EMPLOYMENT TRIBUNALS

Claimants **Respondent**

Ms. J. Jotangia V **Mears Care Limited**
Ms. K. Brighton
Ms. A Harris

Heard at: London Central **On: 31 October, 1 & 2 November 2018**

Before: Employment Judge Mason

Representation
For the Claimants: Mr. A. Allen, counsel.
For the Respondent: Ms. J. Fry, solicitor.

RESERVED JUDGMENT

The judgment of the Tribunal is that:

1. The Tribunal declares that the Respondent made unlawful deductions from the Claimants' wages contrary to s13 Employment Rights Act 1996 and breached the Claimants' contract of employment by failing to pay the Claimants for full contractual guaranteed hours.

2. The Tribunal declares that on occasions (to be determined at the Remedy Hearing) the Respondent has failed to pay the Claimants National Minimum Wage contrary to the National Minimum Wage Act 1998 and National Minimum Wage Regs 2015.

3. The Respondent failed to notify the Claimants of changes in their particulars of employment (specifically the method of calculating remuneration) before making the changes or within a month thereafter and the Claimants are each awarded 4 weeks' pay.

4. Full remedy will be determined at a Remedy Hearing on 13 February 2019.

REASONS

Background and issues

1. In this case Ms. Jotangia, Ms. Brighton and Ms. Harris ("the Claimants") claim that the Respondent has made unlawful deductions from their wages and failed to comply with the national minimum wage legislation. Their claims were presented on 10 January 2018 and, following an unopposed application by the Claimants, permission was given on 6 September 2018 to amend the claims to include claims for underpayments from the date of the ET1 to the date of the Tribunal hearing. Mr. Allen confirmed at the Hearing that the Claimants were no longer pursuing a claim for travel expenses.

2. The issues to be determined by the Tribunal are as follows:

2.1 Did the Respondent breach the Claimants' contracts of employment and make unlawful deductions from their wages by failing to pay the Claimants for their full guaranteed hours specified in their contracts in circumstances where:

(i) the Claimants (allegedly) declined work offered by the Respondent because it was not within the Claimants' agreed hours of availability and/or not within reasonable travelling distance of their home?; and/or

(ii) the Respondent failed to offer the Claimants sufficient hours of work within their availability and/or within reasonable travelling distance of their homes?

2.2 Did the Respondent breach the Claimants' contracts of employment and make unlawful deductions from their wages by failing to pay the Claimants for their full travelling time:

(i) from home to their first assignment and from their last assignment to home; and/or

(ii) between assignments?

(iii) if so, what is the correct rate of pay? (The Respondent says the correct rate is the National Minimum Wage and the Claimants say it is £9.15 (their hourly rate)).

2.3 Has the Respondent failed to pay the Claimants in accordance with the national minimum wage legislation?

2.4 Has the Respondent failed to comply with the requirements of s4 Employment Rights Act 1996 ("ERA") by failing to provide the Claimants with written confirmation of an alteration in their terms and conditions?

2.5 If so, should the Tribunal order the Respondent to pay the Claimants two or four weeks pay (s38(2)(b) Employment Act 2002)?

Procedure at the Hearing

3. It was agreed with the representatives that the Tribunal would hear evidence and determine liability and remedy would be determined at a separate hearing if the Claimants were successful. An agreed bundle was provided [pages 1-192] and some documents were added by the Claimants on the second day; Ms. Fry did not object. Any reference in this Judgment to [x] refers to page [x] in the bundle. I have only considered documents which are cross-referred to in the witness statements or which I was taken to at the Hearing.

4. I heard from the Claimants and, on behalf of the Respondent, from Ms. B. Walsh (Chief Operating Officer), Ms. T. Wicks (Branch Manager), Ms. R. Sivakumar (Care Co-ordinator) and Mr. D. Langston (Financial Controller). The witnesses all adopted as their evidence-in-chief their respective witness statements and were cross-examined. Ms. Fry and Mr. Allen both provided helpful written comprehensive submissions and I also heard their oral submissions. Having agreed with the representatives a provisional date for a Remedy Hearing (13 February 2019), I reserved my decision which I now give with reasons.

Findings of fact

5. Having considered all the evidence I make the following findings of fact having reminded myself that the standard of proof is the balance of probabilities.

6. The Respondent provides domiciliary care to elderly and vulnerable people ("Service Users") in the public and the private sector in Service Users homes, sometimes within a housing block. The Respondent employs approximately 4,450 Care Workers.

7. The Claimants at all material times were employed (and continue to be employed) as mobile Care Workers to provide domiciliary care to Service Users. Initially, the Claimants were employed by Harrow Council's Social Services and had Harrow Council terms and conditions of employment. In January 2013, their employment was transferred (TUPE) to Care UK Limited. The Respondent then took over Care UK Limited on 1 June 2015 and changed its name to Care UK Homecare Limited; it then changed its name again to Mears Homecare Limited and then Mears Care Limited (the named Respondent) which is a subsidiary of Mears Group Plc. Ms. Jotangia has continuous service since 30 April 1990, Ms. Brighton since 8 November 1999 and Ms. Harris since 2 July 1994.

8. The time each Care Worker spends with each Service User is referred to as "Contact Time". Contact Time varies in frequency and duration. It is accepted that domiciliary care may be subject to frequent and last minute change as it depends on Service Users' needs which can change daily. Time spent by Care Workers travelling (i) from home to the first assignment, (ii) between assignments and (iii) from the last assignment to home, varies depending not just on the distance but also the traffic and mode of transport. Ms. Jotangia generally drives between assignments and only walks if service users' homes are close to each other; Ms. Harris travels by public transport (bus or occasionally train) or walks; Ms. Harris travels by bus or walks.

