When I asked her where she had not referred to the allegation a fabrication in her witness statement, she replied "I have not specifically referred to that". I find that incredible. Whilst I recognise that Miss Wren is not legally qualified and was not represented, she is, nonetheless an intelligent and articulate person as illustrated by the quality of her particulars of

claim and her witness statement. If she believed that someone had fabricated her signature on two fundamentally important documents that set out the terms of her employment, I would have reasonably expected to have referred to those allegations in her claim form, or at least, in her witness statement given the timings when she said she first received the two documents with the alleged forged signatures. Her omission to do that is, frankly, glaring. Making such allegations under cross-examination when they should have been averred at a much earlier stage in the litigation seriously damages Miss Wren's credibility not only in this regard but generally.

It is more probable than not that Miss Wren signed the "Welcome letter" on 14 August 2019 and the contract of employment on 15 August 2019.

28. The "Welcome letter" provides, amongst other things:

I write to congratulate you on your recent interview for the post of Concierge/Housing Support Worker. We look forward to you starting your employment with us on Thursday, 15 August 2019 at 9:30 AM. Initially you said that you didn't want the post then 14 August 2019, you called into the office to say that you do want the post and that you have resigned from your previous post. You shared that you have a family to support thus would welcome an immediate start in good faith given you have not yet been fully cleared to work as detailed below. We commenced your DBS process on 03rd July 2019.

Louise, you are aware that we have not been able to secure any positive references for you as your previous employment reference was not suitable and your other referee did not agree to offer you any reference although I telephoned them several times.

...

You agree that you will be performance managed within 3 months and again within six months which gives sufficient time for customers, staff and management to form a view of your suitability for the post to be evidenced given you have not yet produced any suitable references and we have not been able to secure any suitable references for you.

You will commence your post on £9ph for 30 hours work. Please note that over time is not payable. You stated that you must leave work at 3 PM, Monday, Tuesday, Wednesday, Thursday and Friday. You are aware that you will not be paid for any lunch breaks. Your working week will be 9:30-3 PM Monday-Friday but there will be a requirement for you to be on call and to make safeguarding checks to customers during evenings and weekends when required which will constitute part of your working week is no overtime will be paid. Time off in lou [sic] is negotiable/agreeable in advance with management.

Once again, congratulations and we look forwards to welcoming

you as agreed above. You agree to sign this letter as confirmation of our discussion which has taken place in my office on 14/09/19.

By counter signing the “Welcome letter” Miss Wren signified her agreement to the basis upon which she would be working for Red.

29. The contract of employment contains the following terms that are relevant to the issues to be determined:

- a. Her job title is Concierge/Housing Support Worker.
- b. She was to report to Mr and Mrs Cherrington.
- c. She may be required to work anywhere depending on the requirements of Red. There would be no specific work location or client for which she would be working.
- d. She would be paid £9 per hour for a maximum 30 hours per week. This would be paid monthly in arrears on the last day of each month by bank giro credit direct to her bank or building society account. She would be required to hand in her monthly expenses sheet 15th of each month. Overtime was not payable.
- e. Her employment was on the basis of a zero hours arrangement. Under this arrangement, from time to time, Red would have a requirement for casual work and by signifying her agreement, she confirmed to Red that she would be available for Assignments. There was no obligation on Red to offer Miss Wren an Assignment and no obligation on her part, if an Assignment was offered, to accept it. The contract was not intended to give rise to any legally binding commitments unless and until she accepted an Assignment that is offered to her. If she accepted an Assignment, her employment would begin on the date and time the Assignment started and would end automatically at the end of the Assignment. Either party could terminate the employment by giving one week’s notice of termination in writing. If an Assignment was offered and accepted, Ms Wren was obliged to undertake it and Red was obliged to pay her for the work performed. There was no presumption that work would continue to be offered to her.
- f. Hours of work would be agreed in relation to each Assignment and Red was under no obligation to offer any particular hours of work and Miss Wren was not obliged to accept the hours offered for a particular Assignment. Once she accepted an Assignment, the hours agreed would become binding on both parties. The contract stipulated:

Your total paid hours of work will not exceed 30 hours in any week.

