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EMPLOYMENT TRIBUNALS

Claimant: Miss A Clark Chesaites

Respondent: Ms Louise Jones

Heard at: East London Hearing Centre

On: 15 November 2017

Before: Employment Judge Goodrich

Representation

Claimant: In person

Respondent: In person (Assisted by Ms Bernadette Heaney)

JUDGMENT

The judgment of the Tribunal is that:-

- 1. The Claimant's unlawful deduction from wages claim succeeds to the extent further set out below. The Respondent is ordered to pay the Claimant £2,595.19. The Respondent may make such deductions from that payment to the Claimant of tax and national insurance paid by her from the sums, provided that she provides copies to the Claimant of the certificates of such deductions.**
- 2. The Respondent failed to provide the Claimant with a statement of employment particulars and is ordered to pay the Claimant two weeks pay amounting to £864.**

REASONS

The Claim and the Issues

1 The background to this hearing is as follows.

2 Before presenting her claim the Claimant obtained two early conciliation certificates from ACAS. Hackney Council was named as one prospective Respondent and Louise Jones as another prospective Respondent. For both certificates the ACAS first contact was stated as being 30/03/2017; and ACAS conciliation closed on 14/05/2017.

3 The Claimant presented her Employment Tribunal claim on 22 May 2017, bringing an unlawful deduction from wages claim. The Claimant named two Respondents, Hackney Council and Ms Jones.

4 The Claimant gave brief details of her claim which she described as being that she was supposed to be paid £9.40 an hour and, instead, was paid instead £6.25 per hour. She stated that she believed she was owed about £9,000.

5 The London Borough of Hackney entered a response to the claim. Amongst the points made in their response were the following:

- 5.1 It was not accepted that the London Borough of Hackney was the employer of the Claimant.
- 5.2 Ms Jones, the second Respondent, has a disability entitling her to a high level of care support; and the Claimant was a health care assistant employed by Louise Jones under the direct payments scheme.
- 5.3 The local authority recommends that service users should pay health care assistants £9.40 per hour, which is the London living wage; but the rate the service user chooses to pay is at their own discretion; and the first Respondent believes that the service user, Louise Jones paid the Claimant the minimum wage of £7.20 per hour.

6 Louise Jones entered an ET3 response to the claim. Amongst the points made in her response were the following:

- 6.1 The Claimant worked on average 60 hours per week, comprised of three 12 hour day shifts (9.00am – 9.00pm) and two 12 hour night shifts (9.00pm – 9.00am).
- 6.2 The night shifts are sleeping in nights and paid at £55. The day shifts at the time of the Claimant's employment were paid at £95 making the hourly rate in the daytime to be £7.92.

- 6.3 She was not informed of the recommended London living wage £9.40 per hour until being visited by two members of the Hackney's direct payment team who advised her that she should be paid the London living wage of £9.40 per hour; and was informed that she should notify her employees that Hackney would look to backdate any outstanding money owed to her employees because of this oversight. She was still awaiting an update from Hackney.
- 6.4 During November she was advised by the direct payment team to pay her employees £9.40 per hour for all hours worked as a gesture of goodwill but that Hackney had left the issues outstanding.
- 6.5 She felt that she had not been fully supported by Hackney in resolving these issues.

7 The Claimant subsequently produced a schedule of her claim based on an entitlement of £9.40 per hour; her schedule amounting to £10,138.60.

8 On 25 August 2017 a Preliminary Hearing was conducted by Regional Employment Judge Taylor. She recorded that after discussion, by consent, the London Borough of Hackney was dismissed as a Respondent to these proceedings. Additionally she recorded the issues of the case being:

- 8.1 What was the express term of the Claimant's employment contract as to her entitlement to basic pay (daytime rate and basic pay night-time rate)?
- 8.2 Does the Claimant establish an express or implied term governing her wages entitling her to payment of £9.40 per hour from 1 September 2015 or any subsequent date if applicable?
- 8.3 Has the Claimant been paid the national minimum wage throughout the course of her employment?
- 8.4 Has the Respondent made unlawful deductions from the Claimant's wages?

9 The case was listed for a two day hearing on 19 and 20 October 2017.

10 On 19 October 2017, however, instead of the case being decided, the hearing was converted into a Preliminary Hearing, conducted by Judge Foxwell. This was caused by the Claimant having been issued with a strike out warning on the basis that she had failed to exchange witness statements in accordance with the Case Management Orders. The Claimant explained that she had sent them to Hackney Council and that it appeared that Hackney was acting as a go between post box for the parties. Judge Foxwell accepted the Claimant's explanation.

