**Case Number:3303941/2024**

# EMPLOYMENT TRIBUNALS

**Claimant:** Ms Judith Wobo

**Respondent:** Abi Support Limited

**Heard at: Reading** (in public by CVP) **On:** 10 and 11 December 2024

**Before:** Employment Judge Chudleigh

**Appearances**
For the Claimant: Mr F. Clarke, counsel

For the Respondent: Ms B. Omotosho, tribunal advocate

# RESERVED JUDGMENT

1 The claimant's application to amend her claim to claim an unlawful deduction from wages after the date of presentation of her ET1 is refused.

2 The claimant's pleaded claim in respect of unlawful deduction of wages is to be considered further at a date to be fixed.

3 The parties are to seek to agree what (if any) wages are properly payable by the respondent to the claimant based on the principles set out below. If they are unable to agree, they are to jointly apply for:

(1) a one day hearing by CVP before me to determine (a) what hours were worked by the claimant during the claim period outside actual call time and travel time for which the respondent failed to pay the claimant i.e. note writing outside allocated call time and gaps between calls when the claimant was not free to manage the time and to pursue her own interests; and (b) remedy; and

(2) for case management orders in respect of that hearing including for the production of a joint schedule detailing for each working day in the claim period, a breakdown of the calls scheduled, the travel time

allowed by the respondent, the time between the start of the first call and the end of the last call, the length of all gaps between calls, the distance from the route to the claimant's home, whether the claimant was on a solo route, driving or being driven and the appropriate rate of pay. In each instance the parties are to indicate their position on whether in any gap the claimant would have been free to manage the time and to pursue her own interests.

# REASONS

**Application to amend**

1. On the morning of the first day of the hearing the claimant applied for permission to amend to claim alleged unpaid wages falling due after the date of presentation of her claim (12 April 2024) and an adjournment of the hearing so that the original and amended claims could be determined together after disclosure and the provision of witness evidence in relation to the amended claim.

2. The claimant did not produce a draft of the proposed amendment but Mr Clarke explained that she wished to amend paragraph 39 of the original particulars of claim to add a claim in respect of deducted wages between April and November 2024. It was common ground that there had not been disclosure in respect of the period post the ET1 and that period had not been addressed by all witnesses.

3. It was the claimant's case that she had not made the application previously as the respondent had breached the case management orders. Her explanation for wanting an adjournment was that she only wanted to be cross-examined once.

4. When asked what the position would be about a claim in respect of any wages unlawfully deducted in the period from November 2024 Mr Clarke said that there had to be a line in the sand at some point and hopefully any such claims could be settled once the tribunal's approach to the claims was clear.

5. The respondent objected to the application which was late and not formulated in writing and pointed out that two days of tribunal time had been set aside for the hearing.

6. I took into account the guidance on amendment in **Selkent Bus Co Ltd v Moore** [1996] ICR 836 which reminds tribunals that, in deciding an application to amend, discretion should be:

   "exercised in a manner which satisfies the requirements of relevance, reason, justice and fairness inherent in all judicial discretions… the Tribunal should take into account all the circumstances and should balance the injustice and hardship of allowing the amendment against the injustice and hardship of

refusing it … It is impossible and undesirable to attempt to list [the factors to be considered] exhaustively, but the following are certainly relevant: … the nature of the amendment, whether the claim is out of time and if so, whether time should be extended under the applicable statutory provision; and the extent of any delay and the reasons for it".

7. The tribunal must always have in mind the overriding objective in rule 2 of the Tribunal rules and focus on the balance of prejudice, injustice and hardship that would be occasioned by granting or refusing the amendment – **Vaughan v Modality Partnership** [2021] ICR 535.

8. In **Scottish Opera Limited v Winning** (UKEATS004709BI) Underhill P. indicated at paragraph 5 that "it is essential that parties seeking permission to amend… formulate the proposed amendment in the same degree of detail as would be expected had it formed part of the original claim".

9. I considered all the circumstances carefully and in particular, the balance of prejudice.

10. The claim was made at a late stage in the process with no proposed draft to indicate the detail of the proposed amendment. Moreover, it appeared to me that the principles decided in the already pleaded claim would be likely to be determinative of any claim for the period from12 April 2024 to November 2024.

11. Further, the claimant (who was still employed by the respondent) would be able to present a new claim to the tribunal in respect of what she alleged was an ongoing unlawful deduction of wages and was likely to be in time given she said the unlawful deductions were continuing.

12. For those reasons and because it was undesirable to adjourn the determination of the pleaded claim when the parties were prepared and ready and to days of tribunal time had been allocated, I refused the application to amend. The application for a postponement then fell away as it was pursued only in conjunction with the application to amend.

**The issues for determination**

13. The respondent had raised time points in its response but by the time of closing submissions those arguments were not pursued.

