Appeal No. UKEAT/0217/12/DA

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 8 May 2013
Judgment handed down on 8 May 2014
Revised 6 August 2014

Before

HIS HONOUR JUDGE SEROTA QC

MS V BRANNEY

MR I EZEKIEL

MR J ESPARON T/A MIDDLE WEST RESIDENTIAL CARE HOME APPELLANT

MISS L SLAVIKOVSKA RESPONDENT

Transcript of Proceedings

JUDGMENT

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APPEARANCES

For the Appellant	MR AKHLAQ CHOUDHURY (of Counsel)
For the Respondent	MR STEPHEN WYETH (of Counsel) Instructed by: Lyons Davidson Solicitors 5th Floor, St Bartholomew House 90-94 Fleet Street London EC4Y 1DH

SUMMARY

NATIONAL MINIMUM WAGE

The Claimant was employed as a care worker at the Respondent's residential care home. She was required to work a number of 'sleep-in' night shifts and be available for emergency purposes. There were statutory provisions that required the Respondent, for example to ensure that at all times suitably qualified, competent and experienced persons were working at the care home in such numbers as are appropriate for the health and welfare of service users.

The Claimant maintained that she was required to carry out certain duties during the night shift whereas the Respondent maintained that she was not required to carry out any duties save in case of emergencies and was permitted to sleep in the facilities provided. The Claimant received a lump sum for each sleep-in shift, but this was at a rate substantially less than the hourly rate of the National Minimum Wage. The Claimant claimed inter alia that she was entitled to be paid the National Minimum Wage because she was carrying out 'time work' as defined by section 1(1) of the **National Minimum Wage 1998** and regulations 3 and 15 of the **National Minimum Wage Regulations 1999**. She put her case on 2 grounds:

(a) she was required to work during her sleep-in shift and

(b) she was entitled to be paid simply for being present at the Respondent's premises.

The Employment Tribunal found in favour of the Claimant on both grounds. On appeal the Employment Appeal Tribunal upheld the decision on both grounds. The authorities in point were difficult to reconcile; however in the instant case the Employment Tribunal was correct to find that the Claimant was entitled to be paid simply for being at the Respondent's premises. Her presence constituted time work.

An important consideration in determining whether an employee is carrying out time work by reason of presence at the Respondent's premises 'just in case' must be why the employer requires the employee to be on the premises. If he requires the employee to be on the premises pursuant to a statutory requirement to have a suitable person on the premises "just in case" that would be a powerful indicator that the employee is being paid simply to be there and is thus deemed to be working regardless of whether work is actually carried out.

HIS HONOUR JUDGE SEROTA QC

Introduction

1. This is an appeal by the Respondent from an order of an Employment Tribunal at London South (Employment Judge Balogun and lay members). Reasons were sent to the parties on 13 December 2011. The hearing lasted four days and one day was spent by the Employment Tribunal in chambers.

2. The Employment Tribunal held that the Respondents had failed to pay a payment in accordance with the **National Minimum Wage Regulations 1999** (NMWR) for hours spent on a night shift and had thus made unlawful deductions from the Claimant's wages. The Employment Tribunal also held there had been automatic unfair dismissal and that the Claimant had suffered detriment by reason of making protected disclosures. The claim that the Claimant had suffered discrimination on the grounds of her race was rejected. Issues of remedy were held over.

3. On 27 January 2012 the Respondent applied for the decision to be reviewed and on 3 February 2012 presented his Notice of Appeal. The review was rejected on 9 February 2012.

4. On 25 April 2012 on the paper sift Wilkie J referred grounds 1 and 2 only of the Notice of Appeal to a full hearing and disposed of the balance of the Notice of Appeal pursuant to rule 3(7) of the Employment Appeal Tribunal Rules. Grounds 1 and 2 relate to National Minimum Wage deductions from wages.

5. At a remedy hearing held on 24 May 2012 the Claimant was awarded some £30,000, including £15,408.28 for failure to pay the National Minimum Wage. On 13 November 2012

Cox J permitted amendment of the Notice of Appeal and requested the Employment Tribunal to give further reasons on what are referred to as "Burns/Barke" grounds. These were provided in January to the Employment Appeal Tribunal and sent to the parties on 28 February 2013. The appeal essentially raises a point that has been debated in a number of cases, whether "sleep-in hours" constitute "work" within the meaning of the Regulations. The point has proved to be one of some difficulty, and, as will shortly be seen, there are a number of authorities in point that are difficult to reconcile with each other.

The factual background

6. We take the factual background largely from the decision of the Employment Tribunal but with particular emphasis on the National Minimum Wage issue.

7. The Respondent trades as Middle West Residential Care Home in Godstone. The residents of the home have learning difficulties. The Claimant is from the Ukraine and had consent to work in this country. On 13 December 2008 the Home Office wrote to the Respondent approving an extension of the Claimant's visa on condition that the Respondent agreed to pay her at least £7.02 per hour.