9. Ms. Wicks has been the Claimants' manager since September 2017; prior to this their manager was Ms. Leanne Smith ("LS"). Ms. Wicks manages a number of people including four Care Co-Ordinators one of whom is Ms. Rosemary Sivakumar. Ms. Sivakumar co-ordinates the Claimants's work. She explains [w/s para. 3] that she rosters their hours through a system called Coldharbour by inputting their availability on a weekly basis. A weekly rota is then sent to the Claimants' mobile phones on a

Friday; the rotas are not agreed in advance with the Claimants. The rotas can change during the week in accordance with Service User's needs, sometimes at short notice.

10. In January 2013, the Claimants entered into new written contracts of employment with Care UK Limited; these terms and conditions came into effect on 1 April 2013 ("the April 2013 Contract"). Only about 10 employees (including the Claimants) have contracts of this kind, all other Care Workers are employed on "zero hours" contracts.

11. The April 2013 Contract provides for a guaranteed number of number of hours; these are variously referred to as "guaranteed hours", fixed hours" and "contractual hours"; I will refer to them as "Guaranteed Hours":

11.1 Guaranteed Hours were agreed with each Claimant in accordance with their availability depending on their personal circumstances and other commitments. At all relevant times their Guaranteed Hours were (and remain) as follows:

(i) Ms. Jotangia: 30 hours per week between 7am and 1pm Monday to Friday;

(ii) Ms. Harris: 30 hours per week between 8am and 2pm Monday, Tuesday, Wednesday, Saturday and Sunday.

(iii) Ms. Brighton: 25 hours per week between 8am and 1pm on Monday, Tuesday, Friday, Saturday and Sunday.

11.2 Any change to these hours required the consent of both sides. As Ms. Walsh confirmed in her verbal evidence, the Respondent requested flexibility but it is accepted that such flexibility is not built into the Contract.

12. The key terms in the April 2013 Contract [49-59, 62-72 and 73-83] are as follows:

"**1. <u>Responsibilities, Work Content and Place of Work</u>**

[*the Respondent] is responsible for providing services at various locations for varying periods of time. Accordingly you will have no fixed or regular place of work and will be expected to perform your duties as specified on your rota at any location that is within reasonable travelling distance of your home. For management purposes you will be allocated to a local Branch/Office (your "Office/Branch") and Line Manager (the "Manager") both of which may be subject to change from time to time.*

Your Office/Branch is Harrow."

"**2. <u>Hours of Work and Employment Status</u>**

The Contracts state that Ms. Jotangia and Ms. Harris are required to work 30 hours per week and Ms. Brighton 25 hours per week.

"*You are required to work [*30/25 as applicable*] per week in line with the availability we have agreed with you ("your contracted hours"). Actual hours of attendance will be determined by your line manager and will be in accordance with appropriate shift patterns."*

"If you do not fulfil your contracted hours in any pay reference period you will be required to make the shortfall up in the following pay reference period. Failure to do this will result in any shortfall being deducted from your salary in the next pay reference period."

"If you wish to make any changes to your availability this will need to be agreed with your Manager, and will require 4 weeks written notice. It is at the discretion of the Company to review your contract in respect of changes to your availability, changes to your personal circumstances or for operational reasons"

"3. **<u>Remuneration and conditions of service</u>**

[Hourly rates for weekdays, weekends and Bank Holiday are set out but the parties agree that from 5 September 2016 this was superseded by a flat rate of £9.15 per hour].

"*Your contracted hours of work are 30 hours per week.*
This includes an amount for the time spent travelling between assignments".

"6. **Telephone Logging System/Timesheets**
"It is the nature of your work that you do not have normal hours of work or a normal place of work. For all assignments you are required to "log in" and "log out" of the service user's home, using the telephone logging system".

"7. **Deductions from Pay**
"The Company is authorised to deduct from your pay any monies which you owe arising out of the work you have undertaken or its termination, including where statutorily instructed to do so, any overpayments, advances, loans, training subsidies ...
"NB. By signing and returning a copy of this Contract you authorise the Company to deduct any money that you may owe the Company from any monies owed to you by the Company in accordance with this clause".
"This Agreement constitutes the entire agreement and understanding between the parties and supersedes all previous contracts, representations, agreements or arrangement, whether written or verbal (if any) relating to the employment of the Employee/you by the Company or any Group Company which shall be deemed to have been terminated by mutual consent as from the Commencement Date".

13. Initially the Claimants objected to the terms in the April 2013 Contract but after discussions involving GMB and Unison and in consideration of one-off payments, Ms. Brighton signed the April 2013 Contract on 22 January 2013 [59] and Mrs. Jotangia and Ms. Harris signed on 23 January 2013 [72 and 83]. I have not been provided with any evidence as to how the terms in the April 2013 Contract compare with their previous terms and the representatives agreed at the Hearing that this is not relevant to the issues as it is not in dispute that the only relevant written terms and conditions for the purposes of these claims is the 1 April 2013 Contract.

