



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: S/4102002/2017

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Held in Glasgow on 29 and 30 October 2018

Employment Judge: Laura Doherty

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Miss Halide Mustafa

**Claimant
In Person**

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ScotNursing Ltd

**Respondents
Represented by:
Mr Haynes -**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that: -

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1. the claimant's claim for breach of contract is dismissed.
2. the claimant's claim for unauthorised deduction of wages under Section 13 of the Employment Rights Act 1996 (ERA) is dismissed.

REASONS

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1. The claimant presented a claim of a breach of contract, unauthorised deduction of wages, and unfair of dismissal on 14 June 2018. The claimant lacked sufficient qualifying service to present a claim of unfair dismissal, and this claim proceeds only as one of unauthorised deduction of wages and breach of contract.

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2. The claimant had earlier made an application to amend to include a claim of automatically unfair dismissal on the grounds that she was dismissed because she exercised a statutory right, however this had been refused.

3. The issues before the Tribunal were:
- (i) **breach of contract claim**; whether the respondents had acted in breach of the claimant's contract of employment, and if so what the damages flowed from that breach.

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- (ii) **unauthorised deduction of wages claim**; whether the respondents had made any other unauthorised deductions from the claimant's wages under section 13 of the ERA, and if so, how much. This requires the Tribunal to determine the wages which were properly payable to the claimant.

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4. The claimant gave evidence on her own behalf, and evidence was given by her father, Mr Mustafa, and her sister, Miss Plerte Mustafa.

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5. For the respondent's evidence was given by Mrs Paula Lickrish, Office manager, Mr Robert Hall, Deputy Manager, Miss Anne Sinclair, the Finance Director, and Mrs Morvan Finlayson the Company Secretary.

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6. The respondents produced a bundle of documents, to include documents provided by the claimant in compliance with directions issued at a PH for Case Management purposes which took place on 23 February 2018

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7. In the course of that Case Management PH the claimant indicated that she wished to introduce into evidence a recording of telephone conversations which she had with the tax office, in which she was told that she was not registered with the respondents for tax purposes. The claimant was directed to produce the recording, and the transcript of it, to the respondents.

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8. The claimant supplied the respondents with a disc, but no transcript of the recordings. Mr Haynes, appearing for the respondents, told the Tribunal that that that the disc which the claimant supplied was inaudible.

9. Ultimately the respondents accepted for the purposes of this Hearing that the claimant made four telephone calls to the tax office on 1 July 2016, 25 January 2017, 23 February 2017 and 23 March 2017 and that she was told on those occasions that she was not registered for tax purposes with the respondents. This concession having been made by the respondents, it was unnecessary for the Tribunal to listen to the audio recording or for it to be introduced into evidence.

Findings in Facts

10. The respondents are a nursing and care agency, engaged in the business of making arrangements for the provision of nursing and care staff on an agency basis. Part of their work is carried out within a call centre, which is manned by call centre staff.

11. The claimant, whose date of birth is 03/04/1995, was employed by the respondents in the period from October 2014 to March 2015. The claimant left her employment with the respondents in March 2015 to travel to Australia.

12. When the claimant returned to the UK she was contacted by the respondents, who advised they had a vacancy. The claimant began working again with the respondents on 20 June 2016 and remained employed with them, until her employment was terminated by them on 6 June 2017.

13. On both occasions the claimant was employed as a call centre staff member. The function of that job is to place agency staff in suitable work places.

14. The respondents operate their business on a 24/7 basis. Prior to October 2014, call centre staff worked 9am to 5pm, Monday to Friday. From October 2015, in consultation with staff, this was changed, so the call

centre staff worked a twelve-hour shift pattern (8.30am to 8.30pm), two days on, two days off, on a four-weekly rotation. Call centre staff were split into two teams (a Green Team and a Red Team). Depending on the number of staff members operating within each team, staff were obliged to provide on- call cover every 3rd or 4th shift they worked. On-call cover was provided from 8.30pm (following the completion of a shift), until 7.30am when a handover took place to the shift the following day.

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15. The call centre teams had from time to time, either three or four members of staff in each team. The hours which each team member worked varied per week, depending on the rotation, but over a four-week rotation, each team member worked 140 hours in the call centre office, and in addition to that covered on call duties on a rotational basis, either every third or fourth shift, depending on the number of members of staff in their team at a particular time.