11 Judge Foxwell then recorded what he understood to be the substance of the claim. In summary he recorded that:

- 11.1 The parties agree that when the Claimant worked for the Respondent she did two 24 hour shifts and one 12 hour shift each week; and that the agreed rate of pay for a 24 hour shift was £150 and for a 12 hour shift it was £95 for a day or £55 for nights. He observed that, depending on the treatment of night work, the rates paid may fall below the national minimum wage.
- 11.2 The Claimant's case was that her rates of pay was significantly below the London living wage of £9.40 per hour; and that the Respondent agreed to pay the London living wage in November 2016 and that she was paid this for that month. Judge Foxwell also recorded that the Claimant also said that she did not suffer a deduction from her pay in December 2016 or January 2017; and that she asserted that she suffered significant deductions from pay in the period up to October 2016.
- 11.3 He recorded that he explained to the Claimant that under section 23 Employment Rights Act 1996 the time limit for presenting a complaint of unlawful deduction from wages is three months from the deduction complained of or, where there are a series of deductions, three months from the date of last in the series; and that it appeared that the claim had been presented outside the time limit.
- 11.4 It was clear that the Respondent had not appreciated the possibility that she may not have complied with the National Minimum Wage Regulations. He referred the parties to the recent case of *Focus Care Agency v Roberts [2016] UKEAT/244*.

12 Judge Foxwell directed both parties to file additional witness statements aimed at the issue of whether the Claimant was entitled to be paid at the National Minimum Wage rate for the hours of her night shift.

13 The case was listed for a one day hearing before me.

14 At the outset of the hearing I sought to clarify with the parties whether the issues to be determined were as described in the previous Preliminary Hearings. They did, subject to the following matters.

15 At various points during the hearing the Respondent, Louise Jones, appeared to accept that the Claimant should have been paid at the National Minimum Wage amount for her night shift as she accepted that the Claimant did do some work during the night shift although she also had her own bedroom and was able to sleep for part of her night shifts. She felt let down by Hackney Council's direct payment's team for leaving the issue outstanding from November 2016 to date.

16 For the Claimant's part, although she notified me that she wished to continue to press her claim based on the London living wage for the entirety of her employment, she said that she would be content for her claim to be accepted on the National Minimum Wage basis, having understood that Judge Foxwell regarded her London living wage claim as weak (although Judge Foxwell did not express an opinion on this in his written

record of the Preliminary Hearing summary).

17 The issues for me to decide were, therefore:

17.1 Is the Claimant's claim in time?

17.2 If not, was it reasonably practicable for it to have been presented in time?

17.3 If not, was it presented within a reasonable time thereafter?

17.4 Was the Respondent contractually required to pay the Claimant at the London living wage rate of £9.60 per hour throughout her employment or any part of it?

17.5 Alternatively, was the Claimant entitled to be paid at the National Minimum Wage rate (variously £6.70 and £7.20 per hour) for her night shift; and, if so, was there an underpayment of her wages?

The Relevant Law

18 Section 13 Employment Rights Act 1996 ("ERA") provides that a worker has the right not to suffer unauthorised deductions from their wages.

19 Section 23 ERA provides a right for a worker to present a complaint to Employment Tribunal that their employer has made an unlawful deduction from their wages, contrary to section 13.

20 Section 23(2) ERA contains the primary time limit, namely that a complaint shall be made before the end of the period of three months beginning with, in the case of a complaint relating to a payment received by the employer, the date when the payment was received.

21 This primary time limit is subject, however, to qualifications.

22 The early conciliation requirements, to obtain a certificate from ACAS before issuing proceedings, also make extension of time provisions.

23 Further than that, section 23(4) ERA provides that where the Employment Tribunal is satisfied that it was not reasonably practicable for a complaint under this Section to be presented before the end of the relevant period of three months, the Tribunal may consider the complaint if it is presented within such further period as the Tribunal considers reasonable.

24 Section 23(3) ERA provides that where a complaint is brought in respect of a series of deductions or payments, the references in subsection (2) to the deduction or payment are to the last deduction or payment in the series or to the last of the payments so received.

