



# EMPLOYMENT TRIBUNALS

Claimant: A  
Respondent: B

## AT A HEARING

Heard at: Leeds On: 11<sup>th</sup> February 2019  
Before: Employment Judge Lancaster

Representation  
Claimant: In person  
Respondent: Mr S Flynn, counsel

## WRITTEN REASONS

1. Reasons for this decision were given orally at the conclusion of the hearing. The Claimant has also now requested Written Reasons for the Judgement sent to the parties on 18<sup>th</sup> February 2019 and corrected under a certificate dated 21<sup>st</sup> February 2019.
2. The remaining claims were for unauthorised deductions from wages and/or breach of contract.
3. The legal issue is therefore what was the remuneration properly payable to the Claimant under contract (as modified if applicable by the National Minimum Wage Regulations).
4. The factual issues in these claims were set out in my letter dated 14<sup>th</sup> January 2019 where I directed that the case be listed for final hearing. They are as follows:

“There are only two issues still to be finally determined.

Firstly the Claimant alleges that he has still been underpaid for "sleepovers" notwithstanding the receipt of an additional £261 gross/£175.47 net.

The Claimant has now been paid at the correct rate (£7.20 per hour) for 96 hours of sleepover

The factual issue is therefore whether the Claimant worked 120 hours as he appears to be claiming (£864/£7.20per hour = 120 hours)or 96 hours as the Respondent sets out in its calculations. The difference stems from whether the 12 shifts were of 10 hour or 8 hour duration.

Unless the Claimant can show that he in fact "worked" and is entitled to be paid for 120 hours this claim must fail.

As set out in the Tribunal letter of 24th September 2018 this claim for the National Minimum Wage to cover periods during a sleepover where the Claimant was not actually working, in any event, cannot presently succeed in the light of the Court of Appeal judgement in Royal Mencap Society v Tomlinson-Blake (and associated cases) [2018] IRLR 932 [20128] EWCA Civ 1641. If the Claimant is able to show that there are a further 24 hours outstanding and not paid at the rate of £7.20 (a total of £172.80 gross) then he may if he wishes apply to have this part of the claim stayed further pending determination of an appeal in the Mencap case to the Supreme Court. The Tribunal will not at this point in time be legally able to give judgement for that additional sum as this would not be following the Court of Appeal's decision.

The second issue is whether the Claimant has been paid at the correct contractual hourly rate for the work he did that was In fact paid hourly. This would not include the sleepovers which were, under the contract, only payable at a fixed sum of £25.

The Claimant says that he was entitled to be paid at a rate of £7.70 per hour after 6 months (an additional 50p). The Respondent says that , as set out in the Recruitment Pack, the higher rate after the end of the probationary period (which it asserts was not successfully completed in any event) is only £7.50.

The Respondent has made an "ex gratia" payment of £116.10 which is an additional 30p per hour for 387 hours worked after the end of the 6 month period.

Unless the Claimant can show that the correct contractual rate in his case was in fact £7.70 this claim must fail.

It appears, if successful, to be worth £77.40 gross (387 x £0.20)

The claim for loss of future earnings after the end of employment is, as the Respondent contends, misconceived and the application to strike out that claim will be dealt with at the start of the hearing, as set out in the Tribunal letter dated 9th October 2018."

5. The Claimant did not in fact ever apply for a stay in the proceedings in respect of the "sleepover" payments.

6. In any event I found as a fact that he was not owed any further potential sums for sleep-in hours worked at the national minimum wage. The time sheets filled in by the Claimant himself record what parts of the 10 hour sleepover shifts were in fact already claimed for and remunerated at the contractual hourly rate. It is only the remaining time that is not already paid for where the sleepover allowance alone represents the remuneration. The Respondent has calculated, based upon these timesheets, that an additional 96 hours need to be accounted for by increasing the pay to reflect the minimum wage: I accepted that evidence.
7. I also found as a fact that there was no concluded agreement that the Claimant's hourly rate would go up by 50 pence per hour to £7.70 per hour after the end of his probationary period. I did not accept that the Claimant was ever told by his manager that he would actually receive such an increase and I accepted the Respondent's evidence that she would have had no actual authority to agree a pay rise outside of the parameters set by the HR department. The Claimant's evidence was in any case somewhat vague: he said only that "it was my understanding that I would get this pay rise after 6 months". The clear documentary evidence in the Recruitment Pack issued at the commencement of employment was that after successful completion of the probation period pay would rise to £7.50 per hour. At the most there may have been a statement by his manager that if he in fact passed his probation (and it not accepted by the Respondent that he had in fact done so, given the concerns about his performance and behaviour at this time) he could expect a pay rise subject to HR approval and in accordance with the standard practice. Even if the figure of £7.70 per hour had erroneously been mentioned (and I found on balance that it was not) this conversation was not intended to be and was not a contractually binding agreement. The Claimant has not therefore proved an entitlement to more than the sum which has already been paid to him as a gratuity to take his pay up to £7.50 per hour.
8. The findings and therefore the reasons for considering awarding costs are as set out in paragraphs 2 to 4 of the Judgment.
9. I also separately considered whether I should exercise my discretion to award costs and I found that it would be unconscionable for the Claimant not to have to pay costs in these circumstances where he had put the Respondent to the wholly unnecessary expense of attending this hearing.
10. The Respondent claims the cost only of counsel's attendance at the hearing and not for any other preparation. £850.00 is therefore the amount by which the Respondent is in fact out of pocket as a result of the Claimant's unreasonable conduct of these proceedings and there is no reason to seek to go behind that figure.
11. I took into account the fact that the Claimant has been and is currently in work, with an agency working for Phoenix Textiles on a full 37 hours per week. I also took into account the Claimant's ability to pay to the extent that I was able to defer the payment for some 2 ½ months to allow time to organise his finances.

DATE 1<sup>st</sup> March 2019

JUDGMENT SENT TO THE PARTIES ON

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AND ENTERED IN THE REGISTER

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FOR SECRETARY OF THE TRIBUNALS

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