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THE EMPLOYMENT TRIBUNAL

BETWEEN

Claimant	**and**	**Respondent**
Mr N Pavlov		**Benjemax Limited**

Held at London South **On 9 January 2019**

BEFORE:Employment Judge Nash

Representation

For the Claimant: **In person**
For the Respondent: **Mr I Pettifer, solicitor**

Judgment having been sent to the parties on 8 March 2019 and written reasons having been requested in accordance with rule 62 (3) of The Employment Tribunals Rules of Procedure 2013 on 18 March 2019, the following reasons are provided:

REASONS

The Hearing

1. The Originating Application was presented on 28 August 2017 and the Response submitted on 9 November 2017. There was a preliminary telephone hearing on 5 July 2018 which set directions and listed a substantive hearing on 19 October 2018. In the event it was not possible to hear the case on 18 October 2018 and it was put off until 9 January 2019.

2. On 9 January 2019, in respect of witnesses only the Claimant gave evidence. The Tribunal had sight of a bundle agreed by the parties.

The Claims

3. The only claim before the Tribunal was under Section 13 Employment Rights Act 1996 for unauthorised deduction from wages.

The Issues

4. The hearing was subject to significant listing difficulties. This hearing had been listed for 3 hours on the basis the Claimant would not attend. In the event the Claimant did attend the hearing which was listed for only 2 hours.

5. Much of the time set aside for the hearing was involved in establishing the issues.

6. Accordingly, the Tribunal and parties agreed that this hearing would only determine the nature of the work performed under the National Minimum Wage Regulations.

7. The Claimant agreed with the Respondent that he was carrying out unmeasured work pursuant to Regulation 44 of the National Minimum Wage Regulations 2015 during the day time, including at weekends.

8. The sole issue for this hearing was whether the work done at night was either timework as contended by the Claimant, or unmeasured work as contended by the Respondent.

The Facts

9. The Claimant worked for the Respondent as a live-in carer for a vulnerable adult with dementia and vision impairment ("the client"). The parties had signed a written contract of employment. The contract stated in terms that it was a zero hours contract, save for a "working hours agreement". There was no "working hours agreement" but there was a Daily Average Agreement. There was no dispute that both parties understood that the Daily Average Agreement was the "working hours agreement" referred to in the contract of employment.

10. This Daily Average Agreement asserted, without any citation, that a body described as the "Inland Revenue National Minimum Wage Commission" had classified the work as unmeasured work.

11. The contract of employment provided that, if a specific working hours agreement was in place between the Respondent and the employee, the following would apply. The employee will work such hours and at such times as are assigned on the attached working hours agreement.

12. Under the Daily Average Agreement – live in care dated 18 July 2016 - a plan of work was attached with an estimate of how long each task would take as follows:

"This will be to 8 hours per day unless otherwise agreed and it is for this time that you will be paid. You will be agreeing to do the tasks set out on the plan for the wages offered. We are confident that the plan given to you is a realistic estimate at this time, however, if the needs of the customer change regularly or significantly, this will be needed to be communicated to your supervisor immediately."

13. The Agreement stated that the assignment commenced on 8 July 2016 for a maximum daily number of hours, 10 hours, and a rate of pay per day.

14. The Agreement stated, "this assignment is on an "stop start" basis, the periods between duties are regarded as rest periods; therefore, care assistants must inform their supervisor of any changes effecting this daily average group, including disturbed sleep. During the first week of your assignment we would ask you to monitor your hours using the form on page 3 and return to the office on completion to ensure the accuracy of this agreement and the support provided to our customer." (There was in fact no page 3.)

15. A further Daily Average Agreement dated 28 September 2016 stated as follows:-

"The worker carries out work which is unmeasured work for the purposes of the National Minimum Wage Regulations 2015. This agreement is a daily average agreement is contemplated by Regulations 49 and 50 of the National Minimum Wage Regulations 2015.

The worker … agrees that the average daily hours approximate to a realistic average daily hours."

16. The Daily Average Agreement was based on a daily plan. This daily plan set out a list of fixed tasks for the Claimant to do every day. The task timetable listed a number of tasks, such as personal care including bathing and showering (with details for instance "may need help redressing if not wearing the correct clothing") and breakfast (including details such as preparing a hot meal or light breakfast). Each task was assigned a time or duration of between 1 hour and 15 minutes. Each relevant task was stated to be a daily task. There were no specific times at which any particular task should be carried out. Each task could be carried out as and when it suited the client and the Claimant.

17. The Daily Average Agreement stated that if the work being done changed this should be communicated to the Respondent. The agreement stated in terms that care assistants (such as the Claimant) must inform their supervisor if the Daily Average Agreement turned out to be incorrect.

18. The tasks including night time assistance and stated that the client, "may get up at night but needs no assistance".

19. The Tribunal also had sight of documents on which the actual time spent on various tasks per day was recorded. For instance, on the week starting 28 July 2016 under

personal care including bathing and showering, it was recorded that a third of an hour was taken every day.

20. The Claimant and Respondent agreed that the working time was in effect divided into day time (7am until 9pm) and night time (from 9pm to 7am).