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16. The changes introduced in October meant that call centre staff worked less hours in the call centre over a 4-week rotation than they had previously, but they also dealt with on-call.

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17. Prior to the introduction of these changes, call centre staff received flat rate payments for covering an on-call shift.

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18. From October call centre staff had the option, on a voluntary basis, to cover on- call in addition to their rostered on- call duties, and this was remunerated at a flat rate of £20 per on -call shift covered during the week, and £30 per on -call shift covered at the weekend. Overtime was also available to call centre of staff on a voluntary basis. The overtime rate of pay was worked out by dividing the staff members' salary by 37.5 hours per week.

19. The purpose of on -call was to deal with out of office queries in relation to the placing of staff. The member of staff who was responsible for on- call

was provided with a laptop, and a telephone. They were expected to log on to the laptop to deal with a query. They were not permitted to use the telephone provided for anything other than business use.

5 20. There was no restriction on where on -call could be performed, other than that person performing on -call had to have access to Wi-Fi and a telephone signal. The person on call was not permitted to drink alcohol while on call. It was the expectation that telephone calls be taken in a quiet environment, where there was no loud music or noise in the background.

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21. The majority of on -call queries occurred either at the beginning or the end of the on-call period, although on -call enquiries could come in at any point. A significant number of on call telephone calls were from staff running late for a shift. A significant number of the on-call queries could be dealt with reasonably shortly, although this was not always the case.

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22. On call activity was recorded by the person covering on call on 'on call-sheets'. This recorded, among other things, the time of the call within a particular band, the frequency of the calls, and what activity was undertaken in response to them. The sheets produced by the claimant when she was covering on-call are produced at 141 to 162.

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23. The respondent's staff agreed to the changes proposed in October 2014, and the business thereafter operated on that basis.

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24. When the claimant first commenced working with the respondents in October 2014 she was interviewed by Anne Sinclair, Finance Director, and Paula Lickrish (Ms Sinclair's daughter), one of the managers. The claimant started working 9am-5pm for a period of around two weeks as part of her induction and then moved to shift working. She thereafter worked the shift pattern described above, including covering on call. The claimant was paid a fixed salary for the work which she performed.

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25. On the claimant's returning to work with the respondents in June 2016 the process was less formal. She was spoken to by Anne Sinclair, who told her that everything effectively was the same as before in terms of working hours, and payments.

26. During the second period of her employment, the claimant again worked 9am-5pm for a period of just less than 2 weeks, and then moved to the shift pattern as described above, which included covering on-call.

27. In the period from 11/07/16 until 12/05/15 the claimant was rostered to cover 48 -on call shifts, which covered a total period of 3,410 hours. The claimants on call log on activity for those shifts, over that period, and the on-call sheets which she completed recording the on-call activity, indicated that she performed a total of 41 hours of work over that period (page 163 to 165).

28. The claimant asked the respondents for a contract of employment. She did not receive this immediately, but she did receive a contract of employment on 27 September 2017 (page 75 to 81), which she signed.

29. The contract is dated 25 August 2016, and states that claimant held the position of '*call centre core staff member*' and her start date was 20 June 2016. The contract stated on the first page;

*'salary per annum: £16,867.44,
hours of work: 37.5 hours per week'*

30. Clause 3 of the contract under '*Hours of Work*', states:

'Given the nature of the Company's business and the need for flexibility in order to meet the change in requirements of the business, it is expected that all staff will be flexible in relation to their working hours. The normal working hours however staff will be as follows:

3.1 *For nursing, caring and call centre agreed hours will be worked each month (see front page) on a shift rota basis at such times as may be required by the Company on the request of the Director/Chief Executive.*

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3.2 *For office-based personnel involved in administration, the normal working hours are 9.00 am to 5.30 pm with one hour for lunch or 09.00 am to 5.00 pm with half an hour for lunch. You will be required to work such hours as are necessary in order to perform your duties and you may therefore be required to work additional hours beyond those hours from time to time in order to meet the needs of the business. You will not be entitled to additional remuneration in respect of any such additional hours worked.'*

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31. The contract provided at clause 7 for a probationary period, stating that the policy was in the staff handbook.