8. The Claimant was employed by the Respondent; the first contract is dated 1 November 2005. The terms included a provision that the Claimant should be paid £6 per hour for working 37.5 hours per week with sleep-in duty at £20 per shift. On 9 November 2007 the Claimant signed the Working Hours opt-out. On 1 April 2008 the Claimant's conditions of employment were varied, and sleep-in duty was changed to "waking-night duty". The Respondent's evidence was that this was a mistake and the Claimant's duties remained exactly as before. This was accepted by the Employment Tribunal; see paragraph 5.

9. The Employment Tribunal appeared to accept the Claimant's evidence that she was not allowed to sleep during night shifts, and her evidence was that she worked between 9.00pm and 10.00pm and from 7.00am to 9.00am but the night shift lasted from 9.00pm until 7.00am the following morning.

10. It is not necessary to set out the details of the Claimant's allegations of having suffered bullying and harassment by other members of staff or discrimination.

11. The Claimant's last contract was of 22 April 2008. She was employed as a senior care assistant until she was dismissed on 22 June 2010 for gross misconduct. The Claimant was resident at the care home and worked during the day. She had a tenancy agreement for her flat and paid rent. The Claimant worked a sleep-in shift from 9.00pm until 7.00am the following morning for which she was paid £25.

12. We refer to certain terms of her contracts. In the contract of 1 November 2005, paragraph 7 was headed "On-Call Duty":

> **"7.1 To comply with the regulatory requirements you are required to provide back-up in emergency situations."**

13. The rate of pay was shown as £6 per hour Monday to Saturday and, by paragraph 9.4, for "sleep-in duty", 2100 hours to 0700 hours, at the rate of £20 per shift.

14. At paragraph 7.0 of the latter contract there was a similar provision relating to on-call duty as that in the agreement of 1 November 2005, which we have already set out.

15. The Claimant's rate of pay was set at £6.70 per hour, Monday to Saturday, her contracted hours were 35 per week, and her normal working days were Monday to Friday on a "rota basis".

16. The Claimant's evidence was that she was not allowed to sleep when on night shift and did a variety of duties during the shift, including checking residents every 40 minutes to 1 hour (depending on their medical condition), ironing, changing incontinence pads and training new staff at night. This was denied by the Respondent, who said there were sleeping facilities and the Claimant was able to sleep on site but be available for emergency purposes. The Claimant did not give evidence as to when during the night shift she carried out the duties we have referred to, but her witnesses suggested that most of the work on the night shift was done between 9.00pm to 10.00pm and 7.00am to 9.00am. The Employment Tribunal accepted this evidence. The Respondent's case was that between 9.00pm to 10.00pm and 7.00am to 9.00am staff were paid at their normal rate of pay. The Employment Tribunal found this was the case between 7.00am and 9.00am because the night shift finished at 7.00am but did not accept that staff were paid their normal rate between 9.00pm to 10.00pm:

> **"[…] as this is contrary to what is written in the Claimant's contract, which provides for a payment of £25 (originally £20) for sleep-in duty, 2100 to 0700."**

17. The Employment Tribunal then went on to deal with issues relating to unfair dismissal, harassment etc. It is pertinent to note that an inspection by Her Majesty's Revenue & Customs determined staff on the same terms as the Claimant were being paid the National Minimum Wage. The Respondent's evidence was that it was essential to have somebody in the care home at night in case of emergency but they were not required to work beyond 10.00pm.

18. At paragraph 42, after considering various authorities (to which we shall refer later), including Regulation 15(1) of the NMWR, the Employment Tribunal found that the Claimant was required to be on the Respondent's premises throughout the shift and could be required to carry out ad hoc duties and be on hand in an emergency. It accepted the Claimant's submission that whether she was allowed to sleep during the shift or not was irrelevant. The Employment Tribunal concluded that the Claimant was entitled to receive the National Minimum Wage for all of the night-shift hours. She was latterly paid £25 for a ten-hour night shift, which averaged £2.50 per hour, which was clearly below the National Minimum Wage. It followed that the Claimant had suffered an unlawful deduction from her wages.

19. At the conclusion of the hearing we reserved our decision and we asked the parties if they wished to send us any relevant statutory requirements for the staffing of residential care homes. We were referred to Regulation 18 of the **Care Homes Regulations 2001** (CHR) and Regulation 22 of the **Health and Social Care Act 2008 (Regulated Activities) Regulations 2010** (NSCA 2008 (RA)R 2010). We shall refer to these later.

20. The Respondent submitted that there was no requirement placed on the Claimant to work during the night; that was the Respondent's evidence. Despite this it was submitted that the Employment Tribunal had not made sufficient findings, for example as to whether the Claimant attended to residents every 40 minutes.

21. We have mentioned that a reference was made to the Employment Tribunal to provide amplification of its reasoning set out in paragraph 42. In a communication from Employment Judge Balogun dated 21 January 2013 the Employment Tribunal said that it

concluded that the Claimant was not on call during the night shift but actually carrying out time work. The Employment Tribunal accepted the Claimant's evidence that during the night shift she undertook a variety of duties.