14. On 23 April 2013, JN, a Senior HR Manager of Care UK wrote to Ms. Brighton [84]; the letter is headed "*New Terms and Conditions of Employment – Pay Arrangements*"; Ms. Jotangia and Ms. Harris received similar letters. JN stated:
"I write further to my letter of 26 March 2013, which provided you with some information on how your pay would be calculated with effect from the 1 April 2013.
In my previous letter I explained:
1. *That you will continue to be paid on the 26th of each month.*
2. *From the 1st April 2013 as previously explained to you, you will be paid at an hourly rate or sub hourly rate in accordance with the duration of visits on your rota. You will always be paid your contracted hours.*
3. *In order to continue to pay you on a monthly basis your pay will be calculated using your hours worked/rota for the week ending 24 March 2013. This will enable us to calculate your average monthly/pay.*
4. *Each month you will be paid an average of 4 weeks worked.*
5. *If you worked any additional hours or a different mix of sub hourly visits this will be adjusted in your pay the following month. This may result in an additional payment or deduction and will be based on your submitted timesheets."*

15. In March 2014, the Claimants were required to attend a meeting on 7 April 2014 to discuss their terms and conditions [84A] and following that meeting, on 11 April 2014

Service Manager LMcH, wrote to the Claimants on behalf of Care UK [85-86] stating as follows:

*"**Re: Guaranteed Hours***

I write in reference to the above following our meeting on the 7th April which was arranged to discuss the Harrow terms and conditions of employment, particularly in relation to Guaranteed Hours. As explained to you on the day, a small minority of Care Workers are failing to meet the hours required of them under their contract of employment. This means that the branch is paying for hours which have not been worked. This is an unacceptable position which cannot be sustained.

As you may be aware, your guaranteed hours are set out in your Contract of Employment, and that these are required to be worked on a flexible basis in line with your schedule of availability. Clause 2 of your contract states:

"If you do not fulfil your contracted hours in any pay reference period you will be required to make the shortfall up in the following pay reference period. Failure to do this will result in any shortfall being deducted from your salary in the next pay reference period."

Therefore, if you are unable to fulfil your contracted hours within the availability you have provided, you will be required to makes [sic] those hours up in the next pay period."

The letter concludes:

"*As from 5th May 2014, if you do not fulfil your contracted hours in any pay reference period you will be required to make the shortfall up in the next pay reference period. Should you not make up those hours, then any shortfall will be deducted at the next pay reference period*".

16. I accept Ms. Walsh's evidence [w/s para. 15-16] that in June 2016, the Respondent, having suffered significant losses, undertook a commercial review of its contract provision, including in Harrow. I also accept Ms. Wick's evidence [w/s para. 10-12] that since she assumed branch management in September 2017, the Service Users have changed and declined in Harrow but there is "*an abundance of flexible opportunities"* in Hillingdon.

17. On 3 August 2016, NB (Respondent's Operations Manager – South 3 Area) wrote to the Claimants [86-87] regarding a change in their hourly pay rate to take effect from 5 September 2016. The letter states that the Respondent was proposing to increase the Claimants' hourly pay rate to £9.15 and remove the "*sub hourly enhancement*". NB also advised that the Respondent had made a commercial decision to stop providing local authority funded care as of 5 September as it was not financially viable. He states:

"*You will have the opportunity to work in the London Borough of Hillingdon if you wish to do so".*

NB concludes by inviting the Claimants to attend a consultation meeting in August; I have not been provided with minutes of any consultation meeting in August 2016

18. Since 5 September 2016, the Claimants have been paid an hourly rate of £9.15 and in around February 2017, their pay changed from monthly to weekly.

19. On **22 February 2017**, a meeting took place chaired by LS, Branch Manager at the Respondent's Chiswick Branch with "contracted care workers" at their request to discuss their hours. The minutes [87A], which do not record who attended, state:

"It is evident that the hours contracted are not being carried out. Back in September last year Mears withdrew from Harrow council and now only have 350 hours private work a week. This has limited the

amount of work we give within the care workers agreed availability. This means the branch is at a financial loss and need resources in other areas".

The possibility of working in Hillingdon was discussed and some care workers expressed a number of concerns including the additional travelling time without a car.

"*Harrow will be looked at carefully, it may mean changing the clients in order that you are delivering your hours. As [sic] aware this cannot go on much longer and as we are offering alternatives at this moment in time redundancy is not an option."*

"I am interested to know (those who were unable to attend) if you would be prepared to work in Hillingdon?

If you are able to I will ensure we support you with how to travel there and that all the visits are within the area".

20. A further meeting took place on **29 March 2017**; I accept the Claimants attended that meeting as they signed the minutes [87B-C]. The minutes record that LS asked the Claimants if they had considered moving to the Hillingdon branch as their contracted hours were not being filled. LS reminded them of the provisions of their contract (specifically clause 2) and (relevant extracts) stated:

"Care UK policy/agreement states that if working hours are not fulfilled then it must be made up in next pay period or money deducted.

"Care UK contract does not place geographical restrictions on working areas"

"As good will [LS] has offered to allow up to 30 mins travel time"

"Starting very soon Mears will want all the hours fulfilled"

"It was made clear that travel time is paid from arrival at first call until the finish of last call".

21. On **4 April 2017**, LS followed up this meeting with a letter to each of the Claimants [88-93]:

"It remains the case that this Branch is paying salary for some 250 hours each week and this is being matched with only 25 hours of attendance across all the "Fixed Hours" employees.

"Fixed Hours staff are an important part of the team and I welcome the opportunity to work with you to reduce this huge mismatch.

"As discussed when we met, my team and myself will meet with each "fixed hours" team member to review availability and see if this can be made to match our requirements, I would much rather work with you to achieve an agreed outcome rather than resort to a contractual solution.

Having said that my research has made me aware of [the April 2013 Contract]. It is my view this contract covers our current situation.

I am therefore writing to you to confirm that with effect from Monday 10 April 2017, we will be fully applying the following clauses from [the April 2013 Contract]...".

LS then sets out extracts from sections 1 and 2 (see para. 12 above).