14. The parties had not agreed a list of issues in advance of the hearing. The overarching issue was whether the total amount of wages paid to the claimant each month from 30 March 2023 to 30 March 2024 (excluding May and September 2023) (the "claim period") was the less than the total amount payable to her each month after lawful deductions. The determination of that issues required consideration of:

    1) Whether (in accordance with her primary case), the claimant was engaged on work the entire time between the start of her first call and the end of her last call during the claim period in that she was either attending calls, writing notes, or travelling between calls?

2) If so, whether pursuant to the terms of her contract, the claimant was entitled to be paid in respect of all that time? The respondent accepted that she was entitled to be paid for calls and reasonable travel time between calls but not for time spent writing notes outside allocated call time.

3) If not, whether the claimant was contractually entitled to be paid in respect of time between calls when she was idle or waiting for the next call?

4) If so, the amount of any unlawful deductions?

15. I heard evidence from the claimant and Mr Michael Abioke, one of the directors of the respondent. It transpired during Mr Abioke's evidence that the respondent had not disclosed pages from a note book illustrating travel time calculations or copies of WhatsApp messages sent to employees detailing travel times for routes. Accordingly, I ordered the disclosure of those documents and I allowed the claimant to be recalled to give evidence in relation to them and for Mr Abioke to be recalled for further cross-examination.

**Findings of fact**

16. The claimant was employed as a "Support Worker" by the respondent. In essence she was a care worker who attended at the homes of service users and attended to care needs such as providing medication, feeding and personal hygiene.

17. The respondent is a company engaged in the provision of care to local authority service users. It has around 85 employees.

18. The respondent provided company vehicles for its care workers to travel in to the homes of service users.

19. The claimant was either on "solo runs" when she drove the company vehicle and did not travel with other employees. On other occasions there were one or more care worker in the company vehicle.

20. The driver drove the other carers to their appointments and picked them up. The driver only attended to service users if there was delay. On those occasions the claimant might or might not be the driver.

21. There were different contractual rates of pay depending whether the claimant was driving or not.

22. The claimant lived in Didcot where the respondent was also based. The contract provided that the claimant would be "….be based from the [respondent's] address and will be required to work at various locations as directed by the Company to meet the needs of the business".

23. The respondent operated around seven or eight routes which incorporated all service users' homes. One route was in Didcot but others like Reading and

Newbury were further afield. The routes changed periodically as service users were added or removed e.g. because they had died. Routes were reviewed on a weekly basis and tweaked as necessary.

24. The claimant's contract of employment provided that her salary was £23,400 per annum and that payment was made monthly in arrears on the last working day of each month.

25. The claimant's contract provided regarding hours of work as follows:

"The Company operates a 24-hour service, Monday to Sunday.

Your normal hours of work are 37.5 hours each week to be worked flexibly between the above hours in accordance with the agreed rota. You will be entitled to an unpaid break of 30 minutes each day. These normal hours of work may be varied from time to time to meet the operational requirements of the Company.

You may be required to work hours in addition to those above. This may include the need to work shifts, unsocial hours, and weekends."

26. The contract further provided:

"Your working time is recorded by an online application, and you must observe Company procedures on clocking in and out during working hours. You may only claim for hours worked. If you finish your duties early, you should ask for additional work or clock out at the time you finish working.

You are to complete notes (clock-in, write notes, administer medication (when applicable) and clock out on the same day (00:00 - 23:59) of the shift."

27. From 1 January 2024 to 31 March 2024 there was a down turn in work and the claimant's contractual hours were reduced from 37.5 per week to 30 hours per week.

28. It was agreed by the respondent that once the claimant completed her contractual hours in any given week she was entitled to overtime pay.

29. Each week the respondent calculated what travel time should be allocated to each route and added pay in respect of that time to the pay of employees in respect time spent doing calls.

30. The system for calculating and recording travel time was informal and mistakes were made in relation to pay on a regular basis.

31. The respondent used Google Maps to calculate travel time and a manager recorded travel times in manuscript in a booklet. Employees were then sent a WhatsApp message detailing what the hours were to be for each route. By way of example:

"These are now the hours for the following routes from Monday 10/7/23

Didcot Solo: 11 hrs
Mon and Thurs (12 hrs)

Oxford Sole-Run 11.25 hrs

Wallingford
Carer & Driver 10.75 hrs……"

32. The WhatsApp messages were sent so employees could check that their pay was correct, not so they could invoice the respondent.

33. Sometimes the respondent added an hour of paid time in respect of what Mr Abioke described as "inconvenience" and he gave as an example helping another carer in a client's house.

