



# EMPLOYMENT TRIBUNALS

**Claimant:** Ms D A Rivera

**Respondent:** Ms E Rivas

**Heard at:** London South ET via CVP      **On:** 27-28 September 2022

**Before:** EJ Rea

## Representation

**Claimant:** Mr Patrick Halliday (counsel instructed through LawWorks)

**Respondent:** Mr Manjit Panesar (litigation friend)

# JUDGMENT

1. The Claimant's claim for breach of contract in respect of the failure to pay her the National Minimum Wage (NMW) is upheld. The Respondent is ordered to pay the Claimant the sum of £18,837.91. The Claimant must account to HMRC for any income tax and National Insurance deductions due on this sum.
2. The Claimant's claim for the Respondent's failure to provide a written statement of particulars of her employment, contrary to section 1 of the Employment Rights Act 1996 (ERA), is upheld. The Respondent is ordered to pay the Claimant an award equal to 4 weeks' pay in the sum of £2,092.80, in accordance with section 38 of the Employment Act 2002

3. The Tribunal hereby makes a declaration under section 12(3) of the ERA that the Respondent failed to provide itemised pay statements as required by section 8 of the ERA.

# REASONS

## Claims and issues

1. The Claimant brought the following claims before the Tribunal:
  - i. non-payment of the NMW (pursued both as a claim in contract for sums due, and alternatively as a claim for unauthorised deductions from wages under sections 13 and 23 of the ERA);
  - ii. non-provision of a statement of particulars of employment (contrary to section 1 of ERA); and
  - iii. non-provision of any payslips (contrary to section 8 of ERA).
2. The issues are agreed and are more specifically dealt with in the conclusions below.

## Procedure, documents and evidence

3. The Tribunal heard evidence from:
  - a. the Claimant
  - b. the Claimant's caseworker, Dolores Modern
  - c. the Claimant's friend, Marena Sanchez
  - d. the Claimant's daughter, Johana Makarian
  - e. the Respondent
  - f. the Respondent's daughter, Luna Coco
  - g. the Respondent's partner Dino Costas
4. The Tribunal was provided with witness statements from each of the witnesses and a hearing bundle comprising 257 pages.
5. A Tribunal appointed interpreter was provided to assist the Claimant and some other witnesses in giving their evidence.
6. A list of issues had been prepared by the Claimant's representative which was largely agreed to which the Respondent had responded in a separate document. The Claimant's representative had also prepared an opening statement.

## The Law

7. The right to receive the NMW is governed by the National Minimum Wage Act 1998 (“the 1998 Act”) and the National Minimum Wage Regulations 2015 (“the 2015 Regulations”).
8. “Workers” (as defined by section 54(3) of the 1998 Act) are entitled to the NMW. In this case, there is no dispute that R employed C as a “worker”.
9. The NMW rate applicable to the Claimant is set by regulation 4 of the 2015 Regulations. At the material times it was:
  - a. from 1 April 2018 to 31 March 2019, £7.83 per hour;
  - b. from 1 April 2019 to 31 March 2020, £8.21 per hour;
  - c. from 1 April 2020 to 31 March 2021, £8.72 per hour;
  - d. as of 1 April 2022 (relevant here to remedy), £9.50 per hour.
10. Pursuant to regulation 7, in order to determine whether a worker has been paid the NMW, is necessary to calculate:
  - a. the worker’s remuneration in each pay reference period, determined in accordance with Part 4 of the Regulations; and
  - b. the hours of work in the pay reference period, determined in accordance with Part 5 of the Regulations.
11. If the worker is paid monthly, the pay reference period is a month (regulation 6). NMW entitlement for any particular pay reference period is based on the applicable rate at the start of that period (regulation 4B).
12. Part 4 contains the rules on the calculation of remuneration. The starting point is the worker’s gross pay for the relevant pay reference period (regulations 8 and 9). Subject to special rules on living accommodation, benefits in kind (e.g. meals) do not form part of a worker’s remuneration, whether or not they have a monetary value attached to them (reg 10(f)).
13. Accommodation is addressed through the so-called ‘accommodation offset’: see regulations 9(1)(e), 14, 15 and 16. The rules on this provide for a fixed addition to deemed remuneration in respect of any accommodation provided by the employer to the worker (assuming there is no deduction from wages for accommodation). At the material times, the fixed amounts were:

- a. from 1 April 2018 to 31 March 2019, £7 per day;
- b. from 1 April 2019 to 31 March 2020, £7.55 per day;
- c. from 1 April 2020 to 31 March 2021, £8.20 per day.

