EMPLOYMENT TRIBUNALS

Claimant: Mrs P Webster

Respondent: Langdon Community

Heard at: Manchester **On:** 17 December 2018

Before: Employment Judge Martin

REPRESENTATION:

Claimant: Mrs C Parkinson (Solicitor)
Respondent: Mr B Gray (Counsel)

RESERVED JUDGMENT

The judgment of the Tribunal is that the claimant's complaint of unlawful deduction from wages is not well-founded and is hereby dismissed.

REASONS

Introduction

1. The claimant gave evidence on her own behalf. Mrs E Russell, HR Manager, gave evidence on behalf of the respondent. The Tribunal was provided with a bundle of documents marked Appendix 1.

The Law

2. The Tribunal considered the following legislation and case law:-

- Section 13(3) Employment Rights Act 1996 –

  "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 wages

properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated…as a deduction made by the employer from the worker's wages on that occasion."

- **Royal Mencap Society v Tomlinson-Blake**; **Shannon v Rampersad & Another (t/a Clifton House Residential Home) [2018] IRLR 932**, where the Court of Appeal held that:

  "The worker is and is required to be available for the purposes of working at or near his or her place of work and is entitled to have the time in question counted as time work for National Minimum Wages. In that regard it is noted that sleepers in are characterised for the purpose of the regulations as available for work."

  That case concerns the care sector and the Tribunal was asked to read the judgment, and in particular our attention was drawn to paragraph 100 of the Judgment.

- **Miles v Wakefield Metropolitan District Council [1987] ICR 368** where it was held that an employee's right to remuneration depends on his doing or being willing to do the work that he was employed to do, and that if he declined to do that work the employer need not pay him. In that case the defendant council had been entitled to deduct the sums in question from the claimant's salary in view of his refusal to work on Saturday mornings in accordance with his duty.

- **Miller v 5M (UK) Limited UKEAT/2005/0359**, and in particular paragraphs 9 and 10. The Tribunal was referred to the proposition that there was no breach of section 13 if an employee is not willing to undertake part of their contracted hours, namely that an employee's right to remuneration depends on his doing or being willing to do work for which he was employed, and that if he declines to do that work an employer need not pay him.

The Issues

3. The parties agreed a List of Issues as follows:

   (1) The respondent accepted that they had withheld payments amounting to 1.75 hours per week from the claimant's wages.

   (2) The Tribunal had to consider what were the terms of the claimant's contract of employment regarding hours and "sleeps".

   (3) Did the reclassification of service user (EL)'s sleep hours amount to a variation of those terms?

   (4) Was such a variation a breach of the claimant's contract of employment? It is accepted by the respondent that the claimant did not agree to a variation to her contract in those terms.

(5) Did this amount to a deduction within the meaning of section 13(3) of the Employment Rights Act 1996?

(6) Specifically, what amount of wages are properly payable to the claimant for her day shift? Is it:

(a) 20.75 hours as the respondent contends; or

(b) 22.5 hours as the claimant contends?

(7) Is the claimant entitled to any compensation for a deduction in her wages and/or a declaration in relation to any future deduction from wages made since July 2018, namely from the date that the claim was presented to the Tribunal?

Findings of Fact

4. The respondent is a registered charity engaged in the provision of supported living services to young adults with learning difficulties and disabilities.

5. The claimant commenced employment with the respondent in January 2008 as a part-time support worker.

6. The claimant's terms and conditions of employment, which are stated to commence from November 2016, are at pages 56-65 of the bundle.

7. Paragraph 3 of the contract of employment deals with the claimant's hours of work, which states:

> "The employee's normal working hours are:-
>
> 22.5 hours per week."

8. The contract goes on to state that:

> "The employee may be required to work such further hours as may be necessary to fulfil his/her duties or the needs of the business. Whenever possible, the line manager will give the employee reasonable notice of any additional hours."

9. On page 57 under "place of work" it also states that "the work may include overnight stays at the premises and this will be on your rota".

10. Under "general" at page 30 of the contract of employment (page 64) it is stated that:

> "The employer reserves the right to vary the terms of employment contained in this agreement. The employer will notify the employee in writing within one month of such variation."

11. Over the period of approximately the last six years the claimant has been working with one particular service user (hereinafter referred to as EL). She worked

a rotating two week shift pattern. As part of that shift pattern she worked one night at EL's property which would alternate between a Tuesday and Wednesday night.

12. In evidence to the Tribunal the claimant stated that she did work with other service users, but principally, over the last six years, had been working with EL. She had previously worked with other service users.