> **"Although the evidence seemed to suggest that the bulk of those duties were done between the hours of 9.00pm and 10.00pm, we noted that one of the duties was the checking of residents every 40 minutes to 1 hour dependent on their medical condition and this duty, by definition, would have been carried out over the course of the shift. The Claimant was required to be on the premises throughout the shift, and we accepted her evidence that she was not allowed to sleep on duty. In those circumstances, the various case authorities to which the Employment Tribunal had been referred dealing with whether employees were allowed to sleep or not while on call were of no assistance to the Employment Tribunal."**

Ground 1

22. It is said that the Employment Tribunal misapplied or misconstrued the **National Minimum Wage Regulations 1999** in concluding that Rule 15(1) and/or Rule 15(1A) did not apply to the facts of the instant case. It was the Respondent's submission that the Tribunal was not referred to or failed to have regard to a number of authorities, including in particular **South Manchester Abbeyfield Society v Hopkins** [2011] ICR 254, **Wray v Leese** [2012] ICR 43, and (a case decided subsequently) **City of Edinburgh Council v Lauder** UKEATS/0048/11. It was submitted that the conclusion that the Claimant was not "on call" during the sleep-in hours and therefore a person to whom Rule 15 did not apply was inconsistent with the Employment Tribunal's findings and with authorities as to what being "on call" actually meant or required.

Ground 2

23. It was submitted that paragraph 42 of the Reasons of the Employment Tribunal for finding that Rules 15(1) and (1A) did not apply were inadequate and failed to explain why the Claimant was not on call or merely available for working during the sleep-in hours. This is a **Meek v City of Birmingham District Council** [1987] IRLR 250 point.

24. Mr Choudhury, who appeared on behalf of the Respondent, took us through the relevant provisions of the **National Minimum Wage Act 1998** (NMWA) and the NMWR. Mr Choudhury identified the principal point as whether the Claimant was undertaking time work during the entirety of her sleep-in hours as defined by Rule 3. He drew our attention to a number of authorities, to which we shall refer shortly, including **Burrow Down Support Services v Rossiter** [2008] ICR 1172, **Smith v Oxfordshire Learning Disability NHS Trust** UKEAT/0176/09 and **Scottbridge Construction v Wright** [2003] IRLR 21. He submitted that recent and authoritative authority was the decision of the Employment Appeal Tribunal (HHJ Reid QC) in the **Hopkins** case. The Employment Appeal Tribunal had drawn a distinction between cases where an employee was working merely by being present at the employer's premises and those cases where the employee was provided with sleeping accommodation and was simply "on call". The Employment Tribunal was criticised for not considering the decision of the Employment Appeal Tribunal in **Wray**.

25. Mr Choudhury submitted, in the light of the authorities to which we have just referred, the Employment Tribunal should have asked whether or not the sleep-in hours fell within Rule 15 and asked what type of job it was; was it a job whose essential function involved simply being present at the employer's premises at night dealing with specific responsibilities that arose in that time, or was it a job where the employee was simply required to be at or near work and available at work (i.e. on call)? If it were the latter, then the employee would not be working through the night for the purposes of the Regulations. It was also necessary to consider whether the employee's sleep-in hours were core hours or were in addition to core hours, in which case the likelihood was that the employee was merely on call or available for work. Thirdly, was the Claimant sleeping at or near work so as to be available to provide work

should she be so required? If the answer to that question was affirmative, the likelihood is she was merely available for work or "on call".

26. Mr Choudhury then took us through the relevant facts as found by the Tribunal, including the finding that the Respondent did not need staff to be awake during the night (paragraph 5). Mr Choudhury was critical of the further reasons given by the Employment Tribunal and suggested that there was an inconsistency between the fresh findings of fact in the further Reasons and the original Reasons, not to be resolved simply by adapting the latter Reasons. The Employment Appeal Tribunal should guard against the risk that an Employment Tribunal might tailor its response to a request for explanations or further reasons so as to put the decision in the best possible light, he submitted.

27. Mr Choudhury submitted that the Employment Tribunal should have concluded that the Claimant's role was not one whose essential functions were simply to be present; her role was to be "on call" to deal with emergencies if required. Sleep-in hours were additional to her core hours; she slept at work when on sleep-in duty, so she was simply available if required for emergencies. The Claimant's home was at or near work within the meaning of Rule 15(1), and the exception to the deeming provision applied so that none of her "on-call hours" could be treated as time work. The only time that could be counted was time actually spent awake and working.

28. Mr Choudhury repeated that the Employment Tribunal had distinguished the **Rossiter** and **Wright** cases because in **Rossiter** the employee had no "core hours" and the only role of the employee was that of "night sleeper" who had particular duties to perform during the night

whereas the Claimant had no duties to perform; similarly, in **Wright**, a substantial part of the employee's work amounted to "being there".