14. Deductions from wages and payments from the worker to the employer for the employer's own use and benefit are, subject to certain exceptions, treated as reductions in the level of remuneration (regulation 12). There is such an exception for payment by the worker to the employer for goods and services (reg 12(2)(f)). However, that exception applies only to 'payments' and not to 'deductions'.

15. The legislation describes different methods for calculating hours of work, depending on the type of work done. There are four types; 'time', 'salaried hours', 'output' and 'unmeasured' (regulation 17).

16. Where an employer has failed to pay the NMW, two types of claim are available to a worker, namely:

- a. a claim for breach of contract, relying on section 17 of the 1998 Act, which provides the worker shall "*be taken to be entitled under his contract*" to be paid the higher of (a) the difference between the NMW and actual relevant remuneration for each pay reference period and (b) an 'uprated' difference, calculating by multiplying the difference by the current (at the time of determination) NMW rate and dividing by the NMW rate during the relevant pay reference period; and
- b. a claim for unauthorised deduction from wages under sections 13 and 23 of ERA 1996 (again relying on the implied contractual right to receive the amounts described in section 17).

17. Under s 23(4A) of ERA 1996, recovery of deductions via the latter type of claim is limited to those that took place in the two years preceding the date of the claim. By contrast, via the former type of claim, underpayments over the previous six years can be recovered, as long as the claim is started within 3 months of the end of employment, plus any extension of time under the ACAS conciliation provisions (as it was in this case).

18. Section 28 of the 1998 Act (entitled "*reversal of the burden of proof*") provides that in any complaint of unauthorised deductions from wages and in any civil proceedings involving a claim in contract pursuant to section 17:

*“it shall be presumed for the purposes of the [complaint/proceedings], so far as relating to [the deduction of] that amount, that the worker in question was remunerated at a rate less than the national minimum wage unless the contrary is established.”*

19. By regulation 59(1) of the 2015 Regulations:

*“The employer of a worker who qualifies for the national minimum wage must keep in respect of that worker records sufficient to establish that the employer is remunerating the worker at a rate at least equal to the national minimum wage.”*

20. A failure to keep such records may result in failure of an employer’s case that it has paid the NMW.

## **Findings of fact**

21. The Respondent is a single mother who lives in a house arranged over 3 floors in Wimbledon with her two daughters. The daughters were aged 11 and 13 when the Claimant’s employment commenced.

22. The Claimant made contact with the Respondent in October 2018, having learned that the Respondent was looking to employ a housekeeper. The Claimant relocated from Italy to London to work for the Respondent.

23. The Claimant started working for the Respondent on 18 October 2018. The Claimant had sight of a job advert prepared by the Respondent in advance of being interviewed for the posr. The original version of the advert was no longer available, but the Tribunal viewed later versions in the hearing bundle which the parties agreed were very similar in all material respects. It was agreed orally that the Claimant would live in the Respondent’s home, would receive £1,350 pay monthly and, would work 5 days a week; from 8am to 1pm and from 3pm to 5pm.

24. The Claimant worked for the Respondent for two years as a domestic worker/housekeeper. She did a wide range of work for the Respondent: preparing meals for the Respondent and her two daughters; cleaning; washing and ironing; driving; childcare; grocery shopping; miscellaneous other household duties (e.g. cleaning the car, tending the garden, caring for the Respondent’s cats, serving drinks/food at parties); cleaning other apartments owned by the Respondent; and,

sometimes assisting the Respondent with her 'organiser' business. The range of these duties was largely agreed by the parties although the frequency certain tasks were undertaken by the Claimant was in dispute.