30. I now turn to the question of what hours Miss Wren worked. Miss Wren claims that she worked 34 hours per week. She claims that there was

never any discussion about being on call because she did not know it existed when she started her employment. She claims that she understood that it was not a requirement, but she was regularly telephoned and texted with questions at all hours. She claims that she attended at least one out of hours incident with a customer on 27 October 2019. She also claims that there had been a staff meeting during which it was agreed that to take the pressure off Mr and Mrs Cherrington, on-call working amongst the other employees would be used. She raised the issue of on-call working with Mr and Mrs Cherrington and realised that she would not be paid. She claims that this was a change to her terms of employment.

31. Red's position is that there was no requirement for Miss Wren to be available on call outside what were known as "welfare checks" that took place in the evening twice a week. It denies there was a meeting to reallocate work to ease the burden from Mr and Mrs Cherrington. The only out of hours work was the contractual requirement to perform evening welfare checks. Each welfare check was no more than 90 minutes. The welfare check hours were included in Miss Wren's global 30 hour week.
32. In preparing for this hearing, the parties were required to compile a table setting out what each of them believed were the hours that Miss Wren worked during her employment at Red. I have reproduced the table below.

Date Miss Wren says she worked	Time Miss Wren says she worked	Hours Red says Miss Wren actually worked
Monday 19/08/2019	9am – 3pm	9:30-2:30 – 30 minus lunch
Tuesday 20/08/2019	9am – 3pm	9:30-2:30 – 30 minus lunch
Wednesday 21/08/2019	9am – 3pm	9:30-2:30 – 30 minus lunch
Wednesday 21/08/2019	6pm – 8pm on call	Flexibly between 6-8pm = 90 mins max
Thursday 22/08/2019	9am – 3pm	9:30-2:30 – 30 minus lunch
Friday 23/09/2019	9am – 3pm	9:30-2:30 – 30 minus lunch
Sunday 25/08/2019	6pm – 8pm on call	Flexibly between 6-8pm = 90 mins max
Monday 26/08/2019	9am – 3pm	9:30-2:30 – 30 minus lunch
Tuesday 27/08/2019	9am – 3pm	9:30-2:30 – 30 minus lunch
Wednesday 28/08/2019	9am – 3pm	9:30-2:30 – 30 minus lunch
Wednesday 28/08/2019	6pm – 8pm on call	Flexibly between 6-8pm = 90 mins max
Thursday 29/08/2019	9am – 3pm	9:30-2:30 – 30 minus lunch
Friday 30/08 /2019	9am – 3pm	9:30-2:30 – 30 minus lunch
Sunday 01/09/2019	6pm – 8pm on call	Flexibly between 6-8pm = 90 mins max
Monday 02/09/2019	9am – 3pm	9:30-2:30 – 30 minus lunch
Tuesday 03/09/2019	9am – 3pm	9:30-2:30 – 30 minus lunch

Wednesday 04/09/2019	9am – 3pm	9:30-2:30 – 30 minus lunch
Wednesday 04/09/2019	6pm – 8pm on call	Flexibly between 6-8pm = 90 mins max
Thursday 05/09/2019	9am – 3pm	9:30-2:30 – 30 minus lunch
Friday 06/09 /2019 -	9am – 3pm	9:30-2:30 – 30 minus lunch
Sunday 08/09/2019 -	6pm – 8pm on call	Flexibly between 6-8pm = 90 mins max
Monday 09/09/2019	9am – 3pm	9:30-2:30 – 30 minus lunch
Tuesday 10/09/2019	9am – 3pm	9:30-2:30 – 30 minus lunch
Wednesday 11/09/2019	9am – 3pm	9:30-2:30 less 30 minus lunch
Wednesday 11/09/2019	6pm – 8pm on call	Holiday
Thursday 12/09 /2019	9am – 3pm	9:30-2:30 – 30 minus lunch
Friday 13/09/2019	9am – 3pm	9:30-2:30 – 30 minus lunch
Sunday 15/09/2019	6pm – 8pm on call	Flexibly between 6-8pm = 90 mins max
Monday 16/09/2019	9am – 3pm	9:30-2:30 – 30 minus lunch
Tuesday 17/09/2019	9am – 3pm	9:30-2:30 – 30 minus lunch
Wednesday 18/09/2019	9am – 3pm	Holiday
Wednesday 18/09/2019	6pm – 8pm on call	Flexibly between 6-8pm = 90 mins max
Thursday 19/09 /2019	9am – 3pm	9:30-2:30 – 30 minus lunch
Friday 20/09 /2019	9am – 3pm	holiday 1 day
Sunday 22/09/2019	6pm – 8pm on call	Flexibly between 6-8pm = 90 mins max
Monday 23/09/2019	9am – 3pm	9:30-2:30 – 30 minus lunch