The Claimant's case

29. The Claimant does not dispute the legal submissions as to the law. Mr Wyeth concentrated in his submissions that there was material that justified the conclusion that the Claimant was carrying out paid work during her sleep-in duty. The Employment Tribunal found that she was engaged in time work. The Respondent's case was forensic smoke and mirrors.

30. The appeal was now different to that which it had been originally. The issue has become whether sleep-in duty was time work. It was for that reason that the "Burns/Barke" order was made. The point is not a new point; it is apparent from paragraph 6 of the decision of the Employment Tribunal that the Claimant's case was that she was not allowed to sleep when on night shift and did a variety of duties during the shift, including checking residents every 40 minutes to 1 hour (depending on their medical condition), ironing, changing incontinence pads etc. The Employment Tribunal recorded that this was disputed by the Respondent. The precise findings of the Employment Tribunal were considered to be unclear, and it was for that reason that Cox J on 14 November 2012 invited the Employment Tribunal to provide further reasoning.

31. It is clear from paragraph 14 of the decision of the Employment Tribunal (relevant to the dismissal issues) that a complaint made by the Respondent against the Claimant was ignoring the request for assistance from another employee, Ms Trofinova, resulting in a resident being left sitting on the toilet for nearly one hour. There would have been no substance to this

complaint if it had not been the responsibility of the Claimant to assist her; the allegation had been denied by the Claimant. It is not clear to us whether the complaint relates to an occasion when the Claimant was on a "sleep-in shift".

32. It was never the Claimant's case that payments for the sleep-in shift should *not* be included in the calculation of the aggregate of all relevant remuneration for any pay reference period, and it was unnecessary for the Employment Tribunal to make any specific finding about this. The Claimant's case was that hours worked on the sleep-in shift should be included. The only issue in the case was whether the sleep-in-shift hours were or were not time work.

33. The Employment Tribunal found she was not "on call" but carrying out time work, so there was no need to look to the deeming provision in Regulation 15. The Claimant was required to be on the Respondent's premises and available throughout the shift to carry out ad hoc duties and be on hand for emergencies. There was a wealth of evidence that the Tribunal was entitled to make that finding. The Employment Tribunal found that the Claimant was engaged in *actual* as opposed to *deemed* time work. The case of **Wray** should be distinguished because the employee was engaged in actual rather than on-call work. The Employment Tribunal was entitled to reject the report of HMRC for the reasons it had given. Mr Wyeth asked forensically whether the Claimant was working merely by being present, even if asleep, as in the case of a nightwatchman. The question was, he submitted, whether the Claimant was doing exactly that, just as in the **British Nursing Association v Inland Revenue** [2002] IRLR 480 case. It was more than simply being "on call".

34. We were taken to the duty rotas that had been produced (pages 135-137 of the bundle) that were part of the Claimant's core job. Mr Wyeth submitted that unless it was essential for

the Claimant to be on the premises, why could she not have been at her home, which was only "a stone's throw" away. As Underhill J had said in **Smith**, sleep-in workers were different. The fact that the employee had core hours and then later undertook sleep-in duty did not affect the quality and nature of the work during the sleep-in duty. The person at home waiting for a telephone call can be said to be on call just as the Claimant was waiting for a call while on the premises; the difference was that it was essential for her to be on the Respondent's premises and not so in the case of a person who was at home. The essential question was whether it was an essential requirement that the Claimant be on the premises and was to be paid for being on the premises; it was necessary to ascertain whether there was an essential requirement for the Claimant to be on the premises, or for the Respondent to have someone in the Claimant's position on the premises, at the relevant time. The test was whether this was essential rather than convenient.

The law

35. We now turn to consider the law. Section 1(1) of the **NMWA 1998** provides:

> **"A person who qualifies for the national minimum wage shall be remunerated by his employer in respect of his work in any pay reference period at a rate which is not less than the national minimum wage."**

36. There is no issue in principle whether the Claimant might be entitled to the benefit of the National Minimum Wage if during her sleep-in shifts she was carrying out time work. "Time work" is defined in Regulation 3, which provides:

> **"In these Regulations 'time work' means—**
>
> **(a) work that is paid for under a worker's contract by reference to the time for which a worker works and is not salaried hours work […]."**

37. Regulation 15 relates to time work where a worker is available at or near a place of work for the purposes of doing time work or by arrangement sleeps at or near a place of work and provided with facilities for sleeping:

> **"(1) Subject to paragraph (1A), time work includes time when a worker is available at or near a place of work for the purpose of doing time work and is required to be available for such work except where—**
>
> **(a) the worker's home is at or near the place of work; and**
>
> **(b) the time is time the worker is entitled to spend at home.**
>
> **((1A) In relation to a worker who by arrangement sleeps at or near a place of work and is provided with suitable facilities for sleeping, time during the hours he is permitted to use those facilities for the purpose of sleeping shall only be treated as being time work when the worker is awake for the purpose of working.)"**