22. On **18 April 2017**, LS wrote to the Claimants [237] advising that the shortfall between agreed hours and hours worked would be deducted from wages unless made up for in the following week. On **5 May 2017**, Unison wrote to LS on behalf of the Claimants [238] pointing out that (amongst other things) the April 2013 Contract failed to comply with "*new legislation regarding travel time*". Unison wrote to LS again on **19 May 2017** [239] stating:

"… *contractual hours are not being paid in full, travel time is not being paid and fares for transport from one job to the next are also not being paid, this identifies an overall salary below minimum wage*…".

23. It is not in dispute that until April 2017 the Claimants were paid their guaranteed hours regardless of the number of hours actually worked. As Mr. Langston states [w/s para. 10:
"*Prior to April 2017, the Claimants' hours were "topped up" to their guaranteed hours each pay period. These top-ups were to bring their hours up to the guaranteed hours*" and "*this meant that the Claimants were often paid for hours they had not worked".*
It is also not in dispute that since April 2017, the Respondents departed from this and started paying the Claimants only been paid for actual Contact Time and a proportion of travelling time between assignments.

24. Mr. Langston, as Financial Controller, is responsible for checking compliance with National Minimum Wage ("NMW") Regulations. He explains [w/s paras 4-12] he does this in the following way:

24.1 Total working time is calculated on a weekly basis. All planned Contact Time is treated as working time; he then looks at the gaps between assignments and if a gap is less than 30 minutes this is also treated as working time but any gaps of 30 minutes or more are "*deemed to be a break"* and unpaid.

24.2 Total pay is then divided by total working time and if the NMW is not met, then a top-up payment is made to bring the hourly rate up to the NMW. I accept Mr Langston's evidence that this "top-up" calculation started in April 2017.

24.3 Mr. Langston says (and I accept) that this approach has been developed with external consultants (PWC) and has been approved by HMRC.

24.4 Mr. Langston accepts that travelling time spent between assignments is working time for the purposes of the NMW and candidly acknowledged on cross-examination that this method can work against the Claimants and "*the methodology is open to challenge*". He said in the event of a challenge (but not otherwise) he will look at google maps to check the distance between assignments

24.5 When asked why the Claimants were not paid £9.15 per hour for travelling after April 2017, he told me it was because he was not aware of their contracts and he has therefore treated them the same as the other 4,500 Care Workers who are primarily on zero hours contracts.

25. On **31 July 2017**, Unison lodged a grievance on behalf of the Claimants [240] regarding (amongst other things) payment for travelling time and payment for guaranteed hours. Having received no response, Unison chased LS on 25 August 2017 [241].

26. On **27 October 2017**, ACAS Early Conciliation was started and a certificate was issued on 11 December 2017.

27. TH (of Respondent's HR) responded to the Claimants' grievance on **12 December 2017** [242-244] seeking clarification regarding the identity of the Claimants' representative. On **13 December 2017**, TH wrote again [245-247] inviting the Claimants to a grievance hearing on 18 December 2017.

28. On **10 January 2018**, these claims were presented to the Employment Tribunal,

29. The grievance meeting was postponed to 19 February 2018 and then again to **9 March 2018** [251-262]. Ms Wicks conducted the grievance, AG (HR) also attended.Ms. Jotangia and Ms. Brighton attended the grievance hearing with a Unison representative (DS); Ms. Harris was off sick. The Claimants' grievances regarding the Respondent's alleged failure to pay their full contractual hours and travel time were discussed. The minutes of the collective grievance meeting [263-264] show that TW made the following comments:
"TW advised that calls start from 0600 and then it goes quiet until lunch time from 1200, and then quiet again until mid-afternoon. Care workers needed to increase their availability to ensure that they could achieve their contracted hours on a flexible basis"
"She went on to say that there was work across Hillingdon, including Hayes, Uxbridge, Hillingdon and West Drayton. Care workers should be paid for travelling time between calls but not into the borough since that would be classed as home to work".
"TW reiterated that there were natural gaps in the work so it was necessary to extend availability to encompass the guaranteed hours".
DS stated that travel time needed to be reviewed and addressed. TW confirmed that this issue needed to be investigated in order for her to respond properly".

30. On **16 April 2018**, TW wrote to the Claimants [266-274] advising them of the outcome of their grievance; TW said in verbal evidence that in fact this letter and the conclusions set out in this letter were those of HR (AG):

30.1 Non-payment of travel time between clients
"I would confirm that all Care Workers are entitled to an allowance of paid time which reflects their method of travel between clients. This allowance is based on an assessment of the available information and is intended to be reasonable. Clearly there will be occasions when the allowance is more or less than the time actually taken due to factors beyond the company's control.
I have discussed the process of calculating travel time and consider that it is appropriate based on Google Maps. From my initial review I consider that the time allowed is generally reasonable, however, I also accept that errors may have occurred in some cases. I have therefore requested that the issue is reviewed fully to identify those calls where insufficient travel time had been offered. Where there has been a shortfall in the time allowed payment will be made for the difference.
With regard to the issue of non-compliance with the ECJ ruling on travel time, I would confirm that the company recognises its obligation to pay for such time. A review is undertaken on all Care Workers as part of the payroll arrangements to ensure that no employee receives less than the rate of the National Minimum Wage, or National Living Wage, as appropriate, as a result of their travel time."
This grievance was therefore upheld and TW undertook to ensure that any errors in payment were corrected and to advise the Claimants of the outcome of the review and action to be taken as a result.
At the Tribunal Hearing, in verbal evidence TW said it was her understanding from this that all travelling between calls would be paid.