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Tuesday 24/09/2019	9am – 3pm	9:30-2:30 – 30 minus lunch
Wednesday 25/09/2019	9am – 3pm	9:30-2:30 – 30 minus lunch
Wednesday 25/09/2019	6pm – 8pm on call	Flexibly between 6-8pm = 90 mins max
Thursday 26/09/2019	9am – 3pm	9:30-2:30 – 30 minus lunch
Friday 27/09/2019	9am – 3pm	9:30-2:30 – 30 minus lunch
Sunday 29/09/2019	6pm – 8pm on call	Flexibly between 6-8pm = 90 mins max
Monday 30/09/2019	9am – 3pm	Holiday 1 day
Tuesday 01/10/2019	9am – 3pm	9:30-2:30 – 30 minus lunch
Wednesday 02/10/2019	9am – 3pm	9:30-2:30 – 30 minus lunch
Wednesday 02/10/2019	4:30 – 6:30pm on call	Flexibly = 90 mins max
Thursday 03/10/2019	9am – 3pm	9:30-2:30 – 30 minus lunch
Friday 04/10 /2019	9am – 3pm	9:30-2:30 – 30 minus lunch
Sunday 06/10/2019	4:30 – 6:30pm on call	9:30-2:30 – 30 minus lunch
Monday 07/10/2019	9am – 3pm	9:30-2:30 – 30 minus lunch
Tuesday 08/10/2019	9am – 3pm	9:30-2:30 – 30 minus lunch
Wednesday 09/10/2019	9am – 3pm	9:30-2:30 – 30 minus lunch
Wednesday 09/10/2019	4:30 – 6:30pm on call	Flexibly = 90 mins max
Thursday 10/10/2019	9am – 3pm	9:30-2:30 – 30 minus lunch
Friday 11/10 /2019	9am – 3pm	9:30-2pm – 30 minus lunch
Sunday 13/10/2019	4:30 – 6:30pm on call	Flexibly = 90 mins max

Monday 14/10/2019	9am – 3pm	9:30-2:30 – 30 minus lunch
Tuesday 15/10/2019	9am – 3pm	9:30-2:30 – 30 minus lunch
Wednesday 16/10/2019	9am – 3pm	9:30-2:30 – 30 minus lunch
Wednesday 16/10	4:30 – 6:30pm on call	Flexibly = 90 mins max
Thursday 17/10 /2019	9am – 3pm	9:30-2:30 – 30 minus lunch
Friday 18/10 /2019	9am -3pm	9:30-2:pm – 30 minus lunch
Sunday 20/10 /2019	4:30 – 6:30pm on call	Flexibly = 90 mins max
Monday 21/10/2019	9am – 3pm	9:30-2:30 – 30 minus lunch
Tuesday 22/10 /2019	9am – 3pm	9:30-2:30 – 30 minus lunch
Wednesday 23/10 /2019	9am – 3pm	9:30-2:30 – 30 minus lunch
Wednesday 23/10/2019	4:30 – 6:30pm on call	Flexibly = 90 mins max
Thursday 24/10 /2019	9am – 3pm	9:30-2:30 – 30 minus lunch
Friday 25/10 /2019	9am – 3pm	9:30-2:pm – 30 minus lunch
Sunday 27/10/2019	4:30 – 6:30pm on call	Flexibly = 90 mins max
Monday 28/10/2019	9am – 3pm	Holiday
Tuesday 29/10/2019	9am – 3pm	Holiday
Wednesday 30/10/2019	9am – 3pm	Holiday
Wednesday 30/10/2019	4:30 – 6:30pm on call	Holiday
Thursday 31/10/2019	9am – 3pm	9:30-2pm – 30 minus lunch