13. The claimant said that over the last six years, until April 2017, she usually started work at 4.30pm and worked until 10.45pm. She then stayed overnight with EL, who was not safe to be left on his own, and from 10.45pm until 7.00am she was effectively paid a "sleep" rate. She then worked again from 7.00am until 9.00am when another colleague would arrive to take care of EL. The claimant said her shift on the second week of the rota would be very similar but would commence an hour earlier at 3.30pm, and end at 9.30am, namely half an hour later, but the hours in respect of the night shift remained the same.

14. The claimant said that she undertook this rota for approximately five years.

15. Until the **Mencap** case was heard in the Court of Appeal the claimant was paid her usual contractual hourly rate, which she says is now currently £8.09 and was above the National Minimum Wage, but that she was only paid a £25 shift allowance for the night shift between 10.45pm and 7.00am.

16. In 2017 the local authority reviewed the care package for EL and concluded that there would be a change to his package whereby the period between 10.00pm and 8.00am would be treated as his "sleep" period. EL was receiving a 24 hour day care package.

17. On 5 April 2017 a meeting took place between the claimant, Andrea Page who was Head of Supported Living, and Lisa Booth, her manager, when the claimant and the rest of the team of support workers were informed of the changes. She says that the team was informed of the decision made by the local authority to change EL's care package, and that as a result there would be a change to the shift pattern for her, whereby the "sleep" period would be from 10.00pm until 8.00am rather than 10.45pm until 7.100am, i.e. there would be an increase in the "sleep" period of 1.75 hours.

18. The claimant indicated that she was concerned about losing hours as a result of this change but was assured that that would not happen.

19. The claimant says that she raised concerns about this during her supervision in June 2017. She asserted that effectively the respondent had reclassified her contracted hours as "sleep" hours so that there had been a reduction in her contracted hours. She said that she could not leave EL alone so she could not go home or work on other contracts during that increased one hour 45 minutes when the "sleep" hours had increased with EL.

20. On 15 November 2017 the claimant sent an email to her manager raising her concerns about this matter. In that email she raised a concern about the alteration in the start and finish times of her "sleep" shifts with, EL. She asserted that had resulted in a reduction in her contracted hours by seven hours a month. Her email is

at page 66 of the bundle. The respondent set up a meeting with the claimant which took place on 29 November 2017.

21. The meeting on 29 November 2017 was attended by Mrs Russell, the HR Manager, and Andrea Page, who was the Head of Supported Living in Manchester. The claimant attended with her trade union representative, Mr Carl Jakeway, from Unison. The respondent said that notes were made of the meeting. In her evidence Mrs Russell said that she made handwritten notes of the meeting which were then typed up and are at pages 71-72 of the bundle. The claimant was not sent a copy of those minutes prior to these proceedings.

22. In her statement to the Tribunal the claimant indicated that there was a discussion during the meeting about the change in hours, and that she had queried why other colleagues were not asked to work extra hours. The claimant indicated that Mrs Russell had replied that her colleagues were working overtime and may be unaware a deduction had been made. In her evidence, the claimant suggested that she had been told by other colleagues that was not the case. She also said that she thought they would have noticed a reduction in their pay as a result of a reduction in hours.

23. In the notes of the meeting at page 71, it is noted that there was a discussion about changes to colleagues' hours, as the claimant appears to have raised an issue why other colleagues' hours had not changed, and she was informed that they had been changed by Ms Page, who indicated that they had picked up hours elsewhere.

24. The notes also suggest that there was a discussion as to why it was 9.5 hours which were being discussed, and a discussion appears to have followed about looking at the rota. The claimant said in evidence that, contrary to what was indicated in the notes, the meeting was not adjourned to look at the rota. She also said on cross examination that the discussion about other colleagues' hours was not as indicated in the notes of the meeting.

25. At page 72 of the bundle it is noted that Mr Jakeway indicated that he had explained to the claimant that it was reasonable for the employer to offer work in other properties locally. He is also noted as saying that he had not realised the situation and that the claimant had got confused and thought the hours had been reduced. Mrs Page states that it is due to a review by the local authority which would reduce the support hours. At that stage Mrs Page then went on to suggest looking at making up other shifts, and it is recorded that the claimant says that she was happy to do that.

26. That is the record of the meeting, and Mrs Russell's evidence to the Tribunal was that was also her recollection of the meeting. However, in her evidence the claimant said that it was not her recollection of the meeting. She said that she did not agree to make up her hours with other shifts. She also said in evidence that she did not accept that Mr Jakeway made those comments in the meeting either.

27. In her evidence on cross examination the claimant indicated that she did not think Mr Jakeway had grasped the situation properly about the reduction in hours, but she did not think that he had made those comments at the meeting.

28. The respondent said that, after the meeting, they understood that the claimant was going to contact Mrs Page to arrange taking on other shifts. The claimant did not do so.