25 Where a claim is out of time the burden of proof is on a Claimant to satisfy an Employment Tribunal both that it was not reasonably practicable for a complaint to be presented before the end of the relevant period of three months; and that the complaint was presented within such further period as the Tribunal considers reasonable.

26 Relevant considerations for whether to extend time limits typically include such factors as the substantial cause of the employees failure to comply with the statutory time limit; whether there was some physical factor preventing compliance, such as illness; whether the employee knew of their right to complain to the Employment Tribunal at the time in question; whether there was any misrepresentation about any relevant matter by the employer; whether the employee was being advised at the material time and, if so by whom; the extent of the adviser's knowledge of the facts of the employee's case and nature of advice given; whether there was any substantial failure on the part of the employee or adviser leading to the failure to comply with the time limit; and the extent to which the employer's appeals machinery had been used.

27 Regulation 30 of the National Minimum Wage Regulations 2015 gives a definition as to work for the purposes of these regulations.

28 In the recent case of *Focus Care Agency Ltd v Roberts (and other cases)* [2017] IRLR 588 EAT it was held that if a worker is working within the meaning of Regulation 30, the deeming provision in Regulation 32 is not engaged at all. In order to decide whether, even in a period where a worker is permitted to sleep, he/she is nevertheless working by being present at the work place, a multi factorial approach has to be carried out. The factors referred to included considering whether the individual is working during the period for which he/she claims, work being determined on a realistic appraisal of the circumstances in light of the contract and the context within which it is made; the nature of the engagement and work carried out; whether the contract provides for the period in question to be part of the employee's working hours as a matter of construction; whether the contract provides for pay to be calculated by reference to a shift or by reference to something else, and if so, to what; or to whether an identifiable period is specified during which work is to be done. The fact that an employee has little or nothing to do during certain hours does not mean that he/she is not working. An employee can be working merely by being present even if he/she is simply required to deal with something untoward that might arise, but is otherwise entitled to sleep and even where an employee has never had to wake and deal with an untoward matter. Additional factors were described as being relevant, to which I do not refer, although I have borne them in mind.

The Evidence

29 On behalf of the Claimant I heard evidence from the Claimant herself.

30 On behalf of the Respondent I heard evidence from:

30.1 Ms Natalie Samuels, Direct Payment Support Officer for London Borough of Hackney.

30.2 The Respondent herself, Ms Louise Jones.

30.3 Ms Bernadette Heaney, Personal Assistant for the Respondent.

31 In addition I was provided with some statements from the Respondent for witnesses who did not attend the Tribunal.

32 In addition I considered the documents to which I was referred in the bundle of documents provided for what was scheduled to be the Tribunal hearing in October 2017; and the additional documents produced by the parties since then.

Findings of Fact

33 I set out below the findings of fact I consider relevant to determine the issues I am required to determine. I do not seek to set out each detail provided to me, nor make findings on each dispute between the parties as to what occurred (although the factual disputes between the parties were minor). I have considered all the evidence provided to me and I have borne it all in mind.

34 The Claimant, Ms Annmarie Clark Chesaites, worked for the Respondent from 1 September 2015 to 15 January 2017 as a health care assistant.

35 The Respondent, Louise Jones, is a single parent with a young child, aged two for most of the time the Claimant was employed by her.

36 The Respondent receives a direct care package through the London Borough of Hackney, enabling her to employ between four and six workers including the Claimant.

37 The Respondent received 24 hour care. The Claimant was one of between four and six individuals working for her. She also had a personal assistant, Ms Bernadette Heaney, who performs a range of roles for her, including advocacy. Ms Heaney accompanied the Claimant to this Employment Tribunal and assisted her in presenting her case.

38 The Claimant was interviewed for a position as a healthcare assistant.

39 The Claimant was employed to work on average 60 hours per week, comprised of three 12 hour day shifts, from 9.00am – 9.00pm; and two 12 hour night shifts, from 9.00pm to 9.00am.

40 The parties agreed that the Claimant would be paid £150 per 24 hour shift; £95 for the 12 hour day shift; and £55 for the night shift.

41 The Respondent's holiday year ran from 1 April to 31 March.

42 The Claimant received no written contract of employment.

43 The manner by which the Claimant was paid was that Ms Jones would put emails to a national payroll agency setting out the hours worked by her care assistants. They in turn would send her payslips setting out the deductions of tax and national insurance and

gross and net pay figures. The Respondent paid the employees the net pay; and HMRC the tax and national insurance. Additionally she was required, every three months, to send the London Borough of Hackney copies of her bank statements to show how she was using the budget given to her.