30.2 Non-payment of contracted hours.
"... I have concluded that your contracted hours were agreed by Care UK and regarded as a fixed minimum. This was clearly intended to ensure that there was sufficient resource to meet the needs of clients. As such, the contracted hours would be paid for on a guaranteed basis since they were at the request of the Company.
However, there are two circumstances where the hours may not be paid as a fixed amount. One is if an employee's availability was insufficient to allow them to complete their contracted hours and the

other is if they make themselves unavailable within their availability. Should they be unable to fulfil their contracted hours on this basis then the unworked hours would be carried over, and then deducted in a subsequent pay period, if not fulfilled.
The Branch records will be reviewed to determine the reasons for any deductions made since the previous consultation exercise in April 2017. If it is the case that insufficient work was provided to you then any incorrect deductions that have been made will be corrected. However, if you have unreasonably refused work offered then the deductions will stand. We can also review your availability to ensure that your guaranteed hours can be met within it on an on-going basis.
Similarly, we can also review the areas that you could reasonably cover across Harrow and adjacent areas to achieve your guaranteed hours.
For the avoidance of doubt, should a review of your contracted hours be necessary then full and proper consultation on the options would be held with you at the time.
I would therefore confirm that I hereby uphold this element of your grievance and will make arrangements for the deductions to be reviewed. I will also discuss your current circumstances with you to ensure that any recurrence of this situation can be avoided".

31. On **30 May 2018**, KT (Respondent's HR) wrote to Ms. Harris [275] setting out proposed changes to her terms and conditions of employment, specifically to the guaranteed hours. KT advised that to implement this change the Respondent proposed to issue her with a new contract of employment [not in the bundle] and if, after consultation, she was not prepared to agree then her employment may be terminated on notice with an offer re-engagement on the new terms. Unison responded on **1 June 2018** strenuously objecting.

Summary of key findings of fact:

32. It is not in dispute that:

32.1 Prior to 10 April 2017, the Claimants were paid their Guaranteed Hours regardless of the number of hours they actually worked; and

32.2 From 10 April 2017 the Respondent has only paid the Claimants for hours actually worked based on Contact Time and some of their travelling time between assignments and the Claimants did not agree to this change.

33. The Respondent says the Claimants have been offered but have unreasonably refused offers of work and this is why they have not been paid their full Guaranteed Hours. The Claimants deny this. Mrs. Jotangia says [w/s para. 26 and 62] that she has not refused any offers of work that are reasonable and at no point has the Respondent alleged in writing or otherwise that she has unreasonably refused work that was offered to her; Ms. Harris and Ms. Brighton say the same. The parties have by agreement provided in the bundle details of the Claimants' hours, assignments (including location and pay) during two sample periods, November 2017 and June 2018. Having considered this and all the other evidence on this point, I prefer the Claimants' evidence for the following reasons:

33.1 I accept that the prospect of the Claimants changing their hours of availability and the locations they were prepared to work was discussed on several occasions; however, no agreement has been reached.

33.2 There is simply no evidence before me of specific occasions when the Claimants have declined work whether during the two sample periods or otherwise:

(i) Ms Walsh says [w/s para. 18] that the Claimants are not in all instances accepting work in Hillingdon; Ms. Wicks says [w/s para. 15] that she knows "*they have been offered work within their availability at their preferred location that they have declined*"; and Ms. Sivakumar says [w/s para. 8-10] that the Claimants have "*continuously refused work outside of Harrow*". However, none of these witnesses have provided clear details – such as dates, times, location –and there is no supporting documentary evidence.

(ii) At the Tribunal Hearing, Ms. Sivakumar accepted that there is no evidence in the bundle of any occasion when any of the Claimants have been offered and declined work within their agreed hours and within reasonable travelling distance of their home. Ms Fry also confirmed this.

(iii) Given that the parties have agreed to focus on two relatively short periods (December 2017 and June 2018) such evidence is ordinarily available and the failure to provide it undermines the Respondent's position on this point.

34. I therefore accept that

34.1 The Claimants have not been provided with full weekly Guaranteed Hours which are (i) within their availability and (ii) within reasonable travelling distance from their home;

34.2 The Claimants have been paid for less than their Guaranteed Hours during the two sample periods (December 2017 and June 2018) and by extrapolation for the entire period of their claim;

34.3 The Claimants have not refused specific assignments and this has therefore had no bearing on how much they have been paid; the Respondent has simply been paying the Claimants only for hours actually worked and effectively treated them the same as staff on zero hours contracts.

35. With regard to travelling time from home to first assignment and from last assignment back to home, I find that the Claimants have not at not at any time paid their travelling time from home to their first assignment and from their last assignment to home. Ms. Jotangia and Ms. Harris agreed this was the case in their verbal evidence and although Ms Brighton said she thought morally that the Respondent should pay, I must only consider what happened in practice.

36. With regard to travelling time between assignments:

36.1 Prior to 10 April 2017, I find that the Guaranteed Hours included time spent travelling between assignments:

(i) This is the obvious and common sense reading of section 3:
"*Your contracted hours of work are 30 hours per week.*
This includes an amount for the time spent travelling between assignments".

(ii) I accept the Claimants' evidence that travelling time between assignments counted as part of their Guaranteed Hours and was paid at their usual hourly agreed rate (currently £9.15).

(iii) The Respondent has simply not demonstrated otherwise and Mr. Langston said in evidence that this was the case.

36.2 From 10 April 2017, the Claimants have not been paid for all their travelling time between assignments.

The Law

Unlawful Deduction from Wages

37. Section 13 ERA 1996 gives workers the right not to suffer unauthorised deductions from their wages:

"13 (1) An employer shall not make a deduction from wages of a worker employed by him unless—
(a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or
(b) the worker has previously signified in writing his agreement or consent to the making of the deduction.
(2) In this section 'relevant provision', in relation to a worker's contract, means a provision of the contract comprised—
(a) in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or
(b) in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.
(3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion."