29. The claimant said that, after the meeting, she was asked by her trade union representative to set out her account of the situation, which she says is contained at page 79.3 of the bundle. That is her application for a claim through Unison. In that form she has indicated that her contracted hours have been reduced by one hour 45 minutes for each shift, because her shift now runs into a "sleep" shift. She states that she finds herself working the same number of hours for less pay, which means that she needs to make up seven hours a month. The claimant also indicates that other colleagues are not in the same situation. She states that in the meeting on 27 November she was told other colleagues were working overtime and may be unaware of the fact, but she does not agree that is the case.

30. The claimant says that she raised the matter further at a supervision meeting on 5 December 2017.

31. On 18 December Lisa Booth sent an email to the claimant asking whether the issue with regard to hours was resolved and whether the claimant still needed to pick up hours, and if so whether she could contact her (page 80 of the bundle).

32. The claimant responded to that email on 5 January 2018. She indicated that her union representatives were taking advice on the issue and were assessing her case (page 80.1 of the bundle).

33. The claimant did not arrange to take on any further hours.

34. In January 2018 the respondent made a deduction from the claimant's wages of £54.70 which related to the seven hours.

35. On 22 February 2018, the claimant instructed solicitors who wrote to the respondent in relation to these matters. The solicitors stated in that letter that the claimant was now required to work seven additional hours as her "sleep over" night shift had increased by 1.45 hours a week. They set out in a table her original hours and current hours. They indicated that her original hours were 22.5 hours a week with an 8 hour 15 minutes night shift, which amounted to 30 hours 45 minutes, whereas her new hours were still 22.5 hours a week but now with an additional ten hour sleep night shift which amounted to 32.5 hours. They said that there was an increase of seven hours over a period of four weeks.

36. No reply was received to that letter. The matter was passed by the respondent to their solicitors.

37. The claimant's payslips are at page 98.6-98.9 of the bundle. It is noted that, in June 2017, the claimant was being paid at a rate of £7.80 an hour and her salary on her basic contractual hours was £760.50 with a sleep payment of £25 per shift.

38. By September 2017, the respondent had made the adjustment as required following the case of **Mencap** to ensure that the claimant was paid the national minimum wage for all hours of work during her "sleep" night shift.

39. Accordingly, in her payslip in September 2017 she is noted as still receiving £7.80 per hour. Her salary is still cited as £760.50 for her contractual hours with sleep payments of £25. Mrs Russell says that the sleep payment increased to £45 per shift. There is then a national minimum wage adjustment of £119.55.

40. In her evidence to the Tribunal, the claimant indicated that, following these changes, she understood that she was effectively being paid the national minimum wage for all her hours of work.

41. Mrs Russell in her evidence indicated that employees were effectively paid their normal contractual hours, at the normal contractual rate, which was the National Living Wage and higher than the national minimum wage. She said that the respondent then added all the other payments for overtime and sleep payments. They then calculated what was paid to the employee over the average number of hours, and then made any adjustment to ensure that every hour was being paid at least at the national minimum wage.

42. In evidence Mrs Russell acknowledged that if an employee was just working day shifts and did not work any night shifts, then they would effectively continue to receive a higher rate of pay than the national minimum wage. However, if an employee was working night shifts they may well receive less than the contractual rate of pay, but would receive at least the national minimum wage on their average working hours.

43. Mrs Russell said that part time workers were more likely to be affected by the adjustments made to wages to ensure that all employees were paid at least the national minimum wages for all hours worked, as full time workers would probably on average still receive a higher rate of pay than the national minimum wage even if they worked one night shift a week.

44. In the claimant's case, Mrs Russell indicated that, the claimant was effectively based on her usual working hours, probably being paid about the national minimum wage rather than the slightly higher contractual rate of pay when all her hours were averaged out. Mrs Russell said that may vary, so the claimant may be getting a rate of pay higher than the national minimum wage, depending on how much overtime she worked and how many sleeps she undertook over that period. However, as the claimant largely undertook the same contractual hours and sleeps, it would really depend on how much overtime she worked. The more overtime she worked the more likely she was to receive the higher hourly rate of pay over the national minimum wage.

45. In her evidence to the Tribunal the claimant indicated that, although the Local Authority had suggested that EL's sleep time should be increased, EL often got up much earlier and she still had to look after him. The respondent has produced a log which indicates that, on average, EL was getting up earlier than the time of 8.00am indicated by the Local authority.

Submissions

46. The respondent's representative submitted that the claimant was basing her argument on incorrect assumptions, namely that she had a contractual right to specified hours, and that sleep was work. He said that was not the finding of the

Court of Appeal in **Mencap**. He went on to submit that the claimant had no contractual right to specify either the length of or start or finish times for her night shift.