25. In August 2019, the Claimant's daughter, Johara Makarian, moved into the Respondent's house. Because of this, the Claimant's monthly pay was reduced from £1,350 to £1,000. This reduction was not recorded in writing.
26. In September 2020, the Claimant resigned following a disputed incident involving one of the Respondent's daughters. The Claimant served two weeks' notice with her last day of employment being 29 September 2020.
27. The crucial factual dispute between the parties is the number of hours worked by the Claimant for the Respondent. The Claimant's case is that she worked an average of 60 hours a week for the Respondent. The Respondent denies this and maintains that the Claimant only worked on average 40 hours per week. The Respondent accepts that she did not keep records and so there are no written documents before the Tribunal evidencing the Claimant's working hours. There are text message exchanges between the Claimant and the Respondent which provide some evidence of her working pattern on particular occasions, but these are of limited assistance to the Tribunal. The case therefore largely relies on witness evidence and the Tribunal's assessment of the reliability of that evidence.
28. It was the Respondent's position that the Claimant was financially motivated to bring the case and that she had grossly exaggerated her claim in the hope of persuading the Respondent to settle. The Respondent's ex-partner and father of her two daughters is a well-known figure in the public eye and, the Respondent believed that because of this, the Claimant had expected she would want to settle in order to avoid any potential negative publicity. The Claimant strenuously denied this and maintained that her motivation in bringing the claim was to seek justice and ensure the Respondent understood that what she had done was wrong. The Tribunal noted there was no evidence of the Claimant seeking any publicity for her claim and no journalists attended the hearing.
29. In the Tribunal's assessment, the Claimant's evidence has remained overwhelmingly consistent from when she first sought help after leaving the Respondent's employment, to when she brought the claim, submitted her witness statement and under cross-examination.

30. In contrast, the Respondent's evidence was at times inconsistent. It became clear during cross-examination that her witness statement was inaccurate in a number of respects. The Respondent stated that she had written a first draft of the statement which her litigation friend had re-worked. The Respondent had failed to thoroughly check the final version of her statement before it was submitted. The Tribunal did not consider that there was any deliberate intention to mislead the Tribunal, but this lack of attention to detail did undermine the reliability of the Respondent's evidence to some extent.
31. The evidence given by the other witnesses was in large part contingent on the version of events that had been communicated to them by the Claimant or the Respondent, as the case may be. This was particularly so in relation to Ms Modern, the Claimant's caseworker, although her evidence was useful in demonstrating the consistency of the Claimant's account from the outset. The Respondent's partner had observed little other than the events of the holiday in Ibiza and the occasions when the Claimant had helped out during parties. Mr Costas was unable to provide much in the way of detail and it appeared to the Tribunal that he was determined to substantiate the Respondent's case in every respect.
32. The daughters of the Claimant and Respondent were living in the same house for much of the time although they attended school and so were not usually present in the day during the period prior to the pandemic. To the extent they were able to recount events which they had in fact observed first hand, the Tribunal was persuaded that their evidence was honest and reliable in all material respects. It is of course only natural that each of them would be inclined to favour their own mother's account of events. The Claimant's friend, Ms Sanchez, was able to recount occasions when she saw text messages and heard phone calls from the Respondent interrupting or curtailing the Claimant's time off. Again, the Tribunal was persuaded that her evidence was honest and reliable in all material respects, notwithstanding her loyalty to the Claimant.
33. It was not possible for either party to provide an accurate breakdown of the Claimant's precise working pattern and duties. It is not surprising that, given the nature of the role and the fact the Claimant lived at her place of work, there was a large degree of fluidity in the Claimant's working pattern from day to day and week to week. Over time, it is the Tribunal's assessment that the Claimant's range of duties expanded as the Respondent came to depend on her more and more. In particular, the Respondent accepts that she would leave the Claimant in charge of her children when she was away in the evenings, overnight at her partner's and even when she was abroad, although the frequency of such occasions was

disputed.