Friday 01/11 /2019	Sickness Absence	
Sunday 03/11/2019	Sickness Absence	
Monday 04/11/2019 – Friday 08/11/2019	Leave from work as advised by Mr Michael Cherrington	
Sunday 10/11/2019	4:30 – 6:30pm on call	5-7 = 90 mins max
Monday 11/11/2019	9am – 3pm	
Tuesday 12/11/2019	9am – 3pm	
Wednesday 13/11/2019	9am – 3pm	
Wednesday 13/11/2019	4:30 – 6:30pm on call	5-7 = 90 mins max
Thursday 14/11/2019	9am – 3pm	
Friday 15/11/2019	9am – 3pm	
Sunday 17/11/2019	4:30 – 6:30pm on call	
Monday 18/11/2019	9am – 3pm	
Tuesday 19/11/2019	9am – 3pm	
Wednesday 20/11/2019	9am – 3pm	
Wednesday 20/11/2019	4:30 – 6:30pm on call	5-7 = 90 mins max
Thursday 21/11/2019	9am – 3pm	9:30-2:30 – 30 minus lunch
Friday 22/11/2019	9am – 3 pm	9:30-2pm – 30 minus lunch
Sunday 24/11/2019	4:30 – 6:30pm on call	5-7 = 90 mins max
Monday 25/11/2019	9am – 3pm	9:30-2:30 – 30 minus lunch
Tuesday 26/11/2019	9am – 3pm	9:30-2:30 – 30 minus lunch

Wednesday 27/11/2019	Annual Leave	Holiday
Thursday 28/11/2019	Annual Leave	Holiday
Friday 29/11 /2019	Annual Leave.	Holiday

33.I prefer Red’s account of Miss Wren’s hours worked for the following reasons:

- a. The contract of employment stipulated the hours to be worked. She was employed to work no more than 30 hours per week. Overtime was not payable.
- b. As already commented, Mrs Cherrington was an impressive witness with good powers of recall. She answered the questions she was asked without prevarication. Her answers were precise. She was a reliable witness. In her witness statement, Mrs Cherrington says that had she had agreed that Miss Wren could work flexibly to enable her to drop off and to pick up her child as long as the needs of the organisation were met. Apart from Miss Wren, staff work between 9 AM and 5 PM and conducted a 60–90 minutes welfare checks between 5 PM and 7 PM. Miss Wren worked slightly different hours because of her childcare arrangements. She worked from 9:30 AM to 2:30 PM with a 30-minute unpaid lunch break to be taken within that period, at her discretion. Miss Wren normally took her half hour lunch break at some point between 12:30 PM and 1:30 PM with her colleagues. As Mrs Cherrington was office-based, she saw Ms Wren taking her lunch and often joined her and the other staff. Ms Wren worked 5 days a week Monday to Friday, including her unpaid lunch break.
- c. Mrs Cherrington was clear that there was no expectation for Miss Wren to be available outside her working hours. Her evidence was that remuneration from the Council was not dependent upon the hours worked by employees. It was calculated by reference to levels of occupancy in the shared accommodation. There was one incident on 27 October 2019 when Miss Wren was called upon outside working hours.
- d. As part of her work, Miss Wren was required to visit the houses which had been allocated to her and to provide one-to-one support to each of the customers along with providing a weekly house meeting to ensure good communication between the housemates. This involved supporting customers to attend their professional

appointments where applicable. Miss Wren was obliged to attend a daily team meeting with her colleagues at the office. This was chaired by Mr Cherrington.

- e. In her oral evidence, Mrs Cherrington told me that although she did not keep formal records of hours worked, it was possible to extrapolate that information from various sources. At daily team meeting, Mr Cherrington would brief the employees. During the day, the employees used a WhatsApp group to communicate with each other. The employees would also come in and out of the office during the day to record their activities and at lunchtime, everyone would regroup. The staff would sit together and discuss their work. This would be an opportunity for everyone to catch up. As Red was a small employer, there was no need to closely monitor what staff were doing. At the end of the day, each employee would be expected to check out. Miss Wren was required to perform two evening welfare checks each week. These took about 90 minutes. She was required to log into the management information system and to note anything of concern.
- f. When this information was collated into the table [40], it meant that Miss Wren was working five hours per day, for five days a week which totaled 25 hours per week. She completed her two welfare checks each week which increased her total working week to 28 hours. She was paid to work 30 hours on the understanding that a welfare check or other duty might overrun.
- g. In her oral evidence, Miss Wren accepted that she was entitled to a 30-minute unpaid lunch break. She accepted that she normally took her lunch between 12:30 hours on 13:00 hours and she worked five days per week, Monday to Friday. She accepted that the two weekly welfare checks formed part of her weekly hours. She also accepted that there was no physical Rota. She accepted that if the client knocked at her door at nighttime, she was not obliged to answer the door.
- h. When she was cross examined, Miss Wren alleged that at the start of her employment, Mr and Mrs Cherrington were always on duty. However, she alleged that this arrangement changed at a meeting to allow Mr and Mrs Cherrington to take time off which meant that senior and support workers would be required to do more work in the evenings to allow Mr and Mrs Cherrington to have a break. She suggested that she had to be prepared to be on the phone 24 hours a day and to answer any calls whenever they were made. This was an on-call arrangement. She said that she was regularly called outside hours. I note that Miss Wren does not refer to this meeting when the on-call arrangement was established either in her claim form or in her witness statement. Given the importance of this to her claim, I would have expected her to have made these allegations at that stage rather than raising them under cross-examination. Her failure to do this casts doubt on the veracity of what she is alleging.
- i. The alleged on-call arrangement was tested under cross-