38. We now turn to consider the authorities to which we have referred. Many of them are fact-sensitive, and we shall need, therefore, to briefly set out the relevant facts. In **British Nursing** the employer was a national organisation providing "bank nurses" for nursing in homes and other institutions on an emergency basis. Part of that work involved a telephone booking service, which was provided 24 hours a day. During the day, the booking service was operated by employees working at the employer's premises, but during the night the work was transferred to employees working from home. The booking process involved a duty nurse answering a diverted telephone call and then responding to the request for nursing staff by identifying and contacting the person to do the work. The employees were paid an amount per shift. Buxton J from paragraph 12 said this:

> **"12. I have to say that not only was it open to the employment tribunal and to the Employment Appeal Tribunal to find that the workers were working throughout their shift, but also, as an issue of the ordinary use of the English language, it seems to me self-evident on these facts that they were indeed so working. No one would say that an employee sitting at the employer's premises during the day waiting for phone calls was only working, in the sense of only being entitled to be remunerated, during the periods when he or she was actually on the phone. Exactly the same consideration seems to me to apply if the employer chooses to operate the very same service during the night-time, not by bringing the employees into his office (which would no doubt impose substantial overhead costs on the employer and lead to significant difficulties of recruitment", but by diverting calls from the central switchboard to employees sitting waiting at home. […]**
>
> **13. That in the event there may during the middle period of the night be a few calls to field is nothing to the point. It is for the employer to decide whether it is economic and necessary to**

his business to make the facility available on a 24-hour basis. If he does so decide, it is the availability of the facility, not its actual use, that is important to him; and that is what he achieves by the working arrangements described in this case.

14. But reg. 15 only arises in a case where a worker is not in fact working, but is on call waiting to work. In this case, as we have seen, the tribunal found as a fact that the workers were working throughout the period of their shift. Regulation 15 is therefore irrelevant to these facts.

15. […] As I have already indicated, I find it extremely difficult to say that this Regulation is relevant to this case at all. […] on the tribunal's findings the situation that they were addressing was not a deemed piece of time work but an actual piece of time work. That indeed was the view of the tribunal itself, because having been invited to look at certain aspects of reg. 15, it said this at paragraphs 33 and 34 of its determination:

> **'33. In the present case, the workers are paid to work at home and their place of work is at home.**
>
> **34. We therefore conclude that the words in reg. 15 of "available at or near a place of work other than his home" are not relevant to the present situation.'"**

39. In **Wright** the Claimant was employed as a nightwatchman. He was required to attend the Respondent's premises seven nights a week between 5.00pm and 7.00am, for which he received a weekly wage of £210. Although he had certain minor tasks to perform, the principal purpose of his being on the premises was to be available to respond if an alarm was set off by an intruder. When he was not performing a specific task he could watch television, read or do whatever else he wished to. Sleeping facilities were provided. The Employment Tribunal dismissed his claim to be entitled to the National Minimum Wage. The Employment Appeal Tribunal (Scotland) and the Court of Session held that the whole 14 hours Mr Wright had to be on the employer's premises was to be regarded as "time work" for the NMWR; Regulation 15 did not apply, and Mr Wright was entitled to be paid the National Minimum Wage. Lord Johnston said in his Judgment:

> **"The terms on which the respondent was engaged in the employment of the appellants […] make it clear that in return for remuneration at the rate of £210 per week the respondent was required to attend at their premises between 5 pm and 7 am seven days per week as a night watchman. The work which was paid for under his contract by reference to the time for which he worked was, for the purposes of reg. 3, his attendance as a night watchman for the whole of those hours. […] the fact that the respondent had little or nothing to do during certain hours when he was permitted to sleep does not take away from the fact that he was throughout in attendance as a night watchman and required at any time to answer the telephone or to deal with alarms. The employment tribunal, in our view, confused their estimate of the hours during which the respondent was generally active with an overall consideration of what was required of him as a night watchman at any time."**

40. In **Anderson v Jarvis Hotels** [2006] UKEAT, 30 May 2006 (Lady Smith) the claimant was a guest care manager in the employment of a hotel company who was required to "sleep over" in the hotel several times each week, primarily in case of emergencies such as fire or flood. The sleep-over requirement was made of the claimant notwithstanding that he lived only 10 or 15 minutes' walk away from the hotel. It was necessary to have two of the respondent's employees in the hotel at night for health and safety and fire regulation reasons. The Employment Tribunal found that he was not at the respondent's disposal during periods of sleep-over and was not entitled to be paid therefore unless he carried out any work. This decision was reversed by the Employment Appeal Tribunal. It is plainly wrong to say the claimant was not at the respondent's disposal during sleep-overs, given that the respondent required him to be in their premises during those periods for a stated purpose. It was clear that the respondent required to have someone such as him sleeping over in the hotel. Lady Smith said at paragraph 21:

> **"What is also plain from a review of the authorities is that the employee can be regarded as working even although he is asleep and will be so regarded if the place that he is sleeping is his employer's premises and the reason he is sleeping there is that his employer requires him to be in those premises for the employer's purposes. […] no consideration has been given [by the Employment Tribunal] to the significance attributed to the fact that an employee is required to be physically present on his employer's premises or to the conclusion that emerges from a consideration of the authorities to the effect that the fact that an employee was allowed to sleep during an on call period is irrelevant in circumstances where the place where he is required to sleep is his employer's premises so as to be available if required, for his employer's purposes."**

