THE EMPLOYMENT TRIBUNAL

SITTING AT: **LONDON SOUTH EMPLOYMENT TRIBUNAL**

BEFORE: **EMPLOYMENT JUDGE WEBSTER**

BETWEEN:

Mr R NEGROIU **Claimant**

AND

ALLIED CARE LIMITED

Respondent

ON: **23 March 2017**

Appearances:

For the Claimant: **Mr Patrick Wise-Walsh (FRU)**

For the Respondent: **Mr O Isaacs (Counsel)**

JUDGMENT

1. The claimant was entitled to be paid the national minimum wage for his sleep in shifts.
2. The claimant's claim for unlawful deduction from wages is upheld.
3. The claimant is awarded £12,172.69 gross in compensation.

WRITTEN REASONS

The claim

4. By an ET1 dated 10 October 2016 the claimant brought a claim for unlawful deduction from wages. He works as a care worker for the respondent providing care to people in their own homes. At the date of the hearing he was still employed by the respondent. As part of his role he carries out 2 sleep in shifts per week at the home of T, a man who is diagnosed with autism and has significant needs. For each sleep in shift, which lasts from 9pm until 9 am he is paid £25 (£20 prior to 2015). The claimant asserts that his time spent on sleep in shifts constitutes time work for the purposes of the National Minimum Wage("NMW") Act and that he should be paid the NMW for all time hours worked on those shifts. He claims that the respondent's failure to pay the national minimum wage amounts to an unlawful deduction from wages. He also claims that the respondent failed to follow the ACAS code on grievances as it failed to consider his appeal against his grievance outcome.

5. The respondent submitted an ET3 dated 15 November 2016 refuting the claimant's claim. They accepted that the shifts represent 'time work' but state that the time the claimant spent during the night shift fell under regulation 15 of the National Minimum Wage Regulations (now Reg 32(2)) which states as follows:

   "In addition to time when a worker is working, time work includes time when a worker is available at or near a pace of work, other than his home, for the purpose of doing time work and is required to be available for such work except that, in relation to a worker who by arrangement sleeps at or near a place of work, time during the hours he is permitted to sleep shall only be treated as being time work when the worker is awake for the purpose of working."

   Their response stated that as the claimant falls within this 'exception' they were under no obligation to pay the claimant the NMW unless he was awake for the purpose of working. They said that he was free to be in his own room with the door closed for the duration of the shift unless there was an emergency. They did not accept that the claimant was doing anything other than sleeping or whatever he pleased during the sleep in shifts. They stated that he would be paid if awake for the purposes of working during his shift but he had not notified them or followed the correct processes to show that he had carried out any such 'work' during his shifts. The outcome of the grievance had been that they found he was not carrying out the tasks he said he was during the sleep in shifts. They stated that they had not know about the grievance appeal and had not dealt with it because they has not known it existed.

List of Issues

6. The issues were agreed with the parties at the outset of the hearing. The claimant's claim was essentially one of 'boom or bust' (Mr Isaacs' phrase). The claimant's argument was that either the entire shift was deemed to be time work for the purposes of the NMW or not. The Tribunal was not asked to consider whether each individual act carried out by the claimant during the sleep in shifts constituted time work. The question for me to consider was whether, by virtue of his presence in T's home, the claimant was performing time work. The issues agreed therefore reflect that.

7. Did the sleep in shifts between September 2014 and September 2016 count as working time for the National Minimum Wage? In determining this the tribunal must decide whether the Claimant was working by virtue of being present at his place of work.

8. Did the Respondent make unauthorised deductions of Mr Negroiu's wages by failing to pay the National Minimum Wage for the sleep in shifts?

9. Did the Respondent breach the ACAS guidelines by not giving the Claimant an effective right of appeal against their refusal to uphold his grievance on this matter?

10. If the claimant's claim for unlawful deduction from wages is upheld what is the value of the underpayments to date? It was agreed by the parties that the claimant's claim was worth £12,172.69 gross before any uplift under the ACAS code.

11. If it is found that the respondent breached the ACAS guidelines by not giving the claimant an effective right of appeal what level of uplift, up to a maximum of 25% should be applied (if any) to any damages awarded?

The hearing

12. I heard from 4 witnesses; the claimant and three witnesses for the respondent, Aaron Kelner, Geri Connelly and Doreen Woods. I was given a 190 page bundle. Both representatives gave me written submissions and handed up 5 EAT authorities between them.