examination, where Miss Wren was unable to say when her on call period started and ended. Furthermore, she was also unable to say how much she should have been paid for on-call time worked.

- j. The witnesses called by Miss Wren suggested that she was obligated to work beyond her basic hours suggesting an on-call arrangement. Their evidence was also relied upon as corroborating Miss Wren's claim that she went to work at or just before 9 AM and left at or after 3PM.
 - i. In her oral evidence Ms Pennock, a friend of Miss Wren, said that Miss Wren felt she needed respond to out of hours calls from Mrs Cherrington, colleagues or customers. She admitted that when she had referred to this in her witness statement, she had not said that Mrs Cherrington had told her to respond. She had witnessed one occasion on 27 October 2019 when Miss Wren was required to attend one of the houses out of hours. She did not refer to any other occasions. Her evidence does not support Miss Wren's claim that she was obliged to work out of hours and to be on call. There is a material difference between a person "feeling" they have to respond to out of hours calls and being "told" that they have to do so.
 - ii. Mr Poulter, Miss Wren's ex-partner, said that he believed that Miss Wren felt pressurised to keep her phone switched on outside hours. However, he accepted that she had not been told to do that. He also accepted that the incident on 27 October 2019 was the only example that he had given of Miss Wren attending premises outside her normal working hours. Mr Cherrington had telephoned Mr Poulter because he had been unable to contact Miss Wren and he had asked him to pass the information on about the incident at the house so that Miss Wren could attend. His evidence does not support Miss Wren's claim that she was obliged to work out of hours and to be on call. There is a material difference between a person "feeling" they have to respond to out of hours calls and being "told" that they have to do so.
 - iii. In her witness statement, Mrs Nicholson, Miss Wren's mother, says that she was aware that her daughter started work at 9 AM each morning. Because she had to drop her child off at school at oh 8:40 AM, she would arrive at the office at 8:50 AM. She told me that she knew this because that was what Miss Wren had told her. Miss Wren's colleagues Mr Dixon or Miss Pirt would arrive at approximately at 08:45 AM which would enable Miss Wren to access the office. Under cross-examination, it was put to her that the actual start time was a 9:30 AM and Miss Wren would arrive at the office between 9:20 AM and 9:30 AM. Mrs Nicholson said "I totally disagree". She was then asked whether she agreed that the office only opened at 9 AM to which she replied, "I understand the office would open at 9 AM". She was then taken to her witness statement and it

was put to her that what she had said there was inconsistent with what she had just said in her oral evidence. She replied, "it was a mistake". Because of this material inconsistency, I give this aspect of Mrs Nicholson's evidence little weight. When she was asked about when Miss Wren left work in the afternoon, she disagreed with Red's claim that this was between 2 PM and 2:30 PM. She said that she would collect her granddaughter at 3:05 PM because Miss Wren was still at work. She accepted that this did not happen every day. She suggested that Miss Wren would typically leave work between 3:05 PM and 3:10 PM and that she never left work at 2:30 PM. She then went on to say that Miss Wren had told her that her working hours were 9 AM to 3 PM. If that was the case, she was asked whether she was expected to collect her granddaughter from school every day to which he replied "no". This was because Miss Wren was working near to the school and can get to it in five minutes. She said that her granddaughter knew to stay at school until she was collected. Mrs Nicholson told me that the reason she knew why Miss Wren left work at 3 PM or later was because that was what Miss Wren had told her. She had not seen her leave before 3 PM. She said that she would get a call from her to pick up her granddaughter from school and this had happened at least 3 or four times. Mrs Nicholson's evidence in this respect is hearsay and I give it little weight.