41. Lady Smith continued at paragraph 23:

> **"In the present case, the claimant was clearly subject to employer requirement throughout the sleep-over periods. The reason that he slept over in the hotel was that the respondents were under an obligation to have at least two employees present there overnight for health and safety and fire regulation purposes. The requirement that the claimant remain in the respondents' hotel premises during sleep-over periods was of such significance that he was liable to and indeed had been disciplined in the event of his leaving the hotel at any time during such a period. That was in circumstances where the claimant's own home was not far away. It was, however, clearly not sufficient for the respondents' purposes that the claimant be at home and on call. He had to be in the hotel. The fact that he was there met a need of the respondents. He met that need throughout each sleep-over period. Being present in the premises was, primarily, what he was employed to do during sleep-over periods. That was,**

> **accordingly, his 'work'. I am readily satisfied that the Tribunal were in error in taking the view, as they did, that he could only be regarded as working if he was carrying out some specific activity during a sleep-over period. That approach simply misses the point."**

42. It is to be noted that in this case the claimant was found to be entitled to claim the benefit of the National Minimum Wage notwithstanding that at night his work was separate from his principal daytime duties.

43. We now turn to **Rossiter**, a decision of the Employment Appeal Tribunal presided over by Elias J. The claimant was a "night sleeper". His hours of work were 10.00pm to 8.00am for two nights per week. His job was to ensure the security of the work premises, a care home for people with learning difficulties. He had to monitor health and safety and would be accessible should any emergencies occur. He was required to be awake for 15 minutes to effect a handover of duties and to assist with the breakfast of the residents between 7.00am and 8.00am, otherwise he could be asleep, save when his duties required him to be awake, such as if he heard noises requiring investigation or if anything else untoward occurred. He was paid a flat fee for each shift. Regulation 15 of the NMWR had been amended since **Wright** and **British Nursing** to its present form. The amendment, however, was not intended to alter in any fundamental way the previous law, and the amendments were minor. Elias J said:

> **"The claimant was at work for the whole of the shift, essentially for the reasons given in [*Wright*]. Like the claimant in that case even during the time when he was permitted to be asleep, he was still required to deal with anything untoward that might arise in the course of his shift. It was not a case where he was deemed to be at work although only available to work."**

44. He then continued at paragraph 25, quoting from Lord Johnston in **Wright**:

> **"We recognise that there is some artificiality in saying that someone is working when he is sleeping, but the justification for this, and the steps which the employer might take to ensure that he is getting value for the wage paid, were summarised as followed by Lord Johnston when hearing the [*Wright*] case in the EAT (para 9):**

> **'[…] it is wholly inappropriate for the employer while requiring an employee to be present for a specific number of hours, to pay him only for a small proportion of those hours in respect of the amount of time that reflects what he is physically doing on the premises. The solution for the employer who wishes an employee to be present as a night watchman or the equivalent, is to provide him with alternative and additional work on the premises which enables him both to provide the employer with remunerated time and also the protection of someone on the premises for security reasons."**

45. We were referred to **Hughes v Graham** UKEAT/0159/08, a decision of HHJ McMullen QC. This is a case where the claimant was a care worker in a residential home who was provided with accommodation so that she could discharge her duty to be on call for the residents 11 hours a night, 7 days a week. It was held that she was entitled to the National Minimum Wage because she was working during that period. In **Smith** (Underhill J) the Claimant was a care worker in a care home and on occasion was required to "sleep in" at the home in return for a flat-rate payment. It was conceded that the claimant was engaged in "time work".

46. We next need to refer to **Hopkins** (HHJ Reid QC). At the relevant time the claimants, a housekeeper and deputy housekeeper at a residential home, were provided with living accommodation and required to be on call overnight during the working week. The issue was whether time spent on call was "working time". The Employment Tribunal held that it was, but the decision was reversed by the EAT. HHJ Reid QC referred to a number of the cases we have also referred to, including **Wright**, **British Nursing**, **Anderson**, **Rossiter**, **Hughes** and **Smith**. His analysis is set out at paragraph 38:

> **"We take the view that for NMW purposes the cases show a clear dichotomy between those cases where an employee is working merely by being present at the employer's premises (e.g. a nightwatchman) whether or not provided with sleeping accommodation and those where the employee is provided with sleeping accommodation and is simply on-call. In the latter class of case the employee may be able to call the WTR into issue to assert all the hours on-call are working hours within the WTR, a breach of those regulations and a claim for compensation arising from the breach. However in the latter class of case the employee cannot bring into account all the hours spent on-call for the purposes of a NMW claim. He can only do so (because of the terms of the NMWR regs. 15(1A) and 16(1A)) for such hours as he is awake**

for the purpose of working. In this case, of course, there is no claim under the WTR, only the contractual claim under the NMW."