13. Both representatives were very helpful as were the witnesses.

Findings of Fact

14. The Respondent provides care to various individuals ('service users') under a contract it has with the Local Authority. The value and detail of what has to be provided to the service users is set out in the contract between the

respondent and the local authority in accordance with the service user's needs. The level of care provided is reviewed from time to time depending on the changing needs of each service user. There is also an annual review for each service user. The business arrangement and the fees charged by the respondent for this work was not discussed before the tribunal.

15. The claimant has worked for the respondent since January 2011. As part of his role he performs sleep in shifts at the home of T, a service user for the respondent who is autistic and has significant needs. The claimant also cares for T during the day and his shift pattern consists of a mixture of day shifts and sleep in shifts. T requires 24 hour support. During the day he has 2 carers looking after him. At night he always has one carer sleeping in. There is a separate room in T's house with a bed in it for the carer sleeping in.

16. It was agreed by all parties that the claimant was good at his job and well liked. In particular it was agreed that he got on well with T and since the claimant had been working with him, T's behaviour had improved.

Work undertaken during the sleep in shifts

17. Evidence was provided by the respondent witnesses that the care programme for T states that no active care is required after he is given his medication at 9pm. Although I was not shown a copy of the care plan I accept that this is the case. The carer is meant to be able to retreat to their bedroom for the entire shift and choose how to spend their time until the following morning unless there is an emergency. Mr Kelner said at paragraph 4 of his witness statement that the extent of the claimant's obligations during the sleep in shift were:

"If he [T] did need assistance with anything during a sleep in shift then he would be able to let the Claimant know, even if the Claimant was asleep. It is entirely the Claimant's choice whether to stay awake or go to sleep."

18. The claimant claimed that during his sleep in shifts he performed significant amounts of actual work including helping the claimant with his computer, playing games with him and helping make snacks or get drinks. He said that T frequently stayed up until midnight and beyond and that during this time he would always have his door open and stay awake so that he could keep an eye on T and make sure he was safe.

19. The respondent refuted this. They stated that T did not require that level of support and that they did not believe that the claimant was performing these tasks.

20. Given the parties' agreement that the tribunal was to make a 'boom or bust' finding about whether the claimant's mere presence constituted time work, it

seems to me that whether or not he was performing these tasks becomes largely irrelevant. Nonetheless, given that all the case law in this area turns very precisely on the facts of the situation and that significant amounts of evidence was submitted to the tribunal on this issue, I have decided to make a finding as to what actually happened during the sleep in shifts.

21. The respondent relied on various policies to support their conclusion that the claimant is not carrying out the work that he states. First there was the requirement to fill in the daily logs for all activities and care carried out with T. Failure to complete the log was, they said, dangerous because it would provide an incomplete handover for the next carers looking after T. They stated that the claimant was fully aware of those policies and good at his paperwork during the day. Therefore the fact that he failed to record any or all of the tasks he now relied upon meant that they were not happening. The respondent submitted that the absence of any notes in the daily logs about any assistance given at night demonstrated that the claimant was not in fact carrying out that work. Examples of daily logs were provided (pgs 135-172) that showed detailed information about what happened during the day and nothing happening at night apart from one incident where it was noted that the claimant had not gone to sleep until 4am.

22. Having reviewed the daily logs provided it is clear that there is a stark contrast between the detail provided of what happened during the day and what happened at night. It was not clear whether the logs provided were in relation to shifts specifically covered by the claimant or those covered by all the staff who look after T. Nonetheless, I think it is very unlikely that someone with T's needs would never need any support at night. The fact that the respondent asserted that all actions by staff, however minor, are meant to be documented and yet none (apart from one) is actually documented in the notes demonstrates to me that the claimant and his colleagues were more likely than not to be carrying out small tasks but not documenting them.

23. The complete absence of any record of any actions taken by any of the carers strongly suggest that there was an unwritten rule that bar any significant occurrence, notes were not kept at night. I therefore prefer the claimant's evidence that there was a general agreement that bar an emergency or T requiring significant assistance, notes of small tasks such as making toast and playing computer games were not made at night by any of those doing the sleep in shifts. Such work was not required by any care plan or package and therefore there was no need to record that they had been done. I find that it is more likely than not that T required some support during the night before he went to sleep and that the claimant, when on shift, provided that support.

