



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Ms Malgorzata Kazanecka

v

**Nightingale Hammerson Trustee
Company Limited**

Heard at: Watford

On: 2 February 2017

Before: Employment Judge Southam

PRELIMINARY HEARING

Appearances

For the Claimant: Miss E Pierrot, Counsel

For the Respondent: Mr M Williams, Counsel

JUDGMENT

BY CONSENT

1. The claimant's complaint arising from her contract as House Manager from 1 April 2015 to 15 April 2016 having been withdrawn, that complaint is not dismissed.
2. Claim number 3324279/2016 is dismissed on the ground that it is a duplicate of claim no 3324253/2016.
3. The proceedings are stayed until 16 February 2017.

CASE MANAGEMENT SUMMARY

Listing the Hearing

1. After the matters set out below had been discussed and, where appropriate, agreed, the parties' representatives and I agreed that the claim would be listed for full merits hearing over one day, before a judge sitting alone, to be heard at **Watford Employment Tribunal, Radius House, 51 Clarendon Road, Watford, Hertfordshire WD17 1HP** on **31 May 2017**, starting at 10am, or as soon thereafter as possible. The parties are to attend by 9.30 am. This allocation is based on the claimant's stated

intention to call only herself and one other witness to give evidence, and the respondent's intention to call two witnesses.

2. The time is to be used as follows: the evidence should be completed by lunchtime. Thereafter one hour is allowed for closing submissions (half each side) and 1.5 hours for tribunal deliberation, all including remedy. The claimant must be ready to deal with what she seeks by way of remedy, if she succeeds.

The Claim

3. The claimant submitted two almost identical claims to the tribunal, in which she makes complaints about unlawful deductions from pay. Before she presented the first of those claims she entered into early conciliation with ACAS by sending them the requisite information about the intended claim. ACAS issued a certificate of early conciliation. All of these events took place on 24 August, 2016. The claimant's second claim was submitted two days later.
4. The claimant's case, as explained in the claim form, is that she is entitled to be paid for overnight hours spent at her employer's place of work, where she occupied accommodation provided by the employer and was contractually required to be there five days per week. The claim falls naturally into two separate phases, the first being when the claimant was employed as a House Manager, and the second when she was employed as a weekend cook. Because of a gap between those two employments, the claimant now accepts that her claim in respect of the first employment was submitted out of time. She reserves the right to proceed with that claim in the County Court and has withdrawn the claim from the tribunal. On that basis, with the agreement of the respondent, I have recorded the withdrawal of that complaint and the judgment above makes clear that the claim is not dismissed, for otherwise the claimant would not be able to pursue the complaint elsewhere.
5. For the avoidance of any doubt, I have dismissed the second claim. It was not worded precisely the same as the wording of first claim, but the remedy sought is the same and there is little to distinguish it from the first claim.
6. Today, the claimant requested, and the respondent agreed, that there should be a stay in the proceedings for 14 days, during which time the claimant requests that the respondent does not incur any costs.
7. The claim is resisted. The essence of the defence as pleaded, is, in relation to the part of the claim that is still proceeding, that it is unclear whether the claimant is alleging that she should be paid an hourly rate equivalent to the rate of the National Minimum Wage for the hours of 7:30 PM to 9:30 AM or whether the claimant is arguing that she should be paid not less than that rate for all of the hours she worked, taken as a whole. They deny that the hours that the claimant claims to be working hours between 7:30 PM and 9:30 AM constitute time work within the National

Minimum Wage Regulations 2015 or that the claimant was awake for the purposes of working during those hours.

8. Miss Pierrot explained today that the crux of the Claimant's case is that from 1 April 2015, under both contracts, the Claimant was required to remain at Belmont Lodge overnight, that she was not paid for doing so, and that she was entitled to be paid for doing so. She asserts that, in relation to the "Cook and Sleeping-In Nights" contract is that, from 16 April 2016 until 27 May 2016 she was employed by the Respondent as "cook and sleeping in nights" and that her contract contained the following material terms:
 - 8.1 That she would be paid £9.64 per hour, and that she would be paid a "call out charge" of £10 per hour if required to work during the night.
 - 8.2 That she would be required to work 15 hours per week, during the day time on Saturdays and Sundays. During this time the Claimant was required to work in the role of a cook.
 - 8.3 That she was also required to remain overnight at the care home five nights per week between 7.30pm and 9.30am, for which she was provided a basic single room.
9. The Claimant's case is that she was not paid for any of the hours in which she was required to remain on site overnight between 16 April 2016 and 27 May 2016 and that she was entitled to be paid her contractual rate of pay or, alternatively, at least the National Minimum Wage for that period. I decided that, insofar as the way the claimant now puts her case differs from what she said in the claim form, she is merely providing further and better particulars of an existing complaint, and not a new complaint. She is therefore permitted to proceed by that means.

The Issues

10. It was agreed that the issues the tribunal will have to determine are as follows:
 - 10.1 During the period 16 April 2016 - 27 May 2016, was the Claimant required to remain overnight at the care home five nights per week between 7.30pm and 9.30am? It is currently unclear from the Respondent's defence whether it admits that this was in fact the case.
 - 10.2 If so, did that requirement constitute work for which the Claimant should be paid, for any or all of that time?
 - 10.3 If so, under the terms of the Claimant's contract, what rate of pay was she entitled to receive for that work and did she in fact receive it?

