Appeal No. UKEAT/0240/18/OO

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 11 February 2019

Before

HIS HONOUR DAVID RICHARDSON

(SITTING ALONE)

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(1) MRS J FRUDD
(2) MR I FRUDD — APPELLANTS

THE PARTINGTON GROUP LIMITED — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellants	MRS JANET FRUDD (The Appellant in Person)
For the Respondent	MS ASSUNTA DEL PRIORE (of Counsel) Instructed by: Napthens LLP 7 Winckley Square Preston PR1 3JD

SUMMARY

NATIONAL MINIMUM WAGE

During the open season of the caravan park the Claimants (who were a warden/receptionist team) were on call from evening to morning on either two or three nights each week. The Employment Judge found that during the evening until 10.00pm, when they were on call but not paid, they were working on time work for the purposes of the National Minimum Wage legislation; and overnight from 10pm to 7am (when they were paid for call-outs) they were not working but merely available for work unless they were called out. He did not expressly address the period from 7am until 8am when once again the Claimants were on call but not paid. Some reasoning was required to deal with this period. **Royal Mencap Society v Tomlinson-Blake** [2018] IRLR 932 considered.

Otherwise the appeal was dismissed - the Employment Judge's reasons were sufficient to deal with the on-call period during the close season when the caravan park was shut overnight.

HIS HONOUR DAVID RICHARDSON

1. This is an appeal by Mrs Janet Frudd and Mr Ian Frudd against a Judgment of Employment Judge Horne sitting in the Manchester Employment Tribunal dated 2 February 2018. By his Judgment he determined complaints which the Claimants had made against Partington Group Ltd, the Respondent, alleging that they had not been paid the national minimum wage. To a significant extent their claims succeeded.

2. The appeal was considered at a Rule 3(10) Hearing on 17 October 2018. I permitted it to proceed to this Full Hearing only in two quite detailed respects.

The background facts

3. The Respondent owns and runs caravan sites, including Broadwater Park near Fleetwood. The Claimants, who are husband and wife, were employed at this site from 2008 until 2015 working together as a warden/receptionist team provided with and expected to live in a caravan on site. They were one of three such teams. They worked shifts. The year was divided into two seasons.

4. The open season lasted from March to November. During the open season the caravan site was open 24 hours per day. The Employment Judge ("EJ") described it as follows:

> **"10. Within the perimeter of the Park are 309 caravan pitches. About 240 of these are usually occupied by privately owned caravans. Some 15-20 caravans are usually available for hire, although it would be rare for all of those caravans to be fully occupied. The remaining pitches are either empty or occupied by caravans for sale. It is common ground that this is a relatively quiet caravan site. A significant proportion of the privately owned caravans would be vacant at any one time. Long-term residents tend to know their way around and do not need regular assistance."**

5. On either two or three days each week the Claimants were expected to be on call after their shifts finished. The contractual provision relating to these periods was as follows:

> **"10.4 You will also be required to enter your name on a rota for the purpose of being on call to deal with customers enquiries [sic] or requests for assistance after completion of your shift whether the shift in question finishes at 4:30pm, 5:00pm or 8:00pm. You will be on call until 8am the next day.**
>
> **10.5 Whilst on call you will also be required to cover the Alarm Pager and attend the relevant caravan. You will be paid for Emergency Call Outs in the Open Season from 10pm until 7am and in the Closed Season from 5pm until 8am at the rate of £7.50 per person per call out."**

6. The period of on-call between shifts therefore, effectively divided itself into three for the purposes of payment. From the end of the shift until 10pm the Claimants were not entitled to any payment. I will call this the evening period. From 10pm until 7am they were entitled to payment for call-outs. I will call this the night period. From 7am until the start of the shift at 8am they were not entitled to any payment. I will call this the early morning period. The first ground of appeal is concerned with this early morning period during the open season.