34. On any given day there would be a number of calls on a route. A system called "iStaff" recorded the allocated time for each call. Those times (typically 30, 45 or 60 minutes) were that which were paid for by the local authority and allocated after an assessment of the needs of service users. Sometimes no gap at all was provided for between calls. This was because they were geographically close together. On other occasions there were gaps. Those gaps could be as short as 15 or 30 minutes but could be longer e.g. one hour 45 minutes or even longer. For example on 9 October 2023 there was a gap of six hours between two calls.

35. The respondent did not pay the claimant in respect of any time other than call time, travel time and on the odd occasion "inconvenience".

36. The claimant's evidence was that she was engaged for 100% of her time every working day from the start of her first call until the end of her last call either attending calls, writing notes, or travelling. She also said she never took a 30 minute unpaid lunch break.

37. I did not accept her evidence on those issues. It was not credible. Call times were based on an assessment of client needs and if times were too short that should have been recorded in the notes so an adjustment could be made. Further, it was apparent from iStaff data that there were often significant gaps of more than an hour between calls. The claimant contended that gaps were always filled e.g. by collecting and dropping off care workers when more than one was in the car, but I did not accept that activity took up all the time in the gaps.

38. The claimant lived in Didcot. I considered that there would have been occasions between calls when she could and probably did, return home. She would also have been free to undertake activities such as shopping.

39. I also did not accept that the claimant never was able to take a lunch break and that she always had to have lunch on the run e.g. whist driving between

appointments. It was likely in my view that she usually had time each working day to eat lunch over an uninterrupted period of 30 minutes had she chosen to do so.

40. I accepted that at there were occasions when the claimant did not have time to write up the notes during calls, but took the view that this was likely to have occurred on rare occasions only when the claimant was running late (either because she was required to spend additional time with a service user or because she had arrived late) as allocated call times included time for the writing up of notes.

**Submission of the parties**

41. Mr Clarke produced written submissions on behalf of the claimant which he supplemented with brief oral submissions. His position was that the claim was entirely founded in contract. The issue for determination was what work the claimant undertook that was, on a proper construction of the contract, "hours worked" for which she should have been paid.

42. It was argued that as a matter of fact, the claimant had no idle periods in any working day. She was only ever with a client, travelling between appointments or conducting work in the form of writing notes

43. Alternatively if there were times when the claimant was not on calls, writing notes or travelling, she was still working. She had one unpaid 30 minute break a day and all other time was not a break.

44. In the further alternative, it was argued that the claimant was on standby which was working time or as in the case of **Harris and others v (1) Kaamil Education Ltd (2) Diligent Care Services Ltd 1302183/2016 and others** there was certain time which was working time and other time that was not.

45. The respondent's case was that the burden is on the claimant to prove her claim and she has not established that she was working in the gaps between appointments. Further, it was not plausible that for the whole 12 month claim period did she not take a 30 minute break or that she was working flat out every shift.

46. It was argued that there were occasions when the claimant could have travelled home between calls especially when she was working in Didcot where she lived. She could "go home and turn the lock".

47. Reference was made to **Taylors Service Ltd (Dissolved) and another v Revenue and Customs Commissioners [2024] ICR 1171** a case about whether workers on zero hours contracts were entitled to pay under National Minimum Wage Regulations whilst travelling although it was ultimately agreed by the respondent that the claimant was entitled to pay in respect of travel time between appointments.

48. I was also referred by the respondent to the decision of the Supreme Court in **Royal Mencap Society v Tomlinson-Blake Shannon v Rampersad and**

**another (t/a Clifton House Residential Home) [2021] UKSC 8** although that was a case about provisions of the National Minimum Wage Regulations regarding sleep-in shifts.

**The law**

49. Under s. 13(1) ERA:

"An employer shall not make a deduction from wages of a worker employed by him unless—

(a)the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or

(b)the worker has previously signified in writing his agreement or consent to the making of the deduction.

50. Under s 13(3)ERA:

"Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion"

51. It was for me to determine what wages were properly payable by the respondent to the claimant on each pay day in the claim period except for May and September 2023 in relation to which no claim was made.

52. The claim was based on the contract which provided that the claimant was entitled to pay for "hours worked".

53. Determining what wages were properly payable required consideration of all the relevant terms of the contract.

**Conclusions**

***Whether the claimant was engaged on work the entire time between the start of her first call and the end of her last call as she was either attending calls, writing notes, or travelling between calls?***

54. Whether the claimant was engaged the entire time between the start of her first call and the end of her last call with (1) attending calls, (2) writing notes and (3) travelling between calls was a factual issue that I determined against the claimant as indicated above.

55. The claimant maintained that she was constantly engaged from the time the first scheduled call started to the time the last scheduled ended for 100% of her time either attending calls, writing notes, or travelling between calls.

56. I did not accept that evidence. There were periods between calls when the claimant was not travelling or writing notes – see paragraph 37 above.