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32. The claimant was paid a fixed salary every per calendar month during both periods of employment with the respondents. On some occasions she earned overtime in respect of additional hours or on call shifts she worked.

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33. At some point after commencement of her employment the claimant approached Ms Sinclair, to query if she was on a probationary period. She was told by Ms Sinclair that she was, and that the probationary period was 3-6 months, but that she was not being paid at a probationary rate, and therefore if she passed her probationary period, she would not receive an increase in salary.

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34. The claimant began to become concerned about when she was paid for on call. She spoke to her manager, Paula Lickrish, about this, and was told by Ms Lickrish that she did not deal with it. The claimant spoke to Anne

Sinclair after she received her first salary. Ms Sinclair told her that she was paid a salary.

5 35. The claimant continued to be concerned about how much she was paid and she contacted the respondent's Company's Secretary, Miss Finlayson, around January 2017 to take matters up with her.

10 36. A meeting was arranged between the claimant and Ms Finlayson on 31 January 2017 and Miss Finlayson's handwritten notes of this are produced at page 222. The claimant queried how her salary worked, and how the on-call element of her job was remunerated.

15 37. Miss Finlayson told the claimant that she would need to speak to Ms Sinclair for clarification, but she did confirm to the claimant that she was paid on the basis of a set salary and was not hourly paid.

20 38. Ms Finlayson did speak to Ms Sinclair; however, the claimant heard nothing further, and in February she again contacted Ms Finlayson to ask about the position. Another meeting took place on 28 February 2017 (page 229) Ms Finlayson explained that on call was no longer going to be carried out by the call centre staff, as the respondents had taken a decision to commence a night shift in order to employing staff to carry out administrative duties, and to cover on call. This arrangement was not implemented until sometime later.

25 39. The claimant continued to be unhappy and met again with Miss Finlayson on 23 May 2017 (page 230) when she again reiterated to her that on call would no longer needed to be covered.

30 40. The claimant also queried the position in relation to her tax position. The claimant contacted the Inland Revenue on four occasions; on the 1st of July 2106; 25 July 2017; 23rd February 2107; and 23rd March 2017 when she was told that she was not registered with the respondents for tax purposes.

35 41. The claimant was dismissed from her employment on 20 June 2017.

Note on Evidence

42. The Tribunal heard from a number of witnesses in this case, however not all of the evidence which it heard was necessarily relevant to the issues which it had to determine. The claimant's father and sister both gave evidence as to the effect which performing on call duties had upon her, and to the extent of the work which on -call involved. That was to the effect that it was very onerous, and that the claimant spent a very considerable time at home on this work, and that she could not do anything else if she was on call.

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43. Mr Mustafa's evidence was that the claimant was living with him at home for the entire duration of her employment with the respondents. On the claimant's own evidence that this was not the case, and this inconsistency impacted adversely on the tribunal's assessment of Mr Mustafa's credibility as to the extent of the work involved for the claimant on being on call.

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44. Miss Mustafa accepted that she did not live with the claimant during the entire period when she was performing on call, but she spoke to the restrictions which the claimant was working under when she performed on call, which are dealt with below. On balance and for the reasons outlined, the Tribunal preferred the evidence of Mr Hall as to the requirements and restrictions of on call.

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45. The claimant became emotional and upset on at least two occasions on giving her evidence, and the Tribunal formed the impression that she was genuinely distressed and upset. However, the Tribunal also formed the opinion that on some occasions the claimant's evidence was coloured by her perception that she had been very badly treated by the respondents.

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46. The Tribunal formed this impression in relation to her evidence as to what was required of her on call. The claimant's evidence was that she regularly

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worked long hours on call and that she was restricted from doing anything at all or going anywhere because of being on call. She said sometimes she was up all night. The Tribunal was not persuaded that this was the case. It preferred the evidence of Mr Hall on this point. He gave his
5 evidence in an entirely reasonable manner as to the requirements of on call. He had no obvious motive to be anything other than truthful, and he accepted there were some limitations while on call. Those were that it was necessary to be range of the telephone, and a Wi-Fi signal, and to take the calls in a quiet space, and not to drink alcohol. His evidence was however,
10 that other than that there were no other restrictions. He said being on -call was not overly restrictive and he was able to carry on with many normal activities, he gave the examples of going out for dinner, or taking his dog for a walk. He said he could get on with most things. That was in direct contract to the claimant's evidence which was to the effect that she was
15 prevented from going out at all or doing anything.