7. The closed season lasted for about three months. The gates of the park were locked by 4.30pm. The Claimants' normal working hours were from 8am until 4.30pm. However, Mr Frudd was also required to undertake a security check of the park in the evening when it was closed. He received no specific payment for this. The second ground of appeal relates to this activity. (I should say that the provision in paragraph 10.5 for emergency call-outs in the closed season altered I am told, so that it took effect from 8pm rather than 5pm).

The Employment Judge's Reasons

8. The Claimants sought a finding that the whole of the time when they were on call was time work for the purposes of the national minimum wage legislation. They said it amounted to actual work. It was not their case that on call periods qualified as time work simply because they were available to work.

9. Their case went to appeal at the Employment Appeal Tribunal ("EAT") with others. It is reported as **Focus Care Agency Limited v Roberts** [2017] ICR 1186. The EAT commended a multifactorial analysis: see paragraphs 42 to 44. It was remitted for rehearing. This was the hearing which the EJ conducted.

10. Although the Claimants had sought a finding in respect of the whole time on call, the EJ made a distinction. He found that the night period was not time work. That finding is not the subject of today's appeal.

11. On the other hand, the EJ found that the evening period was time work. He made detailed findings as to the requirements placed upon the Claimants during that period. They included showing round prospective customers, welcoming late arrivals, giving keys to visitors who were subletting caravans, conducting an evening check if security guards were not present, dealing with incidents of noise or unruly behaviour, responding to alarm calls and even on one occasion parking a tractor across the gates until potential trespassers had moved on. The EJ found that the wardens and receptionists were expected to undertake these activities as part of their work. He said the requirement to be on call had a marked effect on the Claimants' leisure time in the evening.

12. The EJ made no express findings about the period from 7am to 8am. He said generally about the period in the evening:

> **"67. Having examined the factors, I am satisfied that during these periods the claimants, and each of them, were employed on time work simply by being required to be on call, by being physically present at the Park, and by being jointly responsible for ensuring that at least one of them was present. They were not merely waiting to work, they were working."**

13. After setting out factors which applied generally to the period after 10pm he concluded:

> **"69. Having looked at the factors separately, I have tried to step back and assess whether, after 10.00pm, the claimants were working or merely on standby to work. My view is that it was the latter."**

14. As to the closed season, the EJ found that the Claimants did not do time work on call at all. He said:

> **"70. I take the view that during the closed season the claimants did not do time work on call, either before or after 10.00pm. I have taken account of the restriction in the claimants' activities: they could not go out together during the evenings as well as at night, but the evening call-outs were so rare that they would have been able to enjoy their evenings inside the Park with almost complete freedom. Provided at least one of them stayed within the confines of the Park, they would have noticed little difference between an evening on call and an evening on their day off. There were no hire customers to attend to, no evening visitors and very little else to disturb them."**

15. The EJ went on to make a qualification about time when there was a security guard working at the park, but I need not address that further for the purposes of these Reasons.

16. When the Claimants applied for reconsideration, they raised a question as to the treatment of the early morning period. The EJ did not address it as a separate question. They did, or at any rate appeared to, raise also a question as to availability for work. The EJ did not allow them to put their case this way by way of reconsideration for the first time.

Relevant law

17. The relevant provisions of the **National Minimum Wage Act 1999** and relevant statutory regulations have been considered in the recent decision of the Court of Appeal in **Royal Mencap Society v Tomlinson-Blake** [2018] IRLR 932; see especially paragraphs 17 to 25. I gratefully adopt that summary of the statutory provisions without repeating it in this Judgment.

18. There is a distinction for the purposes of the **National Minimum Wage Regulations** between actual work and availability to work. Actual work is governed by Regulation 30 of the

current **Regulations**. Availability to work is an additional category governed by Regulation 32. As we have seen in this case the Claimants did not rely on Regulation 32.