24. The second policy relied upon by the respondent to show that the claimant was not carrying out these tasks was the sleep in policy. Mr Kelner stated that there was a verbal sleep in shift policy that if staff did do any work they

should notify him so that they could be paid for that work. The claimant's failure to claim for any of the time he says he was awake and caring for T supports their assertion that he was not in fact doing that work. There is no written policy about how to claim pay for work done during sleep in shifts. Mr Kelner says that he explains this policy to individuals at their induction. Mr Kelner was not working for the respondent when the claimant started and so could not comment on whether the claimant was given the same information. The claimant states that when he started performing sleep ins he was told that there was no need to document work done during sleep ins because you would not get paid for it.

25. Whilst I accept that the claimant probably was told that work done at night would not have been paid for, and that the lack of a written policy implies that such applications should not be routinely made, I believe that the claimant was aware of the possibility that he could be paid if he carried out some significant work whilst on a sleep in shift. I believe that he did not seek to claim for the work he does because he does not view the tasks he carries out for T as significant 'work' because he was simply meeting T's extra needs out of a sense of obligation – he is in T's home therefore he ought to help him were T to ask. As stated above there is no care 'plan' in place for activities and required tasks for T during the hours of 9pm to 9am. The claimant likes T and chooses to help him for example, fix his computer.

26. This ties in with Mr Kelner's statement which says,

"If he [T] did need assistance with anything during a sleep in shift then he would be able to let the Claimant know even if the Claimant was asleep."

The Claimant remains awake to provide the assistance T asks for though he is aware that if he wanted to, he could shut his door and largely ignore T or sleep until T makes an active request for assistance. I do not think he is contractually obliged to remain awake whilst T is awake or so proactively interact with T during the sleep in shift.

27. However my finding that the claimant was carrying out the tasks he says he was during those shifts that does not mean that the support required was essential or that the claimant was obliged to provide it. I find that the claimant was conscientious and cared for T over and above what was expected of him or other staff carrying out the sleep in shift. The claimant said in evidence that he got on well with T and that he felt that he was there, in T's home, he should help T if he needed it whether or not it was an emergency. He said that he found such tasks no trouble and was not going to say no to T if he asked him for help. However the claimant also confirmed in evidence that he knew that if he wanted to he could shut the door and ignore T (in the absence of an emergency) and sleep or made phone calls etc.

28. None of the tasks the claimant carries out appear, on the face of it to be 'essential' and the claimant did not assert any risk or harm to T would have occurred had he not carried out the tasks he described. In my opinion, the non-essential nature of the tasks he describes, lends credibility to the claimant's assertion that he did them.

29. Mr Kelner summarised T's needs at paragraph 4 of his statement:

[T] … is quite independent. He receives a higher level of assistance during the daytime hours of 9am to 9pm. This includes assistance with his medication, preparation of meals, household chores and going out in the community. He is however able to make himself snacks and use the bathroom completely independently.

30. The non-essential nature of the tasks coupled with Mr Kelner's description of T's needs shows confirms to me that there was no contractual obligation on the claimant to provide the active support to T. His role was meant to be responsive. How actively he responded appears to have been a choice rather than an obligation or requirement. The extent of his contractual obligations and the respondent's contractual obligations to the local authority are discussed below.

Presence at T's home

31. The issues in dispute that I believe are more relevant to the claimant's current claim are whether the claimant was able to leave T's home during his sleep in shift and whether there was a contractual obligation on the respondent to provide a sleep in worker for T to satisfy their contract with the local authority.

32. All three respondent witnesses stated that the claimant was able to use an 'on-call' support service if T needed support at night. T was known to sometimes be violent and in such instances the claimant may have needed assistance. The claimant agreed that there was on call support should he need it though in reality he had not required it to date.

33. All three respondent witnesses also confirmed that the claimant could have called the on call emergency support or his line manager if he needed to leave the premises for any reason whatsoever. Mr Kelner confirmed that he would personally have come to the house to cover his absence and had done so for other staff members. However all three witnesses confirmed that the expectation was that such 'relief' support would only be provided in exceptional circumstances such as a domestic emergency. It was not a service the respondent provides its sleep in shift carers if, for example, the claimant wanted to pop to the shops or go out for a meal.