38. Sections 23-26 ERA 1996 sets out provisions relating to complaints to employment tribunal the relevant parts of which are as follows:

"*23(1) A worker may present a complaint to an employment tribunal —*
(a) that his employer has made a deduction from his wages in contravention of section 13 …"

"*24(1) Where a tribunal finds such a complaint under section 23 well-founded, it shall make a declaration to that effect and order the employer –*
(a) in the case of a complaint under section 23(1)(a0, to pay to the worker the amount of the deduction made in contravention of section 13."

39. Construction of the contract:

39.1 In accordance with the decision of the Court of Appeal in **Agarawal v Cardiff University [2018] EWCA Civ 2084**, employment tribunals have jurisdiction to resolve disputes about the construction of the employment contract when considering claims for unlawful deductions from wages under section 13 ERA.

39.2 If express terms are wholly in writing, then it is a matter of interpreting the document containing them unless it is alleged that the written agreement (i) mistakenly fails to reflect an earlier oral agreement or (ii) it has been replaced or revoked by a subsequent agreement.

39.3 The contract should be interpreted in line with the meaning it would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the

contract (**Lukoil Asia Pacific Pte Ltd v Ocean Tankers (Pte) Ltd (The "Ocean Neptune"[2018] EWHC 163 (Comm)**.)

39.4 Any ambiguities are to be construed against the person who has drafted the contract.

National Minimum Wage ("NMW")

40. Workers are entitled to be paid the national minimum wage in accordance with the National Minimum Wage Act 1998 and National Minimum Wage Regs 2015. The NMW from 1 April 2017 was £7.50 rising to £7.83 on 1 April 2018.

41. **Whittlestone v BJP Home Support Ltd [2014] ICR 275**: the EAT held that a care worker's travelling time between assignments had to be remunerated.

42. In **Federacion de Servicios Privados del Sindicato Comisione Obreras v Tyco Integrated Security SL and anor [2015] IOCR 1159 ECJ**: The EU Working Time Directive (No. 2003/88) ("WTD") defines 'working time' as "*any period during which the worker is working, at the employer's disposal and carrying out his activity or duties, in accordance with national laws and/or practice*" (point 1 of Article 2). The ECJ held, in interpreting the WTD, that for workers with no fixed place of work, time spent by employees travelling between their homes and the premises of the first and last customers constituted "working time" within the meaning of point 1 of article 2 of Directive 2003/88. However, the ECJ stated:

"47 "That conclusion cannot be called into question by the argument of the United Kingdom Government that it would lead to an inevitable increase in costs, in particular, for Tyco. In that regard, it suffices to point out that, even if, in the specific circumstances of the case at issue in the main proceedings, travelling time must be regarded as working time, Tyco remains free to determine the remuneration for the time spent travelling between home and customers.

48. It also follows from the case law of the Court that, save in the special case envisaged by Article 7(1) of Directive 2003/88 concerning annual paid holidays, that Directive is limited to regulating certain aspects of the organisation of working time so that, generally, it does not apply to the remuneration of workers (see judgment in Dellas and others, C-14/04, EU:C:2005:728, [2006] IRLR 225, paragraph 38, and orders in Vorel, C-437/05, EU:C:2007:23, [2007] ECR I-331, paragraph 32, and Grigore, C-258/10, EU:C:2011:122, paragraphs 81 and 83).

49. Accordingly, the method of remunerating workers in a situation such as that at issue in the main proceedings is not covered by the Directive but by the relevant provisions of national law."

Statement of changes

43. In accordance with s4 ERA, if there is a change in any particulars required by s1 ERA, the employer is required to give the employee a written statement containing particulars of the change at the earliest opportunity and in any event no later than one month after the change. S38 Employment Act 2002 provides that where the employer does not comply with s1 or s4 ERA and the employee has successfully brought a separate substantive claim of a kind specified in Schedule 5 to the Employment Act 2002 (which includes a claim under s23 ERA), the employer will be ordered to pay the employee two weeks' pay, or, if it is just and equitable, a higher amount of four weeks' pay. The maximum amount of a week's pay is currently £508.00 (s227 ERA).

Submissions

Respondent

44. Ms Fry submits as follows:

44.1 The Claimants have consistently refused work in line with their stated and agreed availability in locations within reasonable travelling distance of their homes and this means there is no requirement to pay. Ms. Fry accepts there is no supporting evidence of any refusals by the Claimants but says this is immaterial as the Claimants would have refused in any event.

44.2 The Claimants' hours of availability limits them and it is "*naive and unrealistic*" of the Claimants "*to expect that they can continue to have work in the same limited area*".

44.3 The Claimants were consulted in Autumn 2016, February and March 2017 about the need to change working arrangements, including either working in a different borough and/or increasing their availability. The Claimants are unwilling to do either. The Respondent accepts that the Claimants did not agree to the change in working arrangements following consultation. However, the Respondent did not need Claimants' consent was not required as the Respondent was enforcing their existing contractual terms.

44.4 The new arrangements took effect in April 2017 when *"the Respondent paid them the hours they worked rather than their guaranteed hours"* .The Respondent is taking all the steps it can to help the Claimants reach their hours.

44.5 The Respondent's practice of making a NMW top-up payment has been agreed with HMRC and it is "*industry norm*" for Care Workers to be paid in this way and to do otherwise would make the industry "*completely and utterly unsustainable*".

44.6 Redundancy is not an option as "*there is reasonable alternative employment for these claimants"*.

44.7 With regard to travel time, Ms. Fry submits:

(i) The Respondent denies that the Claimants were previously paid travel time. There is no evidence to suggest that the Claimants carried out work or were travelling for the full duration of their Guaranteed Hours. The April 2013 Contract states "*This includes an amount for the time travelling between assignments*"; this is not clear.