34. The Respondent's view was that the Claimant had little to do during these periods as they were teenagers rather than small children. However, it is the Claimant's view that she was working at all times when she was solely responsible for the children. Although the Respondent sought to minimise in her evidence the expectations placed on the Claimant, she did accept that she required the Claimant to remove the children's mobile phones from them at a set time before they went to bed, to restrict their screen time. The Claimant has recounted that on occasion when the children had friends over, there were concerns about them drinking alcohol. As any parent of teenagers will no doubt concede, it can be just as challenging, if not more so sometimes, being responsible for their well-being.
35. The Respondent denied that she was away as frequently as the Claimant asserts but the Tribunal finds that this was a regular occurrence during the Claimant's employment. The Respondent's assertion that the Claimant was given time off in lieu is not substantiated by the evidence and it would have been difficult to do so in light of the fact no records of the Claimant's working hours were kept by the Respondent. It is also unlikely this happened, given that the Claimant was frequently working for the Respondent's friends on her scheduled days off. The fact that the Claimant was unable to find time to attend English language classes is telling.
36. As regards the Claimant's daily rest break from 1-3pm, the Tribunal finds on the balance of probabilities that the Claimant rarely took this break in full. This may in part have been due to the Claimant choosing to continue working but was also likely to have been impacted by additional requests made by the Respondent and her daughters.
37. The Respondent raised at the hearing the fact that the Claimant had taken substantially more than her annual paid holiday entitlement. This was not part of the Respondent's case prior to the hearing and the Claimant did not have a proper opportunity to answer this. However, the Claimant did accept that in July 2019 she took a longer than expected holiday in Italy with the Respondent's agreement so that she could deal with some personal matters. The additional time taken was one week. The Tribunal finds that this was in fact time off in lieu of additional hours worked.
38. The Claimant was paid £1,350 per month from October 2018 to August 2019 and only £1,000 per month from September 2019 until the end of her employment in



September 2020. As the Respondent also provided the Claimant with accommodation, her deemed remuneration also included a statutory 'accommodation offset', effectively raising her pay to £1,5631 (until March 2019), £1,580 (until August 2019), £1,230 (until March 2020) and £1,249 (until the end of her employment).

39. It was accepted that the Respondent did not provide the Claimant with a statement of written particulars of employment. The Claimant's case is that she repeatedly requested a contract of employment but that the Respondent put her off each time. The Respondent denies this was ever raised by the Claimant during her employment and claimed not to know that she was legally required to provide one. The Tribunal notes that there was also a failure by the Respondent to ever put the Claimant on PAYE and that the Claimant eventually registered as self-employed some months later. This substantiates the Claimant's version of events that she made the Respondent aware of her legal obligations as an employer. The Tribunal therefore finds the Claimant's evidence more credible on this point.

### **Decision on Liability**

40. Applying the law to the facts, the burden of proof is on the Respondent to demonstrate that the Claimant was paid at a rate at least equal to the NMW in force at the relevant time throughout her employment. Without records, it will always be difficult for a Respondent to reverse this burden of proof. The Respondent has failed to do so in this case. The Tribunal concludes that on the balance of probabilities the Claimant's normal working hours were on average 60 hours per week throughout her employment.
41. The Tribunal determines that the Claimant took an additional week's holiday over her entitlement which should be reflected in the calculation of her working hours for that pay period.
42. The Respondent breached the Claimant's contract by paying her less than the NMW.
43. The Respondent made unlawful deductions from the Claimant's wages in respect of the £350 deducted each month from September 2019 until September 2020.
44. The Respondent failed to provide the Claimant with a written statement of particulars of employment as required by section 1 of the Employment Rights Act

1996.

45. The Respondent failed to provide itemised pay statements as required by section 8 of the Employment Rights Act 1996.

### Decision on Remedy

46. The Tribunal does not accept the Claimant's submissions that she was carrying out 'time work' simply because she worked additional unpaid hours. There was a verbal agreement regarding the Claimant's contractual working hours at the outset of her employment which was 35 hours per week. The Tribunal's finding is that the Claimant carried out 'salaried hours work' as defined in Regulation 21 of the NMW Regulations.

47. The average number of hours of work actually carried out by the Claimant in each pay period (per month) was 261.

48. From October 2018 to August 2019 the Claimant was paid £1,350 per month. From September 2019 until September 2020, she was paid £1,000 per month.