47. In **Wray**, Underhill J was concerned with the case of a claimant who worked as a temporary pub manager who was required by his contract to sleep on the premises. The question arose whether the time he slept on the premises could be regarded as working time; the Employment Tribunal held that they should not, and the appeal from that decision was dismissed. Underhill J noted that there was now:

> **"[…] a fair amount of case law on whether 'sleep-in' periods of one kind or another constitute work, whether time work or salaried hours work, for the purposes of the NMWR."**

48. Underhill J noted that the authorities were helpfully set out and reviewed in **Hopkins** and cited the passage that we have set out above at paragraph 38 in the Judgment of HHJ Reid QC. Underhill J said that it was helpful to quote slightly to expand that summary without differing in any way from what HHJ Reid QC had said:

> **"(1) There are cases where an employee is required during the night to perform certain tasks or undertake certain responsibilities, such as dealing with phone enquiries, as in [*British Nursing*], or undertaking the responsibilities of a night-watchman, as in [*Wright*]. If that is the nature of the job the employee is in truth working throughout the period in question, even if actual tasks only come up intermittently or infrequently and even if he or she is free to sleep in the intervals between those tasks. In such cases paragraphs (1) and (1A) of Regulations 15 and 16 do not come into play at all: as explained in [*Rossiter*], the role of paragraph (1) is to deem the employee to be working in periods when he is in fact not working but is required to be available to work (subject to the two exceptions identified below).**
>
> **(2) In other cases the employee is not required to work but is required to be at or near his place of work and available to work: the usual shorthand for such cases is 'on call', though that term is not used in the Regulations. That is the kind of case where the employee is deemed to be working by paragraph (1) of Regulations 15 and 16, but subject to (a) the 'at home' exception in paragraph (1) itself and (b) the 'sleeping facilities' exception in paragraph (1A).**
>
> **The distinction between the two classes of case may be difficult to draw in some particular factual situations. The cases of night-sleepers in residential homes, such as were under consideration in [*Rossiter*] and [*Smith*] may be examples.**
>
> **In the present case the position seems to us to be quite clear on the Tribunal's findings and to be similar to that found in the [*Hopkins*] case. In our view it is evident that the requirement that the Appellant sleep on the premises did not require her to do any work during that period. She was not in a position analogous to that of a night-watchman or a night-sleeper in a residential care home who has a responsibility throughout the night for those present in the home (or indeed to that of the hotel manager considered in *Anderson v Jarvis Hotels PLC* UKEAT/0062/05 – though this was not strictly speaking a minimum wage claim). She had no responsibilities of any kind. On the evidence, she was not, as we have already said, in breach**

> **of her duties if she left the premises for periods during the evening or night, provided she slept there. The purpose of the requirement was stated to be, as the Tribunal put it, 'a minimum security measure or preventative measure'. That no doubt in large part meant simply that the property was less likely to be burgled if it was evidently occupied, irrespective of whether anyone was there at a particular moment. It is nevertheless true that if something untoward occurred at the premises, most obviously an attempted break-in or a fire, the Appellant would be expected to deal with it appropriately, most obviously by calling the emergency services. But that very limited degree of responsibility is, as we have said, different from the responsibility falling on a manager in a hotel or a night-sleeper in a home for the disabled."**

49. The same point was considered in **Lauder** (Lady Smith). This was a case in which residential wardens in a sheltered-housing development were provided with "tied accommodation" rent- and council tax-free. Their contracts provided for salaried hours work of 36 hours per week. In addition, the employees were required to be on call at tied houses outside their normal working hours on four nights during the week. Lady Smith referred to all the authorities, including **Hopkins**, **British Nursing**, **Wray**, **Rossiter**, **Wright** and **Smith**. She drew attention to the distinction between "on-call" cases and "at-work" cases. In the case before her she concluded that as the claimants were on call there was no question of their being entitled to receive the National Minimum Wage.

50. After the close of submissions we drew the attention of counsel to the provision relating to on-call duty, which provided that "to comply with the regulatory requirements you are required to provide back-up in emergency situations". We asked the parties to provide us with details of the relevant statutory regulations concerning staffing in care homes. Our attention was drawn to the CHR 2001 and its replacement, NSCA 2008 (RA)R 2010. Regulation 18 of the 2001 Regulations provides as follows:

> **"Staffing**
>
> **18. (1) The registered person shall, having regard to the size of the care home, the statement of purpose and the number and needs of service users—**
>
> **(a) ensure that at all times suitably qualified, competent and experienced persons are *working* [our italics] at the care home in such numbers as are appropriate for the health and welfare of service users […]"**

51. Regulation 22 of the 2010 Regulations provides as follows:

> **"In order to safeguard the health, safety and welfare of service users, the registered person must take appropriate steps to ensure that, at all times, there are sufficient numbers of suitably qualified, skilled and experienced persons employed for the purposes of carrying on the regulated activity."**

Discussion

52. We have referred to the facts of the cases we have cited as well as the reasoning of the various courts. It has to be observed that it is very difficult to see the difference between the night sleeper in **Rossiter**, **Hughes**, the housekeepers in **Hopkins** and the sheltered housing residential wardens in **Lauder**, or between the temporary pub manager in **Wray** and the guest care manager in **Anderson**. In each case the employee is required to be on the premises "just in case" and is in that sense on call. How does one distinguish between those "at-work" cases, where the employee is paid simply to be there "just in case", and those "on-call" cases where he is required to be there on call and is not deemed to be working the whole time?