***Whether pursuant to the terms of her contract, the claimant was entitled to be paid in respect of all that time?***

57. The respondent accepted that the claimant was entitled to be paid for attending calls and for reasonable travel time between calls, but not for time spent writing her notes or for anything else.

58. The respondent's case was that the claimant was obliged to and should have written her notes during the time allocated for calls. This activity was factored into allocated call time and should have been done during the calls as a matter of good practice whilst the information was fresh and as service users may have had visits later the same day from different carers who would have needed to see the notes.

59. I accepted that there were rare occasions when the claimant wrote her notes later in the day. However, contrary to her case I concluded that her usual practice was to write the notes during allocated call time as indicated above.

60. The respondent maintained that the claimant was contractually required to write her notes during calls before she clocked out. I did not agree. The provision in the contract was:

    "You are to complete notes (clock-in, write notes, administer medication (when applicable) and clock out on the same day (00:00 - 23:59) of the shift."

61. In my view this term means that the claimant was to write notes on the same day as the call, not during each call.

62. I considered that the writing of notes was work within the meaning of the contract and that the claimant was entitled to be paid in respect of time spent doing so.

63. Whilst I have concluded that the claimant did probably write notes outside allocated call times, this was likely to be rare and usually she wrote the notes in allocated call time as she was required to do. There was no evidence before me as to how often the claimant wrote notes outside allocated call times and if necessary that issue will require to be considered further at a future hearing if not agreed between the parties.

***Whether the claimant was contractually entitled to be paid in respect of time between calls when she was idle or waiting for the next call?***

64. The claimant's case was that if she was not writing notes or travelling in between her calls, nonetheless she was working the entire time in any gaps.

65. She maintained she was either driving or waiting, while in a company vehicle, often with colleagues. The case was that as a matter of contractual construction, all gaps excluding the 30-minute unpaid lunch break were not breaks. It was argued that the contract expressly says that there is one permissible break per day (i.e. the lunch break) and the implication is that other periods of non-call time were not regarded as breaks.

66. I did not accept that argument. The contract provided that the claimant "…may only claim for hours worked". If the claimant was idle between calls, she was

not necessarily working. Whether she was working or not within the meaning of "hours worked" in the contract depended, in my judgment, on what she was free to do.

67. Mr Clarke argued that borrowing from the position in relation to working time in **DJ v Radiotelevizija Slovenija (C-344/19) [2021] 3 C.M.L.R. 8**, where employees was on "stand by" and the constraints imposed on a worker "affect, objectively and very significantly, the possibility for the latter freely to manage the time during which his or her professional services are not required and to pursue his or her own interests" [37], the employee should be taken to have been working if she was not free to manage her time and to pursue her own interests.

68. I agreed with that analysis. Where the gap between calls was short, e.g. 15 minutes then the claimant was not likely to be free to manage her own time and to pursue her own interests. However, the same was not likely to be the case when the gap was longer. On those occasions e.g. when the gap was one hour 45 minutes, the claimant could have gone home or pursed other of her interests.

69. This was also an approach advocated for by the respondent as an alternative to the primary position that only call and travel time were to be considered when calculating "hours worked" . Ms Omotosho spoke frequently in her submissions about the claimant's ability to turn the key in the lock of the door at her own home.

70. Accordingly, I concluded, that when the claimant was not free to manage her own time and to pursue her own interests she was, on a proper construction of the contract, working. She was not free to do as she pleased as she was rostered to attend a further call at a time too soon to allow her to pursue her own interests.

71. Otherwise she was not working within the meaning of the contract and not entitled to pay.

72. For the sake of completeness, I point out that the respondent did pay the claimant in respect of travel time. Mr Clarke indicated that although the method of calculation appeared imperfect, no additional claim was pursued in respect of travel time.

***The amount of any unlawful deductions?***

73. It was not possible for me to determine this issue on the evidence before me. The respondent's position was that the burden of proof was on the claimant and that she had not proved her case in relation to each instance when there was an unlawful deduction. However, that approach did not accord with the interests of justice. This is a complex area of the law and the claimant was hampered in her hearing preparation by the respondent's breach of the tribunal's case management orders.

74. I concluded that the claimant's claim should be considered further at a date to be fixed. In the meantime the parties are to seek to agree what (if any) wages

are properly payable by the respondent to the claimant based on the principles set out above.

75. If the parties are unable to agree, they are to jointly apply for a one day hearing by CVP to determine (a) what hours were worked by the claimant during the claim period outside actual call time and travel time for which the respondent failed to pay the claimant i.e. note writing outside allocated call time and gaps between calls when the claimant was not free to manage the time and to pursue her own interests; and (b) remedy.

76. The parties must also apply for case management orders in respect of that hearing including for the production of a joint schedule detailing the information set out above.

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EJ Chudleigh

11 December 2024

Sent to the parties on:
17/12/2024

For the Tribunal Office:
N Gotecha