34. There was some discussion regarding a colleague who had been disciplined for leaving a service user's home without telling anyone. Everyone agreed that the claimant could not leave T's house during sleep ins without first calling his manager to organise cover. I accept that the claimant would not be disciplined if he were to call his line manager for such assistance but Ms Woods confirmed that were he to regularly leave part way through his shifts for whatever reason, then they would have to discuss with him the viability of him continuing to carry out those shifts.

35. I find that the extent of the 'relief' cover provided by the respondent was very limited and had the claimant frequently availed himself of such cover he would not have been asked to continue covering sleep ins. The default position was that the claimant was expected to remain at T's home from 9pm until 9 am unless there were significant extenuating circumstances. In essence that was the whole point of the sleep in shift – to provide a continuous presence at T's home. The claimant was that presence during the sleep in shifts regardless of whether he carried out the ad hoc care he mentions.

Local authority contract

36. Ms Woods agreed during evidence that the respondent was contractually obliged to the local authority to provide a carer to sleep in at T's home. The local authority had secured additional funding and the social worker had assessed that T, as a vulnerable adult, needed 24 hour carer presence. Ms Woods said that the cover required was only in case of emergency and that the person rarely if ever had to do anything. Ms Connelly, who investigated the claimant's grievance said that she did not believe that the claimant actually did carry out the work he did but, even if he did, that was not what was contractually required by the local authority. The sleep in care was emergency cover only.

37. I find that these assertions regarding the claimant being on call in an emergency are misleading and undermined by the fact that the claimant himself had access to an on call emergency service. The service provided by the claimant was more than just an on call emergency service, he had to physically be in T's home to provide T with the 24 hour supervision that the local authority had deemed was necessary. If only an on call emergency service was required then this is all that T would be given access to. However his needs are such that this is not suitable and he has to have someone in the house with him because, as confirmed by Ms Connelly, he is a vulnerable adult. The care T required at night could have been minimal or non-existent (and I have found that the claimant probably provided more care than was absolutely necessary), but at the bare minimum the claimant or someone similar has to be on the premises to fulfil the respondent's contractual obligation to the local authority.

38. The respondent witnesses asserted that there were no safe-guarding or care ratios relevant to the situation meaning that the claimant's presence was not a statutory or regulatory requirement. Nonetheless, the local authority had deemed that the sleep in care was necessary for T and was paying for it. The respondent employs the claimant to perform those sleep in shifts. The lack of a regulatory or statutory requirement does not diminish the claimant's contractual obligation to the respondent to be, other than in exceptional circumstances at T's home from 9am to 9pm.

39. The question then for me to consider is whether the factual circumstances outlined above mean that the claimant was carrying out time work for the entirety of his shift or whether he falls within the exception because he was able to sleep at work and was only working when awake for the purposes of working.

Grievance

40. The claimant submitted a grievance dated 30 June 2016. In it he set out that he believed he ought to be paid the national minimum wage for his sleep in shifts. A grievance meeting was held on 26 July 2016 and chaired by Ms Geri Connelly. He gave Ms Connelly some case law and shared with her the advice he had received from the CAB. Ms Connelly did not uphold the claimant's grievance on the basis that she did not believe he was actually performing any tasks during the sleep in shifts because he was not documenting them in the daily logs and he was not required to do anything in any event and was aware of that.

41. The claimant appealed against that decision by writing, as requested, to Mr Aslam Dahya. He states that he sent the letter by recorded delivery. The respondent today did not seek to challenge that he had sent this letter. However they stated that nobody at the respondent was aware of having received it. They admit that it has not been dealt with.

42. In evidence Ms Connelly confirmed that she doubted very much whether any decision at the appeal would have overturned her original decision. The claimant confirmed that he did not intend to introduce any new facts or evidence at his appeal, he was simply intending to restate what he had already said. I accept that it would be very unlikely that an appeal would have overturned the original decision. The respondent was no doubt receiving legal advice and the implications of agreeing to the claimant's grievance was expensive. Further as has been born out by the discussions on case law today, this matter is far from straightforward and as shown today the respondent remains of the view that the claimant is not performing time work whilst asleep at T's house.

43. The claimant did nothing to chase up his grievance. Once he had submitted it he did not raise any concerns at all that it had not been heard until he

submitted his claim to the tribunal. This strikes me as strange given that the claimant is clearly very aware of his rights and keen to sort this matter out. His failure to find out what had happened to his appeal contributed to the respondent failing to hear it.