47. The respondent's representative submitted that there was no breach of the contractual terms. He said that the contractual terms were distinct in that the claimant was required to work 22.5 hours and do a night shift if required.

48. He also submitted that there was no implied term in the claimant's contract as suggested by her. He submitted that a term is implied if, for example, it is a matter of common custom and practice in the industry or what was intended by the conduct of the parties. He said that there was no implied term through the provision of a shift pattern on a rota. He argued that shift patterns were and could be changed by the respondent to accommodate the needs of service users and the requirements of the local authorities, who were paying for those care packages.

49. The respondent's representative further submitted that the claimant was not willing to effectively work all her contractual hours, and on that basis the respondent was entitled to make a deduction from wages.

50. The claimant's representative submitted that there was a breach of contract and that the claimant was entitled to the wages deducted from her salary and a declaration in respect of any wages deducted since July 2018 when the claim was presented.

51. The claimant's representative submitted that the shift pattern was an implied in the claimant's contract of employment, which had developed over a period of time. She submitted that the change in the "sleep" hours was therefore a breach of that implied term and that the claimant was entitled to work that shift pattern and be paid for those hours.

Conclusions

52. The Tribunal reminded itself that the burden of proof is on the claimant.

53. The Tribunal does not find that there was a variation in the claimant's contract of employment, nor does the Tribunal find that there was a deduction from the claimant's wages.

54. The claimant's contract of employment is in writing and sets out the express terms of her employment, namely that she will work 22.5 hours and a night shift if required, which will be set out on a rota. The express terms of her contract also state that she may be required to work additional hours.

55. The Tribunal have not been provided with copies of any rotas issued to the claimant. However, the Tribunal accepts that, over a period of 5 years, the claimant worked to a rota which set out specific times for "sleep" on the night shift for servicer user EL. The Tribunal does not consider that would in itself amount to an implied term in the claimant's contract of employment.

56. As a matter of general principle a term is not implied unless it is certain, necessary, and effectively notorious, namely that it is required either as a matter of normal custom and practice; or to reflect what the parties intended.

57. This is a case concerning the care sector, where the respondent's requirements for their support workers would reflect the requirements of any local authority contract under which they were delivering care and most importantly the needs of their service users from time to time. Those requirements may change and the respondents, like any other organisation operating in this sector, would have to be flexible to accommodate those needs. Accordingly, as a matter of custom and practice in the care sector, it is highly unlikely that any organisation operating in that sector would employ staff on specific set hours. It is also not what the respondent intended when they employed the claimant. Indeed, when the claimant was initially employed she was not working with EL. She was working with a different service user. No evidence has been led that that service user or users had the same sleep pattern as EL. Indeed, it seems unlikely, bearing in mind the sleep patterns of the general population, that service users would all have the exact same sleep patterns.

58. Therefore, this Tribunal does not accept that incorporating specific sleep times into contracts of employment are normal custom and practice within the care sector. Indeed, in this sector an extremely flexible contract in relation to hours would be more likely to be the custom and practice. Further, this Tribunal does not accept that a contract with specific set times for sleep would have been intended to be implied into the claimant's contract by either party, but especially the respondent when the claimant's rotas were drawn up. It is almost inconceivable that the respondent would have insisted on such a contract, as they would be unable to arrange for the claimant to work with any other service user, if the claimant asked to be moved for whatever reason; or the respondent required her to work with a different service user; or anything happened to EL, as was indeed the case when the Local Authority deemed that his care package should be changed. Her contract with the respondent is not limited to providing support for EL. If the set hours for sleep at EL's property were an implied term in the claimant's contract of employment, she could only work for the respondents supporting EL if he maintained his original sleep pattern. She could not work with any other service user, although she had previously done so. Such a contract would be completely unworkable for the respondent to maintain in the care sector in which they operated, and they would not have agreed to it, nor employed the claimant on those terms.

59. For those reasons this Tribunal does not consider that there has been any variation to the claimant's contract of employment, when the respondent increased the "sleep" hours on the claimant's night shift with service user EL, following a change made by the Local Authority to EL's care package in that regard.

60. As the claimant did not make up the additional 1.75 hours a week required under her contract to have fulfilled her 22.5 contractual hours, the Claimant was not entitled to be paid for those hours, as she was not willing to work them.

61. Accordingly, this Tribunal finds that there was no deduction made from the claimant's wages. Her claim for unlawful deduction from wages is hereby dismissed.

Employment Judge Martin

Date 9th January 2019

RESERVED JUDGMENT AND REASONS

SENT TO THE PARTIES ON

24th January 2019

FOR THE TRIBUNAL OFFICE

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