49. The Claimant was provided with accommodation meaning that the accommodation offset should be applied. The applicable rates were as follows:

- a. £7 per day up to and including March 2019
- b. £7.55 per day up to and including March 2020
- c. £8.20 for the remainder of the Claimant's employment

50. It follows from the foregoing that the Claimant was paid less than the NMW in each monthly pay reference period as follows:

- a. From October 2018 to March 2019, her monthly remuneration was £1,563, whereas her NMW entitlement was  $(261 \times £7.83) = £2,043.63$  (leaving a shortfall of £480.63 per month  $\times 6 = £2,883.78$ ).
- b. From April 2019 to August 2019 (excluding July 2019 see (f) below), her monthly remuneration was £1,580, whereas her NMW entitlement was  $(261 \times £8.21) = £2,142.81$  (leaving a shortfall of £562.81 per month  $\times 4 = £2,251.24$ ).
- c. From September 2019 to March 2020, her monthly remuneration was £1,230, whereas her NMW entitlement was  $(261 \times £8.21) =$

£2,142.81 (leaving a shortfall of £912.81 per month x 7 = £6,389.67).

- d. From April 2020 to August 2020, her monthly remuneration was £1,249, whereas her NMW entitlement was (261 x £8.72) = £2,275.92 (leaving a shortfall of £1,026.92 per month x 5 = £5,134.60).
- e. For 1 to 18 September 2020, her remuneration was £1,249 for that period which was more than sufficient to meet her NMW entitlement (108 x £8.72) = £941.76 (leaving a surplus of £307.24 to be offset against August 2020.)
- f. The week of additional leave over and above the Claimant's entitlement is treated as time off in lieu thus reducing the number of hours worked in July 2019 for the purposes of calculating NMW by 60 hours to 201 hours. This means her remuneration was £1,580 whereas her NMW entitlement was (201 x £8.21) = £1,650.21 (leaving a shortfall of £70.21 for July 2019).

51. The total underpayment of NMW during the Claimant's employment was therefore (£2,883.78 + £2,251.24 + £6,389.67 + £5,134.60 + £70.21 - £307.24) = £16,442.26.

52. Applying the 'uprating' provisions in section 17 of the 1998 Act, it follows that the Claimant has a contractual entitlement to additional pay in the following amounts:

- a. For each month from October 2018 to March 2019, (£480.63 / £7.83 x £9.50) = £583.14. Over 6 months, that totals 6 x £581 = £3,498.84.
- b. For each month from April 2019 to August 2019 (excluding July 2019), (£562.81 / £8.21 x £9.50) = £651.24. Over 4 months, that totals 4 x £651.24 = £2,604.97
- c. For July 2019 (£70.21 / £8.21 x £9.50) = £81.24
- d. For each month from September 2019 to March 2020, (£912.81 / £8.21 x £9.50) = £1,056.24. Over 7 months, that totals 7 x £1,056.24 = £7,393.68
- e. For each month from April 2020 to August 2020, (£1,026.92 / £8.72 x £9.50) = £1,118.78. Over 5 months, that totals 5 x £1,118.78 = £5,593.90
- f. Less the overpayment made in September 2020 adjusted accordingly (£307.24 / £8.72 x £9.50) = (£334.72).

53. Those amounts total (£19,172.63 - £334.72) = £18,837.91.
54. The Claimant is therefore awarded the sum of **£18,837.91** as compensation for breach of her contractual entitlement to be paid the NMW. This sum is below the maximum award that can be made for breach of contract in the employment tribunal of £25,000. The Claimant must account to HMRC for the income tax and National Insurance deductions due on this sum.
55. The Respondent was unable to provide a satisfactory explanation for the complete failure to provide the Claimant with a written statement of statutory particulars of employment. The Tribunal has therefore concluded that it is just and equitable to make an award of 4 weeks' pay. This is based on the Claimant's NMW which applied at the date the Claimant's employment terminated of £523.20 per week (which is below the statutory cap of £538). The Tribunal therefore makes an award of £2,092.80 for the failure to provide the Claimant with a written statement of particulars.
56. The Tribunal hereby makes a declaration under section 12(3) of the ERA that the Respondent failed to provide itemised pay statements as required by section 8 of the Employment Rights Act 1996.

Employment Judge Rea

30/11/2022

Date