44 The Claimant was paid monthly. Although no specific date was given, she was paid by not later than the last day of the month, usually at some point during the last week of the month.

45 So far as I was made aware there were no more than incidental disagreements between the parties' respective accounts of the work performed by the Claimant for the Respondent.

46 The Respondent needs help with day-to-day tasks such as showering, being dressed and dressing her son Daniel, preparing and making meals, shopping and various administrative duties. All cleaning, washing, packing etc is done by carers. The Respondent uses a motorised wheelchair and a manual wheelchair indoors. To go from wheelchair to shower she leans on a carer.

47 As indicated above, the Claimant's night shifts ran from 9.00pm to 9.00am. Other than occasionally popping out to the shops briefly before the Respondent went to bed, the carers were required to be on the premises throughout their 12 hour shifts.

48 The Respondent would go to bed between 11.00pm and 12.00pm. During the first two – three hours of her shift, the Claimant would carry out whatever tasks were required. For example, she would assist her with having a shower, drying, dressing for bed, washing her hair, mopping the floors, cleaning the shower and shower drain. She would usually sit up and talk with the Respondent in her bed clothes until she was ready to go to bed.

49 After the Respondent went to bed, the Claimant was able to go to bed and had her own bedroom in the house. During the night she would get up as required. The Respondent's son, Daniel, would sometimes wake up during the night and was quite unsettled for much of the time the Claimant worked for the Respondent. On occasions she would need to change bedding or bath the Respondent's son as he might have wetted or soiled the bed – he was being toilet trained at the time, so did not wear nappies.

50 The Respondent's son tended to wake up around 6.00am to 7.00am and the Claimant would attend to him. If the Respondent needed to get up or have assistance during the night, she would telephone the Claimant who would provide this.

51 At some point in 2016, either April (according to the Claimant's account); or October (according to the Respondent's account this was the first time the Claimant spoke to her about the issue) the Claimant expressed concerns that she was not being paid at the national minimum wage rate. It is unnecessary to decide this factual disagreement between the parties.

52 The Respondent contacted Hackney Council about the issue.

53 A meeting took place on 16 November 2016 between the Respondent and the direct payment team for Hackney Council. The two members of the direct payment team present were Ms Samuels (the witness in this case); and her manager. Following that meeting the Respondent wrote to her care assistants to notify them of what had been discussed with the direct payments team. Ms Samuels agreed that what she had written was a correct summary of the meeting. In a letter dated 16 July 2016 the Respondent stated:

“We had a meeting with Natalie from Hackney Direct Payments today. It is a requirement if care funding comes from Direct Payments in Hackney that people be paid the living wage of £9.40 per hour, including the time overnight. So for this month that is what she will be paid.

Hackney will also backdate the shortfall in your earnings before the end of the financial year, that is before 1 April 2017.

On Monday I am being assessed by a social worker and my package will be reviewed. As it stands I do not get enough funding to pay the above rates for the hours people work so there is likely to be a change in the next few months. I cannot say right now what this will be as it depends on what the social worker decides.

I will keep you informed.”

54 The care assistants were paid the London living wage for all their hours worked in November 2016, whether day time or night time.

55 From that time onwards the care assistants have been paid at the London living rate (£9.40 per hour) for the day shifts they work. They have been continued to be paid £55 for their night shifts.

56 The Claimant was under the impression, from the letter sent to her on 16 November 2016 after the Respondent’s meeting with Hackney’s direct payments team, that she would be paid £9.40 per hour, backdated to the start of her employment.

57 Meanwhile, the Claimant was chasing both the Respondent and Ms Samuels for her payments to be backdated. On the Respondent’s part, she was dependent on the direct payment team.

58 The direct payment team failed either to notify the Claimant that her payments would be backdated to the start of her employment at a rate of £9.40 per hour; or to tell her that she would not be paid. This was an intensely frustrating process for the Claimant.

59 After various telephone calls to Ms Samuels, the Claimant had numerous telephone calls with Ms Samuels’s manager. The Claimant felt that she was constantly being fobbed off with a number of excuses.

60 Meanwhile, the Claimant’s relationship with the Respondent soured, which both parties attribute to the failure of the direct payments teams part to clarify what the

assistance would be paid for their night shifts.