44. I do not find that the respondent deliberately chose not to hear the grievance but that the letter went missing and for whatever reason was not read by the correct person. The respondent had little to gain by not hearing the claimant's grievance appeal, particularly in circumstances where it was unlikely to involve much more than a meeting with the claimant.

The Law

45. The National Minimum Wage Act 1998 brought in the obligation for employers to pay a minimum wage from 1999. Detail of the rules governing payment are set out in secondary legislation.

46. The National Minimum Wage Regulations 2015 (SI 2015/621) (NMW Regulations 2015) came into force on 6 April 2015, replacing the NMW Regulations 1999 and all of the subsequent amending regulations. This is relevant as the case law and the respondent's response refers to the paragraph numbers and references of the previous statutory instruments. In all other relevant respects however the legislation remains unchanged.

47. It was common ground between the parties that the claimant was carrying out 'time work'.

National Minimum Wage Regulations 2015 (SI 2015/621) (NMW Regulations 2015

The meaning of time work

Reg 30.

Time work is work, other than salaried hours work, in respect of which a worker is entitled under their contract to be paid—

(a)by reference to the time worked by the worker;

(b)by reference to a measure of output in a period of time where the worker is required to work for the whole of that period; or

(c)for work that would fall within sub-paragraph (b) but for the worker having an entitlement to be paid by reference to the period of time alone when the output does not exceed a particular level.

Determining hours of time work in a pay reference period

Reg 31.

The hours of time work in a pay reference period are the total number of hours of time work worked by the worker or treated under this Chapter as hours of time work in that period.

Time work where worker is available at or near a place of work

Reg 32

(1) Time work includes hours when a worker is available, and required to be available, at or near a place of work for the purposes of working unless the worker is at home.

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

48. Being paid the NMW is a contractual entitlement. Failure to pay the NMW amounts to an unlawful deduction from wages. S 13 Employment Rights Act prohibits an employer from making deductions from an employee's wages.

s13 Right not to suffer unauthorised deductions.

(1)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.

(2)In this section "relevant provision", in relation to a worker's contract, means a provision of the contract comprised—

(a)in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or

(b)in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.

(3)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.

(4)Subsection (3) does not apply in so far as the deficiency is attributable to an error of any description on the part of the employer affecting the computation by him of the gross amount of the wages properly payable by him to the worker on that occasion.

(5)For the purposes of this section a relevant provision of a worker's contract having effect by virtue of a variation of the contract does not operate to authorise the making of a deduction on account of any conduct of the worker, or any other event occurring, before the variation took effect.

(6)For the purposes of this section an agreement or consent signified by a worker does not operate to authorise the making of a deduction on account of any conduct of the worker, or any other event occurring, before the agreement or consent was signified.

(7)This section does not affect any other statutory provision by virtue of which a sum payable to a worker by his employer but not constituting "wages" within the meaning of this Part is not to be subject to a deduction at the instance of the employer.

49. The case law on this topic varies hugely in its approach and the weight given to different factors in deciding whether sleep in shifts constitute time work. However each and every judgment referred to by the parties makes it clear that their decisions were acutely fact specific and this was the reason for the discrepancies. I was taken to several cases by the parties. Shannon v Rampersad and Another (t/a Clifton House Residential Home) [215] UKEAT/0050/15/LA, *Whittlestone* v BJP Home Support Ltd [2014] ICR 275, *Esparon t/a Middle West Residential Care Home v Slavikovska UKEAT/0217/12*, Burrow Down Support Services Ltd v Rossiter UKEAT/0592/07 and did *Wray v JW Lees and Co (Brewers) Ltd [2012] ICR 43 (EAT)*. All are EAT authorities so no one case has precedence over the other. The representatives helpfully agreed that my decision would be 'dancing on the head of a pin'.

50. The Respondent relies on the 'exception' in Reg 32(2) NMW Regulations 2015 stating that the claimant was able to sleep in his own bedroom and therefore only 'available' for work. Their argument is that he should only be paid for the times he was awake for the purposes of working.

51. However, arguably, the exception in Reg 32(2) can only be relied upon if the worker is only available and not actually working. The claimant is seeking to assert that he was 'working' for the entirety of the sleep in shift, not on call, and therefore this exception cannot apply. (*British Nursing Association v Inland Revenue (National Minimum Wage Compliance Team) [2002] EWCA Civ 494*).