- 10.3.1 The Claimant's primary case is that, as a matter of contractual construction, she was entitled to be paid at a rate of £10 per hour for the period she was required to work overnight.
- 10.3.2 The Claimant's secondary case is that, as a matter of contractual construction, she was entitled to be paid at a rate of £9.64 per hour for the period she was required to work overnight.
- 10.4 The Claimant's fall back case is that she was entitled to be paid at a rate of pay so as to prevent a breach of the National Minimum Wage Act. (The Claimant relies on section 17 NMWA 1998). In determining whether the Respondent was failing to pay the Claimant the National Minimum Wage, the following may fall to be considered:
- 10.5 What was the category of the Claimant's work for the purposes of the NMW Regs 2015? The Claimant contends that she was engaged in time work. Alternatively, the Claimant contends that she was engaged in salaried hours work.
- 10.5.1 Was the Claimant working or deemed working for all or any of the period she was required to remain at the care home overnight? The Claimant's primary case is that she was working by virtue of the fact that her presence overnight was required. Accordingly, the whole of the overnight period constituted work for the purpose of the NMW calculations. The Claimant relies on Reg 30 (time work) or, alternatively, Reg 21 (salaried hours work).
- 10.5.2 Alternatively, the Claimant claims that she was required to be available at her place of work for the purposes of working and was therefore, pursuant to Reg 32 (time work), or, alternatively, Reg 27 (salaried hours work) entitled to pay for the time she was awake for the purposes of working.
- 10.6 Having regard to the above, was the Claimant paid the NMW, applying the formula in Reg 7 NMW Regs 2015?
- 10.7 If not to what sum is she accordingly entitled under s.17 NMA 1998?

Other Matters

11. This claim is not eligible for an offer of Judicial Mediation. The parties can still seek to settle this dispute by other means. That could include seeking the assistance of ACAS, or the parties could enter into direct negotiations conducted on a Without Prejudice basis. In either case,

nothing that is said in those negotiations may be repeated in the tribunal proceedings

12. I made the following case management orders.

ORDERS

Made pursuant to the Employment Tribunals Rules of Procedure 2013

1. **Schedule of Loss**

The claimant shall, by **23 February 2017**, send to the respondent and to the tribunal a revised schedule setting out the sums claimed, showing how those sums are calculated.

2. **Disclosure of Documents**

2.1 It is ordered that the parties will give mutual disclosure of documents relevant to all of the issues identified above by supplying photocopies and a list so as to arrive on or before **2 March 2017**. This includes, from the claimant, documents relevant to the amounts she claims.

2.2 This order is made on the standard civil procedure rules basis, which requires the parties to disclose all documents relevant to the issues which are in their possession, custody or control, whether they assist the party who produces them, the other party or appear neutral.

2.3 The parties are reminded that they have a continuing duty of disclosure, so that if further documents come to light, or into the possession or control of either party after that date, they shall be disclosed.

3. **Bundle of Documents**

3.1 It is ordered that the claimant has primary responsibility for the creation of the single joint bundle of documents required for the hearing.

3.2 To this end, the claimant is ordered to supply to the respondent a draft index to the bundle by **9 March 2017**.

3.3 The respondent is ordered to notify the claimant on or before **16 March 2017** of any additional documents to be included in the bundle at their request. These must be documents to which they intend to refer, either by evidence in chief or by cross-examining the claimant, during the course of the hearing.

3.4 The claimant is ordered to provide to the respondent a full, indexed, paginated bundle on or before **23 March 2017**, and to bring three further copies of the bundle to the tribunal for use at the hearing, on the day of the hearing.

4. **Witness statements**

- 4.1 It is ordered that oral evidence in chief will be given by reference to typed witness statements from parties and witnesses. The witness statements must be full, but not repetitive. They must set out in chronological order all the facts about which a witness intends to tell the tribunal, relevant to the issues as identified herein. They must not include generalisation, argument, hypothesis or irrelevant material. The claimant's statement must include an account of the matters which are relevant to the remedies she seeks.
- 4.2 The facts must be set out in numbered paragraphs and, if a witness intends to refer to a document, the page number in the bundle must be set out by the reference.
- 4.3 It is ordered that witness statements are exchanged so as to arrive on or before **6 April 2017**.
- 4.4 Each party is responsible for bringing to the Tribunal on the day of the hearing three further copies of the statements of the witnesses, including in the claimant's case, her statement, who will give evidence on that party's behalf.

CONSEQUENCES OF NON-COMPLIANCE

1. Failure to comply with an order for disclosure may result on summary conviction in a fine of up to £1,000 being imposed upon a person in default under s.7(4) of the Employment Tribunals Act 1996.
2. The tribunal may also make a further order (an "unless order") providing that unless it is complied with, the claim or, as the case may be, the response shall be struck out on the date of non-compliance without further consideration of the proceedings or the need to give notice under rule 19 or hold a pre-hearing review or a Hearing.
3. An order may be varied or revoked upon application by a person affected by the order or by a judge on his/her own initiative.

Employment Judge Southam

Date: 14/02/2017

Sent to the parties on:

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For the Tribunal Office