19. The **Royal Mencap** decision, which effectively overruled **Focus Care**, was principally concerned with the borderline between actual work and availability to work in the context of sleep-in cases. The **Royal Mencap** case held that the distinction between the two categories had been wrongly drawn; periods when employees were permitted to be asleep when not required were to be characterised as periods of availability to work rather than periods of actual work. The **Royal Mencap** decision however did not seek to draw the distinction between actual work and availability work in types of case other than sleep-in cases. It recognised that there were many cases in which workers who have accommodation at work, such as caretakers or residential managers, are required to be on-call outside normal working hours, but not at times when they were expected to be asleep: see paragraph 88 in the judgment of Underhill LJ.

20. Thus, for example, the **Royal Mencap** decision throws no doubt on the outcome and essential reasoning in **British Nursing Association v Inland Revenue** [2002] IRLR 480. The employers operated an emergency bank nurse booking service on a 24-hour basis. The night shifts were worked by staff from their homes. They had to remain available throughout the shift to answer calls. In the evenings and from 5.30am onwards they might be busy, but calls were infrequently received in the period from 23.30pm to 5.30am. If they were not required to answer a call, staff could spend their time asleep or doing other activities. Nevertheless, the staff were held to be working throughout the shift. Buxton LJ said:

> **"12. I have to say that not only was it open to the employment tribunal and to the Employment Appeal Tribunal to find that the workers were working throughout their shift, but also, as an issue of the ordinary use of the English language, it seems to me self-evident on these facts that they were indeed so working. No one would say that an employee sitting at the employer's premises during the day waiting for phone calls was only working, in the sense of only being entitled to be remunerated, during the periods when he or she was actually on the phone. Exactly the same consideration seems to me to apply if the employer chooses to operate the very same service during the night-time, not by bringing the**

employees into his office (which would no doubt impose substantial overhead costs on the employer and lead to significant difficulties of recruitment), but by diverting calls from the central switchboard to employees sitting waiting at home. …"

The appeal

21. For the purposes of this appeal I have a core bundle of papers, a short bundle of authorities and skeleton arguments from both parties. The skeleton argument prepared by the First Claimant appends what is really a short supplemental bundle. It includes the witness statement of the Second Claimant, extracts from the site licence and a map of the caravan park. The First Claimant has addressed me today on behalf of both Claimants.

22. As to the early morning period during the open season, the First Claimant submits that having split the call-out time into different sections, the EJ then erred in law by failing to consider that period. It was akin to the evening period and to be categorised as work rather than mere availability to work. The factors which led the EJ to treat the night period as availability to work were not present. The factors which led the EJ to treat the evening period as work were present.

23. In response to this submission, Ms Del Priore argues that the EJ was entitled to treat the early morning period as one with the night period. The Claimants did not advance any evidence that the early morning period was busier than the night period. The EJ's conclusion was plainly correct. It was impossible on any common sense approach to describe the Claimants as working during that time other than when called out. They were at home, free to spend the hour at their leisure or asleep. The EJ did not have to consider the period as discreet or separable, indeed the Claimants did not advance such an argument below.

24. As to the security check in the closed season, the First Claimant submits that the EJ, having found that the Second Claimant was obliged to carry out a check of the park during the

winter months, left this finding out of account when considering whether the Claimants performed time work during this period. She argues that this is shown by the EJ's findings in paragraph 70 that there would not be much difference between a normal night at home and a normal night on call. On the latter, a security patrol would have to be carried out. This was actual work but no record was kept of it or payment made for it. In the circumstances, the EJ should have treated the whole period as work rather than availability for work or had failed give sufficient reasons for the decision.

25. In response to this submission, Ms Del Priore says that because of the way in which the Claimants put their case arguing that the whole call-out period was actual work, the status of the security patrol was never a freestanding question. On any analysis the time spent actually undertaking the security patrol was time work, but the Claimants did not argue that by reference to this period alone there was a breach of the requirement to pay the national minimum wage. There clearly was not.