61 To date, I was informed by Ms Samuels, no decision has been made as to what the care assistants should be paid in the light of the decision given by the Employment Appeal Tribunal in the case of *Focus Care Agency v Roberts*. The Claimant gave in her notice and left the Respondent's employment.

62 Both parties gave schedules as to the hours worked by the Claimant, her gross pay and rates of pay. Additionally, the Claimant gave schedules for what she considered she was owed if she was paid at the national minimum wage at the times in question. By the end of the closing submissions, the Respondent agreed, or at least did not dispute, the Claimant's figures as to the hours worked, once holidays were factored into the figures. The dispute between the parties as to the national minimum wage calculation sheet rested on whether the Respondent should be credited with any months during which the Claimant's gross pay amounted to more than the national minimum wage rates and could be used to offset months in which she was underpaid. I, therefore, adopt the Claimant's figures.

63 The Claimant's explanation for putting in her claim which she did, rather than at an earlier date was as follows.

64 After the national minimum wage went up the Claimant was concerned that she was not being paid at the national minimum wage rate. She believes that it was about April 2016.

65 Ms Samuels, a Direct Payment Support Officer for the London Borough of Hackney, received the telephone call from the Claimant to say that she was being underpaid by Louise (Jones, the Respondent). This telephone call led to the meeting on 16 November 2016 that gave rise to the Respondent's letter on 16 November 2016 to the Claimant. The direct payment team told Ms Jones that the London Borough of Hackney's policy was to pay the London living wage of £9.40 per hour. The letter from the Respondent reflected what had been discussed at the meeting that day, Ms Samuels accepting this to be the case when giving evidence.

66 When the Claimant became concerned that she was being paid less than the national minimum wage rate she spoke to the Respondent. She asked her for a letter to confirm that she was being underpaid.

67 After she received the letter provided by the Respondent on 16 November 2016 she believed that she would be paid at London living wage rate for both her day and night shift.

68 The Claimant then telephoned Ms Samuels on numerous occasions to find out what was happening about being paid the shortfall, as described above. Because she had had the reassurance of receiving the letter she held off from starting proceedings. She understood that by the end of the financial year she would receive full back payment.

69 After Ms Samuels referred the Claimant to her manager, the Claimant continued to telephone him. Despite numerous requests she was unable to get a decision from him.

She believed that they would sort it out. When, however, the direct payment team from the London Borough of Hackney had failed to sort the issue out by 30 March she applied to ACAS for an early conciliation certificate.

70 The Claimant did not obtain legal advice before issuing her claim (although she subsequently obtained assistance from a solicitor in drawing up her schedules of loss). She was unaware that her claim might be out of time.

71 Was the Claimant carrying out timed work for the purposes of Regulation 30 of the National Minimum Wage Regulations when she was performing her night shifts? I find that she was including because:

71.1 Making such a finding is possibly unnecessary as the Respondent appeared to accept, or concede, that the Claimant was working during her night shift.

71.2 The night shifts the Claimant worked were from 9.00pm to 9.00am, so were 12 hour shifts, or formed part of a 24 hour shift. She was paid for the time she worked.

71.3 Between 9.00pm, the starting time for the nightshift, and the time the Respondent went to bed, generally between 11.00pm and midnight, the Claimant was assisting the Respondent in her personal care needs. She was undoubtedly working for the purposes of Regulation 13.

71.4 From the time that the Respondent's son got up, generally around 6.00am to 7.00 am, or sometimes earlier, the Claimant was attending to his needs, she was clearly at work.

71.5 During the time that the Claimant was in bed, she was nonetheless required to get up reasonably regularly, when the Respondent's son woke up during the night, occasionally to change bedding or bath him, when he was being toilet trained and wet or soiled the bed; or if he woke up during the night and needed to go to the toilet; or if the Respondent needed assistance during the night, for example to go to the toilet.

72 From all the evidence provided to me did any deductions made to the Claimant's wages formed part of a series of deductions, or was the series of deductions broken? I find that the deductions made to the Claimant formed part of a series of deductions up to 31 December 2016 because:

72.1 The Claimant's wages were due by not later than the last day of the month, although in practice they were usually paid a few days earlier.