47. Mr Hall also confirmed that the bulk of the on- call work was performed either at the beginning or the end of the on-call period. The tribunal was satisfied that his evidence on this matter was to be accepted, having regard
20 to the nature of the on-call service, and the on-call sheets which were produced in the bundle.

48. The Tribunal was also satisfied that the time spent performing work during the on-call period was significantly less that the whole on call period. It was
25 supported in this conclusion by the evidence of Ms Lickerish, and a document which she has produced (page 163 to 165) which contained an analysis of the claimant's log on activity, which was indicative of the amount of work performed by her, during her in call shifts. This indicated that during the on-call periods where the claimant worked from 11 July
30 2016 until May 2017 (which covered a total of 3,410 hours) she performed 41 hours of work. Albeit the claimant suggested that she worked extensively during the on-call shifts, there was no significant challenge to this document, or to the information contained on the claimant's on-call

sheets (which had been completed by her), which were included in the bundle, and which formed the basis of the respondent's analysis of the time spent working,

Miss Lickrish

5 49. The Tribunal formed the impression that Miss Lickrish's evidence was credible and reliable. She spoke to the shift patterns and the changes which were made in October 2014, and the requirements of on call.

Mr Hall

10 50. The Tribunal found Mr Hall to be a credible and reliable witness. He spoke to shift arrangements, and to the on-call arrangements, and as indicated above his evidence on these matters was convincing.

Anne Sinclair

15 51. There was an issue as to the extent to which the claimant had discussed her queries about how she was paid with Ms Sinclair and what she had been told. The claimant's position was that she had enquired about this on several occasions and had been given conflicting information about being paid at an hourly rate, and she was also told that she had been paid a salary. Ms Sinclair's evidence was that the claimant had approached her to query about a salary increase when she completed the probationary period and was told by her that she was on a probationary period, but not on a probationary salary rate.

25 52. The Tribunal was satisfied that this occurred, and it was also satisfied on balance that the claimant had spoken to Miss Sinclair on more than one occasion about her salary, even though Ms Sinclair denied this. It appeared plausible to the Tribunal that he claimant would have gone to Ms Sinclair with theses issues, as she was the Finance Director.

30 53. Albeit the Tribunal was satisfied there had been some discussions between the claimant and Ms Sinclair, it was not satisfied that Ms Sinclair told her she was paid an hourly rate, and rather the tribunal concluded on

balance that Ms Sinclair told the claimant that she was paid a salary. The Tribunal reached this conclusion, on the basis that as the Financial Director, it would have been unlikely that Miss Sinclair would have told the claimant she was being paid at an hourly rate, given the terms on which the contract she and other call centre staff were on.

Miss Finlayson

54. The Tribunal formed the impression Miss Finlayson was a credible and reliable witness. She gave evidence as to the approach which was made by the claimant in January 2017 querying the how on call was paid and the steps she took thereafter. Miss Finlayson had taken notes, which the meetings she had with the claimant, and the Tribunal had no reason not to accept her evidence as to what was discussed in the course of those meetings.

55. There was an issue in relation to Ms Sinclair and Ms Finlayson's evidence as to the reason why the respondents began to employ nightshift staff. It was put to them on cross examination, that this was done because of the concerns the claimant raised about on -call. Ms Finlayson did not take any part in the decision, and therefore her evidence has limited value on this, but she understood it was because the administrative tasks had become heavier, and it was decided to employ nightshift to assist with these.

56. It was Mis Sinclair's evidence that this decision was taken because the day time administrative staff had become busier, and the respondents decided to employ night shift staff to help with the administrative tasks, and they could also cover on call. The reason why the respondents decided to employ nightshift staff is not directly relevant to the issues which the Tribunal has to determine this case, there was however, no evidence before the Tribunal which suggested that the respondent's witnesses misled the Tribunal on this point.

Submissions

Claimant's submissions

57. The claimant submitted that the respondents breached her contract and failed to pay wages which were due to her. She submitted that when she was first employed by them she was naïve and did not know her rights, and she was given minimum information by the respondents.