26. Rather, Ms Del Priore said the argument of the Claimants was that the performance of the patrol was a factor tending to establish that the whole of the on-call period was time work. In this context, the EJ's decision was sufficiently reasoned and plainly correct. It was impossible in the closed season to regard the Claimants as actually working throughout the call-out period merely because one had to do a patrol in the evening.

Discussion and Conclusions

27. At the outset, I must bear in mind that there is an appeal to the EAT only on a question of law. The EAT is concerned only to see that the Employment Tribunal ("ET") has applied correct legal principles, given sufficient reasons for its decision and reached findings and conclusions which are tenable, that is to say not perverse. In this case, in my judgment, the challenge is really to the sufficiency of the ET's reasons.

28. An ET is obliged to give reasons for its judgments. Thus in **Meek v City of Birmingham District Council** [1987] IRLR 250, Bingham LJ said that although tribunals are not required to create "an elaborate formalistic product of refined legal draftsmanship. … there should be sufficient account of the facts and of the reasoning to enable the EAT or… this court to see whether any question of law arises". In addition, there should be a sufficient indication for the parties to know why they have won or lost.

29. The ground which I have found more difficult to determine is ground 1. The EJ was to my mind plainly entitled to distinguish the three periods of on call time during the open season. The contract itself distinguished them. The EJ's finding that the night time period was not time work, though reached before the decision in **Royal Mencap**, was plainly consistent with it.

30. Equally, the EJ's decision that the hours during the evening were time work was plainly consistent with the approach in the **British Nursing Association** case. Given the range of duties which the Claimants had to perform after their shift had ended, as a matter of the ordinary use of English language, the EJ was plainly entitled to find that they were working.

31. The EJ however did not deal expressly with the period from 7am to 8am. The question for him to address was whether during this period the Claimants were at work - applying the ordinary use of the English language and a common sense approach - or whether they were merely available for work. The Claimants' evidence had not concentrated on that period because of course their case was that the whole period of time on-call amounted to time work; a respectable case given the authorities which the Court of Appeal overruled in the **Royal Mencap** decision.

32. The Claimants however certainly made no concession about the hour in the early morning. It was their case that they were required to be not only available for work but actually working during that hour. To my mind reasoning was required to cover this hour once the EJ had decided, as in my view he correctly did, that the night time period was to be treated differently. It was an hour when the caravan site was open. The contract certainly did not envisage that this was an hour when the Claimants were only going to be disturbed during an emergency call-out: the call-out charge ceased to apply at 7am. The Claimants were effectively in charge of a substantial caravan park at a time when one might expect disturbances other than emergency call-outs.

33. Since there is no reasoning in respect of this period, the appeal will be allowed and the matter remitted to the ET for reconsideration. It is not a matter upon which the EAT is entitled to or could make any evaluation of its own; see **Jafri v Lincoln College** [2014] IRLR 920 at paragraph 21.

34. I take a different view about the closed season. The EJ knew that there was one period in the evening when the Second Claimant would do a security patrol. He found as much in paragraph 21 of his Reasons. However, treating the time encompassed in that patrol on its own

as time work would make no difference to the outcome of the case. Ms Del Priore and the First Claimant were in agreement about that point.

35. Therefore, the key question for the EJ was whether the whole call-out period constituted time work. The whole of the call-out period was one where the caravan park was closed. In paragraph 70, in my judgment, the EJ was looking at the period as a whole.

36. The specific duties which the Claimants had to undertake over the period as a whole were entirely consistent with availability for work coupled with an occasional requirement to work. In my judgment the EJ was plainly entitled to conclude that the closed period, when the caravan park was shut, did not constitute time work unless the Claimants were engaged in some actual activity, such as the security patrol.

37. It follows that I see no error of law or insufficiency so far as the closed season point is concerned and it will be the early morning period in the open season that is remitted for the EJ to reconsider.

38. Applying principles set out in **Sinclair Roche and Temperley v Heard** [2004] IRLR 763, I have no doubt that remission should be to the same ET.