72.2 It is correct that there were a few months during the period of the Claimant's employment that her monthly payments of wages were slightly more than payment at the national minimum wage rate. This is because the Claimant was paid slightly more than the national

minimum wage rates for her day shifts and less (in view of my findings as to the Claimant being at work during her night shifts) for her nights. Thus, depending on the balance between the amount of day shifts and the amount of night shifts the Claimant worked during the month in question, there were a few months in which the Claimant received more than the National Minimum Wage Act rate for the hours worked during the month. The Claimant, therefore, has made no claims for the months of October 2015 and November 2015. For the month of November 2016 the issue does not arise as the Claimant, as a goodwill gesture from Hackney council, was paid at the London living wage rate for both her day and night shifts. This was, however, a one off gesture, not a longer term change in how the Claimant was paid.

72.3 Because the night shift rate for a 12 hour night shift was only £55 gross, this payment was always less than the national minimum wage rate. It meant that in any given month, because of the Claimant's shift patterns she was always likely to receive a monthly gross payment that was less than the national minimum wage rate. Very occasionally, because of the patterns of shift she worked on a particular month she might in fact receive more for the month than the national minimum wage rate. She was, however, always likely to have a shortfall because of the number of night shifts she usually worked.

72.4 Because of this issue the Claimant continued to suffer shortfalls in her monthly wages being less than the national minimum wage rate until the end of December, her last full monthly payment. So far as January was concerned the Respondent made the Claimant a payment of £200 as the Claimant was experiencing financial difficulties, so the issue did not arise.

Conclusions

73 The first question is whether the Claimant's claims are out of time.

74 Because of my finding of fact that the Respondent made a series on deductions up to 31 December 2016, the Claimant's claim is in time because of the extension of time provisions introduced through the requirement for ACAS early conciliation. She applied to ACAS on 30 March 2017, less than three months from the last of her series of deductions on 31 December 2016. As ACAS early conciliation for the Respondent lasted between 30 March 2017 and 14 May 2017; and the Claimant issued proceedings on 22 May 2017, within a month of the early conciliation certificate being provided, the claim is in time.

75 Even, however, if I had decided that the claim was out of time I would have found that it was not reasonably practicable for the claim to have been brought in time and it was brought within a reasonable period of time thereafter. Having in mind the guidance given in the case of *Palmer & Saunders v Southend-On-Sea Borough Council [1984] IRLR 119 CA*:

75.1 The Claimant was not physically prevented from complying with the limitation period, for example by illness.

- 75.2 The Claimant knew that she had the right to bring a complaint to an Employment Tribunal, although she did not have a detailed understanding of the exact time limit. In view of the complexities of the early conciliation provisions and the absence of legal aid for individuals to bring Employment Tribunal proceedings and the Claimant being a low paid employee this is entirely understandable.
- 75.3 The reason for the Claimant's delay in bringing proceedings was that she was trying to resolve the matter without legal proceedings being issued and believed that she would be paid the sums concerned. This is a strong point in favour of extending time limits. Successive governments have sought to encourage employees to issue Employment Tribunal proceedings as a last resort, rather than a first resort.
- 75.4 The reason that the Claimant delayed issuing proceedings was also that she was given false hope by Hackney council that she would be paid at the London living wage rate for both day and night shifts. The Respondent's letter to her, based on her discussions with Hackney council, gave the Claimant hope that Hackney council would pay the money. Thereafter she was unable to get any clear response from the relevant officers in Hackney council as to exactly when she would be paid, other than the Respondent letter that it would be by the end of the financial year; and she believed that she will be paid at the London living wage for the night shifts as well as day shifts.
- 75.5 The claim was issued about a week after the conclusion of the early conciliation process, which I would have found to be within a reasonable time of the end of the time limit

76 In view of my findings of fact that the Claimant was working during her night shifts, the Claimant was underpaid for most of the months that she worked for the Respondent, in that her gross monthly pay for the hours she worked in most of the months concerned was less than the national minimum wage rate in force at the times concerned.

77 The only dispute as to payment was a suggestion, or submission, made by the Respondent's personal assistant (both the Respondent and her personal assistant, Ms Heaney, made closing submissions) that credit should be given for months in which the Claimant received more than the national minimum wage.