58. The claimants said she was pressured into signing a contract of employment in October 2017, and she felt that if she did not sign this, she might lose her job. The claimant said she requested information numerous times at one to one meetings with Anne Sinclair but had not been provided with any. The claimant said she had suffered a huge amount of stress, anxiety and financial loss, which was indescribable because of the respondent's actions. She submitted they had completely ruined her mentally. The respondents had treated her unfairly throughout, and the claimant asked the Tribunal to make the right decision.

59. The claimant sought compensation for the hours which she had worked on call, at the rate of four times the overtime rate which she would have received for working overtime, on the basis of the loss which she had been occasioned to her.

Respondent's submissions

60. Mr Haynes for the respondents submitted that the claimant was employed on the basis of a fixed salary. The contract provided that she worked 37.5 hours per week. This reference to hours was a red herring. If the claimant worked 37.5 hours x 52 divided by 12months then she worked 162.5 hours per calendar month. The claimant was only asked to work 140 hours every four weeks, if an hourly rate were looked at she therefore worked in the office less hours than provided for in the contract. The work performed during on call periods was minimal.

61. The claimant was aware of the terms and conditions under which she was employed. She had worked under these terms and conditions in October

2014, and returned on the same basis, and again worked under those terms and conditions. She was well aware of the requirement to work shifts, and to provide on call cover.

- 5 62. In the event that the Tribunal was not with them on that position, and the claimant was to be paid on an hourly rate, she had already been paid for 22.5 hours of on call work each month.

Consideration

Breach of contract claim

- 10 63. The amount of the claimant's claim as outlined in the documents produced for the hearing, is £21,165.04. This is based on the hours of on call which she worked multiplied by 4 times an hourly rate of £8.66 per hour.

- 15 64. There would be some adjustment to this figure, on the basis that in the course of the hearing, an exercise was conducted where evidence was taken from the claimant about the hours of on call which she recorded she had worked in a Document at page 31 /32. This resulted in the on-call hours which the claimant covered being agreed (a total of 3,410 hours). This figure is slightly different to that used by the claimant in her calculation.

- 20 65. The claimant in any event however submitted that sum of £21,165.04 should be trebled, given the respondents had broken the law, and her overall claim was for £55,000.

- 25 66. Regardless of any adjustment which might be made to that calculation of the number of hours of on-call covered by the claimant, the first issue for the Tribunal is firstly to determine whether there has been a breach of the claimant's contract of employment.

- 30 67. The claimant was issued with a written contract of employment, which set out the express terms of the contract between the parties. The express

terms in relation to pay and hours of work are set out above in the Findings in Fact.

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68. Those were firstly, the claimant's annual salary was £16,887.
69. Secondly the hours of work were 37.5 hours per week.
70. The claimant was employed as a member of the call centre staff, and therefore clause 3.1, applied. That stated; *'agreed hours will be worked each month (see front page) on a shift rota basis as such times as may be required by the company on the request of the director/chief executive'*.
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71. The claimant made submissions as to the meaning of clause 3.2, submitting that the requirement to work additional hours *from time to time*, did not mean anything. However, the Tribunal did not consider that clause 3.2 had any relevance to the claimant's position, as she was identified in terms of the contract as call centre staff, (to whom clause 3.1 is stated to apply) and 3.2 made provision for office-based personnel involved in administration
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72. The Tribunal understands the claimant to claim the respondents are in breach of her contract of employment by failing to pay her wages which were due to her, specifically, for the provision of on call cover, when she was rostered to provide this.
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73. The claimant's contract states that her entitlement is to payment of a salary of £16,867.44.
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74. There was no evidence to support the conclusion that the claimant was not paid the full amount of her salary, and indeed it was not suggested by the claimant that she was paid less than the annual salary specified in the contract of employment. Therefore, there has been no breach by the
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respondents of the contract, by virtue of their failing to pay the claimant the salary which she was entitled to in terms of that contract.

5 75. There is a degree of ambiguity of drafting of the contract, in that it states the hours of work are 37.5 hours **per week**, but it provides at clause 3.1 *that call centre agreed hours will be worked **each month** (see front page on a shift rota basis) at such times as may be required by the company on the request of the director/chief executive.*

10 76. The claimant in fact did not work 37.5 hours each week but worked 140 hours in the call centre over a four-week rotation because of the application of the shift rota, and she also required to cover on call.