34. I find that Miss Wren was not required by Red to keep her telephone on at all times and outside her working hours. She was not told to do that. The fact that she may have done that was a personal choice. It was something that she felt that she should do. It is more probable than not that there was no arrangement for on-call work. Mrs Cherrington's evidence was very clear that Miss Wren was not required to be available after she had completed her welfare visits.
35. I find that the evidence regarding her start and ending times as given by Mrs Nicholson was inconsistent and based on hearsay. Consequently I give it a little weight. I find that it was more probable than not that Miss Wren worked approximately 28 hours per week. She was paid for 30 hours for the reasons given by Mrs Cherrington.
36. I now turn to Miss Wren's rate of pay. Her contract of employment provides that she was to be remunerated at a rate of £9 per hour. In her evidence, Miss Wren accepted that she was paid per hour rather than on the basis of unmeasured time. There were clearly errors with her payslips for which Mrs Cherrington accepts responsibility. Mrs Cherrington was very candid about that fact in her witness statement and in her oral evidence and she apologised for those mistakes several times. Indeed, she said that it was because of the difficulties that she faced with running the payroll herself that she decided to outsource that function to an external service provider. Notwithstanding this, it is clear that Miss Wren was entitled to be paid for five hours on a normal day and 1.5 hours for her welfare checks which were performed twice a week. This was included in the 30-week. There was no contractual basis for paid overtime.

Applicable law

37. Regulation 30 of the 2015 Regulations defines time work is work that is not salaried hours work and is:

- a. work that is paid for under a worker's contract by reference to the time for which a worker works; or
- b. work that is paid for under a worker's contract by reference to a measure of output per hour or other period of time during which the worker is required to work.

Essentially, what this means is that, if a worker is paid according to the number of hours he or she is at work and he or she is not paid an annual salary, the work is treated as time work. The hours of work that are relevant for the purposes of the National Minimum Wage for a time worker are those hours when he or she is actually working. Specific rules cover hours spent on travelling on business, in training or while on-call or on stand-by or at or near the place of work.

38. Hours spent travelling between work and home, rest breaks, periods when the worker is on holiday, off sick or on family leave and time when the worker is engaged in industrial action do not count as time work (regulations 34 and 35 of the 2015 Regulations).

39. In order to determine whether an individual's been paid the National Minimum Wage, it is necessary to ascertain his or her hourly rate of pay. As the rate to be considered is the average hourly rate, there are two figures that need to be established, as follows:

- a. the total pay received in the relevant pay reference period; and
- b. the total number of hours worked during that period.

40. The first matter to be determined, before these calculations can be carried out, is what constitutes the "pay reference period".

41. Regulation 6 of the 2015 Regulations states that the pay reference period is a month or, if the worker is paid by reference to a period shorter than a month, that shorter period. Accordingly workers who are paid weekly will have a pay reference period of one week. Workers who are paid less frequently than every month, such as every three months, with still have a pay reference period of one calendar month.

42. Regulation 7 of the 2015 Regulations provides that a worker is to be treated as remunerated by the employer in a pay reference period at the hourly rate determined by the calculation R/H where R is the remuneration in the pay reference period determined in accordance with part 4 of the 2015 Regulations and H is the hours of work in the pay reference period determined in accordance with part 5 of the 2015 Regulations.

Discussion and conclusions

43. I now turn to each of the issues.

Under the terms of Miss Wren's contract with Red, and without regard to any terms implied by virtue of the National Minimum Wage Act 1998, what were the express or implied terms about the hours Miss Wren was required to work and the pay she was entitled to receive?

There is no dispute that Miss Wren was entitled to be paid £9 per hour. Her employment was regulated by her contract of employment which she signed on 15 August 2019. Her contractual hours were 30 per week.

What hours did Miss Wren work, for which she was entitled to be paid under those terms?

For the reasons given above, I accept the hours that Red says Miss Wren worked during her employment as set out in the table reproduced above (column 3).

Under the National Minimum Wage Regulations 2015, was the work done by the Miss Wren 'time work' or 'unmeasured work'?

It is clear that Miss Wren performed time work as per her contract of employment. She was paid £9 per hour for that work. Although there were errors in her payslips, she was paid for 5 hours on a normal day and 1.5 hours for each evening that she performed welfare checks.

For the purposes of Regulation 7 of the National Minimum Wage Regulations 2015, in each of Miss Wren's pay reference periods, what was the total number of hours of time work or unmeasured work worked by Miss Wren or treated under the regulations as hours of time work or unmeasured work?

Miss Wren was not required to be on call. Her work was time work. The total number of hours that she worked is set out above in the table as per Red's interpretation (column 3).

Employment Judge Green

Date 15 April 2021