(ii) The Claimants have not shown that they have at any time been paid for their first and last commute.

(iii) **Tyco** is distinguishable on the facts and has no relevance: "*The Respondent is minded that the Tyco considers working time and rest breaks, and not the provision of pay. Subsequent interpretation of the judgment has made it clear that this is for domestic legislation, i.e. in the case the National Minimum Wage Acts, to deal with this matter*."

44.8 Ms. Fry concludes that the Respondent has at all times acted within the scope of the Claimants' contracts of employment and has been reasonable in its offers of work. The claim for travel time is not well founded; there is no evidence of an express or implied term for this to be paid at contractual rate; the rate of pay should be at NMW limited to the journeys between visits and not for the first and last commute of the day.

Claimants

45. Mr. Allen submits as follows:

45.1 The April 2103 Contract required the Claimants to be reasonably flexible in relation to location of assignments (subject to the location being within reasonable travelling distance of their home), but the times that they were available for work was agreed and could not be unilaterally changed by either party.

45.2 It is agreed that if the Claimants refused offers of work which was within their available hours and within reasonable travelling distance, the Respondent is entitled not to pay them for the Guaranteed Hours. However, the Respondent's witnesses "*have surprisingly come to the tribunal unarmed with any specific evidence as to what offers were made and refused in the relevant periods*".

45.3 "Reasonable travelling distance" must be determined in line with what a reasonable person, who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract, have understood the parties to have meant.

45.4 It is a well-established principle of contract law that any ambiguity is to be construed against the person who has drafted the contract (Chitty on contracts at 13-095). This must particularly be the case here, given the inequality of bargaining power between the Claimants and the Respondent (or its predecessor).

45.5 In determining "reasonable travelling distance" regard must be had to all the relevant surrounding circumstances including the Claimants personal and domestic circumstances. The Respondent's evidence was wrongly focused on the Respondent's business need. That is not a relevant factor in determining whether a location is a reasonable travelling distance from the Claimant's homes. Clearly on balance the Claimants' evidence and argument should be preferred.

45.6 The Respondent has not implemented the contractual clause *"If you do not fulfil your contracted hours in any pay reference period you will be required to make the shortfall up in the following pay reference period. Failure to do this will result in any shortfall being deducted from your salary in the next pay reference period*". The Claimants are simply paid for Contact Time, either proposed or actual.

45.7 The Claimants did not receive any written confirmation of an alteration in their terms and conditions or precisely what that alteration would involve. This a breach of **s4 ERA 1996** for which under **s38(2)(b) EA 2002**, the Tribunal is obliged to make an award of at least 2 weeks pay and up to 4 weeks pay. The Claimants seek the maximum.

45.8 The Claimants did not like the post April 2017 regime and did not agree to the changes. They involved the union and eventually lodged a grievance.

45.9 With regard to the NMW, Mr, Allen submits:

(i) The Claimants accept that they have never been paid for travel to their first and from their last assignments. However, in accordance with **Tyco**, hours spent travelling between work and home constitute 'working time' for the purposes of the EU Working Time Directive (No.2003/88). However, Mr. Allen accepts this is a "big ask" and would require a "*strained reading*" of Regulation 34(1) and is contrary to the EAT's decision in **Whittlestone**.

(ii) Time when the Claimants are travelling for the purpose of duties carried out by them in the course of their work should be treated as time spent doing work (***Whittlestone)***. The Respondent's practice of excluding any period of 30 minutes or more from "travel time" is "*nonsense*"; all time spent travelling between assignments should be included in any NMW calculation. Furthermore, the Claimants are contractually entitled to be paid travel time between assignments at the same rate as Contact Time. The Claimants are therefore entitled to be paid £9.15 times their contractual guaranteed hours (30 or 25) which includes an amount for the time spent travelling between assignments.

45.10 The parties have agreed to take 8 pay reference periods – reflected in 4 payslips from December 2017 and 4 payslips from June 2018 as examples. The hourly rate during the pay reference period is £9.15. If the Claimants are successful, the Tribunal is being asked to make a declaration under section 24(1) and then to leave it to the parties to (at least initially) attempt to agree the relevant sums. If the tribunal is able to do so, it may also wish to calculate the loss for the two example pay reference periods.

Conclusions

46. Applying the relevant law to my findings of fact to determine the issues, I have concluded as follows.

Unlawful deductions from wages:

47. The Respondent has made unlawful deductions from the Claimants' wages by failing to pay the Claimants full guaranteed hours as specified in their contracts. My reasons are as follows:

47.1 Both parties agree that:

(i) the Claimants are not required under the terms of the April 2013 Contract to accept work outside their hours of availability;

(ii) the Claimants are not required to accept work which is more than a "*reasonable travelling distance*" from their homes; and

(iii) in the event the Claimants decline to work offered which is within their hours of availability and within reasonable travelling distance of their home, the Respondent has the right to make a deduction in accordance with the April 2013 Contract.

47.2 It is also not in dispute that:-

(i) From 1 April 2013 until April 2017, the Claimants were always paid their Guaranteed Hours, no matter how many hours they actually worked.

(ii) Since April 2017, the Respondent has paid the Claimants only for actual (or planned) Contact Time and some travelling time between assignments. The Claimants have not been provided with full weekly Guaranteed Hours which are (i) within their availability and (ii) within reasonable travelling distance from their home. This has resulted in payments for less than their Guaranteed Hours.