52. The case law draws a distinction between situations where being present is itself part of the job the individual is employed to do, and those where this is not the case and the worker is genuinely only "on call". Cases where presence was all important and where the individual was deemed to be working for the entire period include *Scottbridge* Construction Ltd v *Wright [2003]* IRLR 21), *Whittlestone* v BJP Home Support Ltd [2014] ICR 275 (EAT), and *MacCartney* v Oversley House Management UKEAT/0500/05). In those cases, although the worker was allowed to sleep, they were not allowed to leave the premises during the hours in question. They were held to be working, even for the hours they were asleep.

53. Further cases in which there is a legal or regulatory requirement for someone to be on the premises also support the claimant's assertion that a worker is working as opposed to being on call. These include *Anderson v Jarvis Hotels plc UKEATS/0062/05*, and *Esparon t/a Middle West Residential Care Home v Slavikovska UKEAT/0217/12* which found that the worker was working for the entire period because there was a legal or regulatory requirement for someone to be on the premises during that shift.

54. In contrast, *South Manchester Abbeyfield Society Ltd v Hopkins and another UKEAT/0079/10*, found that only hours when the worker was awake for the purposes of working could attract the national minimum wage as did *Wray v JW Lees and Co (Brewers) Ltd [2012] ICR 43 (EAT)* and *City of Edinburgh Council v Lauder and others UKEATS/0048/11* where the EAT held that on-call time during which they were asleep was not working time. The EAT held that the worker's "main job" was done during the hours of 8.30 am to 5.30 pm, and was separate from, and done at a time other than, the overnight "on call" period, which did not amount in its entirety to salaried hours work.

55. The most recent case on this subject was Shannon v Rampersad and Another (t/a Clifton House Residential Home) [215] UKEAT/0050/15/LA. In this case HHJ P Clark approached the question in a different starting point from that of the previous cases. His starting point was Reg 32 (then Reg 16 (1)). He did not first consider whether Mr Shannon was "working" (doing "salaried hours work") under the definition Reg 30 throughout those hours, but instead went straight to the deeming provision in regulation Reg 32(1). He held that, whilst Mr Shannon was "available" for work during his sleep-in hours (and thus could be deemed to be working and eligible for the NMW), he was available at his home, so fell within the exception. He went on to say that regulation 16(1A) was potentially engaged, and concluded that Mr Shannon was only working when he was awake for that purpose.

Submissions

56. Both parties provided me with written submissions at the outset of the hearing and made oral closing submissions. The Claimant submitted that the case of Whittlestone v BJP Home Support Ltd [2014] ICR 275 was most akin to the claimant's case. Ms Whittlestone was required to be at her place of work throughout the shift and would have been disciplined had she left. The claimant maintained that he would have been disciplined had he left the premises. The claimant also submitted that the cases of Scottbridge and Burrow Down assisted him as it was held that even where night watchmen could sleep for much of their shift, their presence was a requirement in of itself and they had to be there to deal with anything untoward.

57. The claimant also relied on the case of Esparon stating that the amount of work actually carried out was irrelevant to whether this was time work or not. A regulatory requirement was therefore a powerful indicator of whether someone was on call or at work. The claimant stated that the requirement did not have to be a statutory requirement but any legal obligation and so the respondent's contractual obligation to the local authority was a strong indicator as well that this was time work.

58. The claimant distinguished the present case from Shannon on its facts because in that case the individual was at home whilst on call. The home was provided by his employer for free. Further the individual was the emergency on call support to the staff on site. He was the back up assistance providing additional cover - not the first port of call.

59. The respondent submitted that the starting point for the tribunal should be the same as HHJ Peter Clark in Shannon. The claimant was someone who was provided with somewhere to sleep and was on call he therefore had to fall within the exception of Reg 32(2). The claimant did not do any work whilst on the sleep in shifts and in any event was not required to do any work but could have slept the entire period unless there was an emergency. The respondent submitted that the claimant was not working, he was merely on call. There was no statutory requirement for the claimant to be there so he could not rely on Esparon or similar cases. The claimant did not face disciplinary action if he left the premises and so the claimant could not rely on Whittlestone.

Conclusions

60. I have found that, bar small ad hoc requests from T, the claimant was not contractually required to do anything other than sleep between the hours of 9pm and 9am though he frequently chose to assist T in tasks where he would normally require support during the day such as fixing his computer, making him toast and generally keeping an eye on him whilst he was awake. I find that the claimant often remained awake until midnight or beyond to carry out

these tasks.