15 77. The Tribunal considered whether the respondents requiring the claimant to perform on call duties and paying her the salary which she was contractually entitled to, where breach of the contract of employment, and if so, what damages flowed from that breach? In order to succeed in her claim, the claimant would need to satisfy the Tribunal that there was a term implied into her contract of employment to the effect that she would be paid 20 4 x her overtime hourly rate of £8.66, above her salary, for the hours when she was rostered for on call.

25 78. The Tribunal could only imply such the term if it was necessary to give business efficacy to the contract, or if it was satisfied that it was the normal custom practice to include such a term in the contract of that particular kind, or if an intention to include the term was demonstrated by the way in which the contract was performed, or that the term was so obvious that the parties the parties must have intended it.

30 79. A term can also be implied into a contract by virtue certain statutory provisions, including the National Minimum Wage Regulations 2015 (the Regulations).

80. A term to the effect that the claimant would be paid over and above her contracted salary for the performance of on call work at 4 times her hourly rate of pay cannot be implied on any these grounds.
- 5 81. It cannot be said that such a term was necessary to make the contract workable.
82. There was no evidence to support the conclusion that it was the custom and practice adopted within the industry in which the claimant was working, that such a term to be included without the need to be put in writing.
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83. It was not possible to imply such a term on the basis of the conduct of the parties. It was clear from the evidence that employees, including the claimant, were not paid for on call unless they worked on -call shifts were over and above those they were rostered to carry out.
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84. Nor could such a term be implied on the basis that the basis it was obvious that the parties intended it. This would mean term will be implied on the basis that it can be said that it was so obvious, that it goes without saying, and on the basis of the facts found the Tribunal was not satisfied that this was the case.
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85. The Tribunal also considered the National Minimum Wage Regulations 2005. Employees have a statutory entitlement to the national minimum wage and a term could be implied into the claimant's contract of employment to the effect that she was entitled to be paid at the rate applicable in terms of the Regulations.
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86. The Tribunal was not addressed on this, nor was it addressed on the effect of the Regulations, the claimant's claim being that she was due a multiple of 4 times her hourly overtime rate of pay.
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87. The Tribunal was able to reach a conclusion on the number of hours where the claimant was on call in the period from 11/07/16 until 12/05/17, and on the time taken up during that on call period with the performance of work,
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but beyond that there was no analysis before the Tribunal of the relevant pay periods, or payments made to the claimant in terms of the Regulations during those pay periods, which enabled it to conclude that there had been a breach of those Regulations, and if so what sums were due to the claimant in respect of such a breach.

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88. There was no basis on which the Tribunal could conclude that there was a breach of contract which gave rise to damages. Accordingly, the claimant's claim for breach of contract fails and is dismissed.

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Section 13 Claim

89. The Tribunal then considered the unauthorised deduction of wages claim. **Section 13** of the ERA provides the right not to suffer unauthorised deduction of wages, and provides at section 13(1);

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'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 however relevant provision of the worker's contract or

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(b) the worker has previously signified in writing his agreement or consent to the making of the reduction.

90. **Section 27(1)** of the ERA defines wages as *'any sums payable to the worker in connection with his employment'*.

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91. In order to succeed in a claim in her section 13, the claimant would have to have some legal or contractual entitlement to the payment which she is claiming.

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92. The claimant's claim is set out above.

93. The task of the Tribunal here is to assess what is properly payable to the claimant. That would include an exercise of determining what was payable to the claimant in terms of the Regulations. That point was not argued before the tribunal, and as indicated above there was an insufficient analysis of the relevant pay periods in terms of the Regulations, and the amounts paid to the claimant in respect of those pay periods, to allow the Tribunal to conclude that there were wages properly due to the claimant in terms of the Regulations which had not been paid.

94. Nor was there any evidence to support the conclusion that the claimant was not paid her contractual salary (i.e. that there was a deduction from her wages which was unauthorised) and on that basis the claim under **Section 13** fails.

Employment Judge: L Docherty
Date of Judgment: 15 November 2018
Entered in register: 19 November 2018
and copied to parties

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