53. We would suggest that an important consideration must be why the employer requires the employee to be on the premises. If he requires the employee to be on the premises pursuant to a statutory requirement to have a suitable person on the premises "just in case", that would be a powerful indicator that the employee is being paid simply to be there and is thus deemed to be working regardless of whether work is actually carried out. Unsurprisingly, Mr Choudhury likened the instant case to the on-call cases such as **Hopkins** and **Lauder** while the Claimant likened it to **Hughes**, **Rossiter** and **Anderson**.

Conclusions

54. We are satisfied that the Claimant was engaged in time work on two separate but independent bases. Firstly, the Employment Tribunal found, we are satisfied, that the Claimant actually worked and carried out duties during the sleep-in sessions and was required to do so. The Employment Tribunal was entitled in its further Reasons to set out its findings as to the work performed by the Claimant, which in any event, as we have already observed, was referred to in its original Reasons; these are not new Reasons.

55. In our opinion, issues as to core hours and job continuation are irrelevant. The Claimant was required to undertake the night shifts quite separately to her day job.

56. The second reason is that in our opinion the Claimant's job when she was required to sleep in on the premises was one where she was entitled to be paid simply for being on the premises, regardless of whether she worked or not or whether she carried out her regular duties. She was paid simply to be there. This view is reinforced by the Regulations. The Respondent was obliged by the Regulations to have staff available on the premises at all times, and the Claimant was there to fulfil that obligation. She was required to undertake night shifts in pursuance of the obligations placed on the Respondent, and it was essential that she was there even if she did nothing.

57. There is no authority for the proposition that the Regulations do not apply if the work in question is not the employee's main job or an adjunct to it and has to be core hours. The proper focus must be on the task actually carried out. In the present case the Claimant was paid to be on the premises and also carried out time work. She was accordingly entitled to be paid at the rate of the National Minimum Wage, and the Respondent's appeal must be dismissed.

58. Before we conclude this Judgment, there are two further matters to which we must draw attention.

59. This Judgment had been prepared ready for dictation in July, but we received a copy of a letter from a Mr C A Carr, who had been the Claimant's partner and had given evidence on her behalf before the Employment Tribunal. This letter had been sent to Mr Esparon and advised him that he had asked the Claimant's solicitors to withdraw her claim against him for the National Minimum Wage. It stated that the Claimant had "recently" confided in him that she had not in fact worked through each night shift and had not remained awake, but she was permitted to rest or sleep on each night shift. It concluded as follows:

> **"From my perspective, regardless of any legal technicality that may be relied on to assist Larysa with her claim, with this new information I see that it was fundamentally wrong for Larysa to have proceeded with this disingenuous claim against you. As such, I have no wish to see any further abuse of the legal system and/or any further legal costs against you […]."**

60. We accordingly decided not to deliver Judgment but to stay the proceedings pending the result of an application by Mr Esparon for a review of the decision. Mr Esparon did seek a review, and the application (dated 5 September 2013) was referred to Employment Judge Balogun, together with a letter from the Claimant's representative of 23 September 2013. Employment Judge Balogun considered that it appeared that Mr Carr and the Claimant were no longer in a relationship, and the indications were that the break-up had not been civil.

> **"According to the [Claimant's] solicitors, Mr Carr sent them email falsely stating that the Claimant wished to withdraw her claim against you and without revealing the change in the nature of the relationship. If that is the case, then there is a serious question mark over the credibility of the "new" evidence and the weight that can be attached to it, particularly as it seems to be based solely on hearsay. In the circumstances, the Tribunal does not consider the evidence to be compelling enough to displace its findings on whether or not the Claimant was allowed to sleep on duty or indeed any other findings. The 'new' evidence does not materially**

affect the Tribunal's decision, given its conclusion that whether or not the Claimant slept during the night shift was irrelevant."

61. Employment Judge Balogun, as it seems to us, has taken a robust decision, as she was entitled to do, in considering the application for a review without having heard direct evidence from either Mr Carr or the Claimant.

62. The second matter to which we would draw attention is that after completion of the Judgment my attention was drawn to the decision of Langstaff P in **Whittlestone v BJP Home Support** UKEAT/0128/13, a case also concerned with the entitlement of a carer sleeping "sleep-overs" in a care home. We have not in any way relied upon this Judgment, because, firstly, no notice was given to the parties, and secondly because I have not had the opportunity of discussing the case with my lay members. However, the Judgment that we have prepared appears to be entirely consistent with the decision of Langstaff P.