61. I have found that the respondent required the claimant to remain at T's home throughout the shift unless there were extenuating circumstances. He was not free to leave and his presence was required by the respondent's contract with the local authority. It was not a regulatory or statutory requirement but a third party required the respondent to ensure that someone was present for the entire period between 9pm and 9am.

62. The claimant was able to sleep for some or all of his shift if he chose to do so but he had to be in T's home. His presence was a requirement; were he to leave he had to have a good reason and he had to notify his line manager before going so that cover could be arranged. Had he decided to leave his shift regularly that would have been a cause for concern for the respondent and it is likely that he would have been removed from that shift. Had he left without notifying his line manager and ensuring that there was adequate cover then he would have been disciplined.

63. The presence of an on call emergency support worker does not undermine the fact that the claimant was the first port of call for T should he need any help during the night. The local authority had assessed T's needs and decided that T needed someone to sleep over at night and agreed to fund this.

64. The room that the claimant slept in at T's house was not the claimant's room nor his home. Other sleep in shift workers used the room and the claimant was not at home waiting to be on call.

65. I am therefore persuaded that the claimant was carrying out time work for the entire sleep in shift. His time was not his own from 9pm to 9am. Regardless of whether he chose to go over and above his duties during the shift, he had to be in situ at T's home and save for a small amount of flexibility, the claimant was not free to leave.

66. The case is remarkably similar in facts to the case of Whittlestone where the ET and the EAT clearly considers the fact that Ms Whitttlestone was never actually called upon to do any work yet was required to be in situ at a place that was not her home but her workplace.

67. Whilst I accept that the claimant would not have been disciplined had he asked to leave the premises he was not free to come and go. As Ms Connelly stated in her evidence the claimant had to physically be at T's house because T was a vulnerable adult who required someone on the premises. The claimant could not ' for instance slip out for a late night movie or fish and chips' [Langstaff, para 58 Whittlestone]. He was not, in similar circumstances to Ms Wray in Wray where she had to at some point return to sleep overnight at the pub but was otherwise free to come and go as she pleased.

68. I accept that there was no statutory requirement as per the judge's 'strong indicator' in Esparon. However there was clearly a need and a contractual obligation for T to have someone in the house with him at all times. The claimant's presence was a necessity both for the care of T but also to fulfil the contractual obligations of the respondent to the local authority. The fact that the local authority deemed it a necessity for T to have sleepover care is a strong indicator that the claimant's mere presence was the essence of the purpose of the sleep in shift. He was there because a vulnerable adult had to have someone in his home with him at all times.

69. The approach taken by LJ Langstaff in Whittingstone is particularly clear on this point.

15. The following observations can be made. First Regulation 15(1) deems some work which is not otherwise time work to be regarded as time work. If work is being done which is time work as defined by Regulation 3 then 15(1) has no application. It only applies to oblige an employer to treat as time work that which otherwise would not be. Second, that work is not to be equated to any particular level of activity. The saying, "they also serve who only stand and wait" is true but it does not necessarily assist in knowing whether the standing and waiting is work or whether it is not: however, it is only to be time work if deemed to be under section 15(1) or (2), and not excluded from the scope of 15(1) by Regulation 1A nor excluded from paragraph 2 by the exceptions in 2(a) and 2(b).

16. Thus the cases, as I shall show, note that where a person's presence at a place is part of their work the hours spent there irrespective of the level of activity are classed as time work. Difficult cases may arise where a worker is obliged to be present at a particular place. That presence may amount to their working. Conversely it may not. An example of the latter might typically be where a requirement is imposed upon an employee to live at or near a particular place but it is not necessary for that employee to spend designated hours there for the better performance of the contractual duties. This is unlikely to be time work: presence facilitates work but it is not itself work. Conversely where specific hours at a particular place are required, upon the pain of discipline if they are not spent at that place, and the worker is at the disposal of the employer during that period, it will normally constitute time work.

70. I conclude that the claimant was indeed required to undertake "*specific hours at a particular place, upon the pain of discipline if they are not spent at that*

place, and the worker is at the disposal of the employer during that period". Whilst he may not have been disciplined had he arranged cover for one off absences with his line manager - he would have been disciplined had he left without notifying anyone. Further he could not have frequently and easily availed himself of the cover provided by his manager. His time was not his own, he was not free to come and go as he pleased.