78 I reject this suggestion, or submission. The Claimant was paid monthly under her (verbal) contract of employment. For each month that she worked, therefore, she was entitled to be paid at the national minimum wage rate. If, on any given month, she was paid less than the national minimum wage rate, she was entitled to the shortfall for that month. If, as occurred for three of the months of her employment, and part of the last month of her employment with the Respondent (part of January 2017) she in fact received more than the national minimum wage rate, she was not entitled to bring a claim for that month. During the months at which the payments made to the Claimant in fact represented more than the national minimum wage rate the Respondent was merely paying the Claimant what was contractually agreed, whether by way of the terms agreed at the outset of the Claimant's employment, or whether because of the goodwill gesture on

Hackney council for the month of November 2016; or whether because of the payment agreed by the Respondent in January 2017 for the part of that month. There was never any suggestion on the part of any of the individuals involved (the Claimant, the Respondent, or Hackney council) that any amounts of payment that were more than the minimum wage would be used to offset amounts that were less.

79 The Claimant is, therefore, entitled to the shortfall in payments of gross wages for the hours worked by the Claimant during months that were less than the national minimum wage rates.

80 To this extent the Claimant's claim succeeds.

81 The next issue is whether the Claimant was in fact entitled to the London living wage for the whole of the hours worked by her, because of the contents of the Respondent's letter to the Claimant on 16 November 2016.

82 It is possible that I am not required to make a decision on this issue as the Claimant said that she would be content with a payment for the shortfall under her National Minimum Wage Act claim, although she also pursued her London living wage claim.

83 I have concluded that the Claimant was not entitled to such sums from my reading of the Respondent's letter. The Respondent did not make any contractual agreement that she would pay the sums concerned. She stated that she did not have the funding for the shortfall in her earnings and that any future payments were dependent on the review of her package to which she referred. She was making a promise as to what she understood Hackney would do, not entering into any contractual commitment as to what she would pay the Claimant and the other care assistants. This element of the Claimant's claim, therefore, fails. It is, perhaps, arguable that the London Borough of Hackney might have been liable; they are, however, no longer a party to the proceedings and this not an issue for me to determine.

84 The calculations of amounts due were for the following shortfalls in the Claimant's gross pay namely:

Date	Amount Deducted
September 2016	£47.31
December 2015	£132.80 (revised from initial figure of £139.50 because of typing error of one hour)
January 2016	£34.20
February 2016	£130.32
March 2016	£171.98

April 2016	£242.56
May 2016	£261.35
June 2016	£352.77
July 2016	£188.00
August 2016	£173.80
September 2016	£195.92
October 2016	£183.78
December 2016	<u>£480.40</u>
Total sum	<u>£2595.19</u>

85 The parties agreed that the Claimant's contract of employment was a verbal one. No written statement of employment particulars was provided as is required under sections 1 and 4 Employment Rights Act 1996.

86 Section 38 Employment Act 2002 provides that the section applies to Employment Tribunal proceedings relating to a claim by an employee under any of the jurisdictions listed in Schedule 5. One of the jurisdictions concerned is section 23 of the Employment Rights Act 1996, relating to unauthorised deductions and payments.

87 As section 38 also provides that when the Employment Tribunal makes an award to the employee in respect of the claim to which the proceedings relate and when the proceedings begun the employer was in breach of their duty under Section 1(1) or 4(4) of the Employment Rights Act 1996 the Tribunal must, subject to subsection (5) increase the minimum award and may, if it considers it just and equitable in all the circumstances, increase the award by the higher amount instead. The two amounts concerned are two weeks or four weeks pay.

88 The Tribunal is obliged, therefore, to make such an award, whether applied for or not, unless there are exceptional circumstances.

89 In this case, I do not consider there are exceptional circumstances, although I do consider that this judgment should be brought to the attention of the Direct Payment department of Hackney Council for them to give consideration to paying the sums concerned. The direct payment section is in effect the paymaster for vulnerable individuals who are given personalised budgets. The direct payment section need to make sure that they provide the individuals concerned with the necessary information in order to enable them to carry out their statutory requirements. I order the minimum sum of two weeks pay.

90 As the Claimant was contracted to work 16 hours per week and the effect of my

judgment is for her to be paid at not less than the National Minimum Wage Act in force at the time concerned, the Claimant is entitled to 60 hours at the rate of £7.20 per hour amounting to £432.

91 I understand, from reading the Employment Tribunal's file, that the Claimant received a full remission of the fees she was required to pay for bringing the claim (until such fees were declared illegal by the Supreme Court in the case of *R (on the application of Unison) v Lord Chancellor*. If so, no issue of repayment of fees arises.

Employment Judge Goodrich

2 January 2018