47.3 The Claimants did not agree to this change. They continued working but under protest having made their objections clear and having lodged a grievance with the assistance of Unison.

47.4 I have found that the Claimants have not refused specific assignments within their availability and within reasonable travelling distance; an essential precondition for the right to make a deduction under the April 2013 Contract was therefore not met.

47.5 The Respondent has simply been paying the Claimants on the basis of work carried out rather than in accordance with their Guaranteed Hours and effectively treated them the same as the vast majority of their other employees on "zero hours" contracts (as Mr. Langston confirmed in evidence). Whilst there is a dispute between the parties as to what is in fact "*reasonable travelling distance*", I am not required to resolve this as this has therefore had no bearing on how much they have been paid.

47.6 The fact that the Respondent in May 2018 formally offered the Claimant's new terms [275], is an indication that the Respondent also recognises that this change was not allowed under the April 2013 Contract.

47.7 Whilst the Respondent may have suffered financially in recent years and lost Service Users in Harrow, this is not a justification for making unlawful deductions from their wages.

48. I do not accept that the Claimants have suffered an unlawful deduction from wages or a breach of contract with regard to lack of payment for travelling time between the Claimants' first assignment and from their last assignment to home. I have not accepted that at any time the Claimants have been paid for this travelling time (para. 35 above) over and above their Guaranteed Hours and the April 2013 Contract only refers to travel between assignments.

49. The Respondent has made unlawful deductions from their wages by failing to pay the Claimants for all travelling time between assignments for the following reasons:

49.1 I have found (para. 36 above) that prior to April 2017, travelling time between assignments counted as part of their Guaranteed Hours and was paid at their usual hourly agreed rate (currently £9.15). This accords with the April 2013 Contract which states "*Your contracted hours of work are 30 hours per week. This includes an amount for the time spent travelling between assignments*". Ms. Wicks also recognised this was the case at the grievance meeting in March 2018 [251-262]: "*Care workers should be paid for travelling time between calls ..."* and in evidence she confirmed that it was her understanding that all travelling between calls would be paid.

49.2 After April 2017, the Claimants have only been paid for travelling time if the gap between assignments is 29 minutes or less. The Respondent's rationale for this blanket rule is expedience in view of the number of employees. However, this is not a valid reason for failing to pay the Claimants for all travelling time between assignments on the occasions when travelling time is genuinely 30 minutes or more and failure to do so is a breach of contract and an unlawful deduction from wages.

49.3 The proper rate of pay for this time is the Claimant's usual hourly rate of pay i.e. £9.15. As Mr. Langston acknowledged in his evidence, the only reason this travelling time (when paid at all) has been paid below this rate is because he was not aware of the Claimants' contracts and he simply treated them the same as the other 4,500 Care Workers who are primarily on zero hours contracts

50. The Claimants are therefore entitled to be paid compensation calculated by reference to the difference between (i) payments actually made and (ii) their contractual entitlement to their full Guaranteed Hours together with any time spent travelling between assignments (not already included within the Guaranteed Hours) – at their usual hourly rate of £9.15.

. National Minimum Wage

51. I have concluded for the following reasons that the Respondent has failed to pay the Claimants minimum wage:

51.1 Mr. Langston's calculation of working time for the purposes of compliance with NMW again disregards any travelling time between assignments of 30 minutes or more which means that the "top-up" payment will on occasion fall short. I recognise that this makes life easier for the Respondent and it may well have been agreed with HMRC; however, this is not justifiable legally.

51.2 It is clear that "working time" includes travelling between assignments (**Whittlestone v BJP Home Support Ltd [2014] ICR 275)**.

51.3 I do not however accept that time spent travelling from home to the first assignment and from last assignment to home is working time for the purposes of the NMW legislation. Whilst the ECJ in **Tyco** concluded that "working time" in the WTD includes time spent by mobile employees travelling between their homes and the premises of the first and last customers, the ECJ also stated that the WTD is generally limited to regulating certain aspects of the organisation of working time so that it does not apply to the remuneration of workers which is covered by the relevant provisions of national law.

51.4 Therefore on the occasions when in any given week the Claimants' total working time (i.e. actual Contact Time and time spent travelling between assignments) divided by the weekly pay fell below the minimum wage, the Respondent failed to pay minimum wage in accordance with the NMW Act and Regualtions.

S4 ERA

52. The Respondent did not effectively notify the Claimants of changes in their particulars of employment (specifically the method of calculating remuneration) before making the changes in April 2017. The letters to the Claimants on 4 April 2017 [88-93] are far from clear and simply recite parts of the April 2013 Contract which the writer (LS) stated would henceforth be "fully applied" without explaining what that meant. I therefore conclude that the Respondent failed to notify the Claimants of the change in the method of calculating remuneration before making April 2017 or within a month thereafter. The Claimants are all long-serving employees who have been distressed by the unilateral and detrimental change in the method of payment and lack of clarity; accordingly I award them each 4 weeks' pay.

53. In view of this, the Remedy Hearing provisionally listed for 13 February 2019 will be effective but it is hoped that the parties can agree the calculation of any sums due to the Claimants in which case the Remedy Hearing can be vacated.

54. For the purposes of rule 62(5) of the Employment Tribunals Rules of Procedure 2013, the issues identified as being relevant to the claim are at paragraph 2 and all of these issues which it was necessary for the Tribunal to determine have been determined; the findings of fact relevant to these issues are at paragraphs 5 to 36; statement of the applicable law is at paragraphs 37 to 43; how the relevant findings of fact and applicable law have been applied in order to determine the issues is at paragraphs 46-54.

Signed by _____ on 12 November 2018

Employment Judge

Judgment sent to Parties on

13 November 2018

_____