71. The claimant had to be there to deal with anything untoward that may have arisen as in the night watchman case of Scottbridge. He was not the back up emergency support to workers who might need his help at some point as in the case of Shannon. In this situation, the emergency call line the respondent referred to as being the claimant's on call support is akin, in my opinion, to the claimant's situation HHJ Peter Clark was considering in Shannon. Mr Negroiu in this case was the first port of call, not the emergency back up. I accept that most of the time he was only contractually obliged to have done any significant tasks had there been an emergency, but as Mr Kelner said in evidence, the claimant was expected to deal with the requests for support from T as and when they arose.

72. I have carefully considered the approach taken by HHJ Clark in Shannon as put forward by the respondent. The most pertinent paragraphs I cite below:

20. This Claimant fell within the first part of Regulation 16; he was available at his place of work, Clifton House, for the purpose of doing salaried hours work and was required to be available for such work and thus, prima facie*, his working hours were those between 10pm and 7am on each night shift. However, the exception applied to him; his home, the Studio, was at his place of work and he was entitled to spend the entire shift at home. Accordingly Regulation 16(1A) is potentially engaged.*

21. Under Regulation 16(1A) the arrangement in force was that the Claimant was provided with suitable facilities for sleeping time (in the Studio, his home) during his shift because he was only required to respond to a call for assistance on the rare occasions he was called by the on duty night worker. In these circumstances, it seems to me, on the plain wording of Regulation 16 only those times when he was awake for the purpose of working counted as working hours and his flat-rate pay (plus accommodation) meant that he was at all times in receipt of the NMW. On that analysis I agree with the ET and the submissions of Ms Reece that this claim must fail.

73. However HHJ Clark then goes on to discuss why this approach does not conflict with the approach taken, for example, by Langstaff in Whttingstone because there, the tribunal's findings had been that the individual was carrying

out time work because part of their job was their mere presence. This is set out in paragraph 27 below.

> *27. I have considered these authorities out of deference to the sustained argument presented by Mr Gray-Jones. It seems to me that the particular facts of this case reflect the approach of the EAT in **Hopkins**, **Wray** and **Lauder**. The cases on the other side of the line may be distinguished on the basis that there the workers were working simply by being present; i.e. the night watchman in **Scottbridge** and the telephone operators in **British Nursing Association v Inland Revenue**.*

74. I have concluded that the claimant's job was carried out by his mere presence and therefore the claimant was carrying out time work for the entire sleep in shift. In those circumstances I do not consider that the approach in Shannon does precludes the possibility of a worker being entitled to the NMW for sleep in shifts.

75. The respondent has failed to pay the claimant the national minimum wage for his sleep in shifts and has therefore made unlawful deductions from his wages in breach of s13 Employment Rights Act 1996.

76. The parties have agreed at the outset of the hearing that if such a finding is made the unlawful deductions amount to £12,172.69 gross. This amount is therefore awarded in full.

77. I now turn to the issue of the potential uplift under the ACAS code. It is accepted that the respondent did not deal with the claimant's appeal against his grievance outcome. I have found that this was not deliberate attempt to ignore the claimant's appeal but a case of the appeal never having been read by the correct person. I have also concluded that it is very unlikely that the outcome to the appeal would have been any different because the respondent has made it clear that the impact of a decision by this tribunal that the claimant was working for his entire shift has significant ramifications for its entire workforce and the financial viability of several of its contracts. It is therefore highly unlikely that it would have upheld the claimant's grievance.

78. The uplift under the ACAS code is only to be awarded where a respondent has unreasonably failed to follow the ACAS code. I do not accept that the respondent has behaved unreasonably. They have an appeals policy which the claimant availed himself of. It appears that the letter was lost once it reached the respondent. The claimant took no steps to ask the respondent about the status of his appeal or mention it in any way until these proceedings were issued. I find that there was no deliberate attempt to avoid the claimant's right to appeal. There has been little or no detriment to the claimant as a result of his appeal not being heard. He had no new facts or information to be considered at the appeal stage and I do not believe that the

respondent would have upheld his appeal. I therefore do not consider the respondent's behaviour unreasonable and I do not award any uplift.

Employment Judge Webster

Date: 20 April 2017