21. The day time tasks amounted to considerably less than 10 hours. It was the Respondent's case that the Claimant would get up from time to time in the night to service the client. However, taking into account night-time work, the Claimant's working hours amounted to considerably less than 10 hours every day.

22. The Claimant's evidence was that once he started work, in practice he worked more than 10 hours every day because the client required a lot of assistance at night as he regularly woke up and needed attending to. According to the Claimant, he spent in the region of 2 to 3 hours a night on average awake and working. When the Claimant told the Respondent that, because of the unplanned night work he was working more than 10 hours every day, the Respondent either told him that nothing could be done or simply failed to respond.

The Law

23. The law in respect of the nature of work under the National Minimum Wage Regulations 2015 is found in the following regulations:-

> **The meaning of time work**
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> **30.** Time work is work, other than salaried hours work, in respect of which a worker is entitled under their contract to be paid—
>
> (a)by reference to the time worked by the worker;
>
> (b)by reference to a measure of output in a period of time where the worker is required to work for the whole of that period; or
>
> (c)for work that would fall within sub-paragraph (b) but for the worker having an entitlement to be paid by reference to the period of time alone when the output does not exceed a particular level.
>
> **The meaning of unmeasured work**
>
> **44.** Unmeasured work is any other work that is not time work, salaried hours work or output work.

Submissions

24. According to the Respondent, the Claimant accepted that there was a genuine contract signed by him. He accepted that there was a genuine daily average agreement he had signed. He accepted that there were no verbal or other variations. There was no evidence before the Tribunal from the Claimant there was work in respect of which the Claimant was entitled under his contract to be paid for the time

he worked. All the evidence pointed to work which was calculated not by reference to time worked but in accordance with The Daily Average Agreement.

25. The Claimant made very brief submissions saying in effect that he ended up doing extra work at night because of the client's needs. He told the employer of this and he should be paid for his work.

Applying the Law to the Facts

26. The Tribunal considered whether the Claimant's work at night, that is between 9pm and 7am, amounted to time work or unmeasured work under Regulation 30 or 44 of the 2015 Regulations.

27. As the Respondent correctly submitted, the Claimant did not contend that he was carrying out time work under paragraph 30(b) or (c), that is work paid by reference to a measure of output per hour. As the Claimant was unrepresented, the Tribunal briefly considered the case under these sub-paragraphs. Under sub-regulation (b) time work includes where a worker's pay is set according to an output which is produced during set hours. The common example given is a pieceworker in a factory who is required to clock in and out at specified times. Even if the pieceworker is paid at a piece rate, they are engaged in time work because their hours of work are set.

28. On these facts, the Claimant's hours of work were not set, and the Tribunal in effect agreed with the Claimant that he was not be engaged in time work under sub paragraphs (b) or (c).

29. The issue for the Tribunal was, therefore, whether the Claimant was engaged in time work under paragraph 30(a) or unmeasured work.

30. To determine the type of work on which a Claimant is employed, a Tribunal is required to analyse all the circumstances including the nature of the work and the contractual relationship between the employer and employee. Unmeasured work is in effect a residual category for work which does not fall into the other three categories of work. It has not always proved easy for Tribunals to distinguish between time work and unmeasured work in every case. This distinction has given rise to a number of cases.

31. In respect of time work, according to government guidance on 'Calculating the Minimum Wage': 'Generally anybody whose pay goes up or down depending on the number of hours they work is likely to be a time worker.' This would appear to apply to those employed on 'zero hours' contracts. Government guidance derives from the Executive and not the Legislature. It is not legislation and, unlike for instance a Code of Practice under the Equality Act 2010, it is not something which a Tribunal is required to take into account where relevant. Nevertheless, I bear in mind that this guidance has not been specifically challenged in any case law. Accordingly, I find that it is of assistance, although far from determinative.

32. Although the Claimant's contract of employment is described as a "zero hours" contract, in practice it was not. The Claimant's wages did not vary depending on the hours worked. On both the Respondent and the Claimant's case, the Claimant's weekly working hours inevitably varied to some extent. Both parties agreed that some weeks there would be more night work and some weeks there would be less. Nevertheless, the Claimant's wage remained the same.

33. According to the then President of the Employment Appeal Tribunal in *Focus Care Agency v Roberts [2017] IRLR 588,* 'if payment is made by reference to something other than time worked or output in a period of time the whole of which is worked (and subject to reg 30(c)…) then it is not time work'.

34. The Tribunal directed itself in line with the Court of Appeal decision in *Walton v Independent Living Organisation Limited [2003] ICR 688, CA*. The Claimant in that case was paid a fixed daily rate and required to live in for 3 days at a time. Her duties were to take care of a disabled person. It was accepted that in each 24-hour period the Claimant would be required to work for a fixed number of hours on active caring but would otherwise be available when required. Once she had carried out those duties, she was at leisure but required to stay on the premises in case the client needed assistance. This included being present at night. The issue for the Tribunal in *Walton* was whether the Claimant was carrying out time work or unmeasured work.

35. The Employment Tribunal (whose findings were upheld by the Court of Appeal), found that the Claimant was not paid under her contract by reference to the amount of time she worked, but her pay was assessed according to the difficulty and duration of specific tasks she had to perform. Accordingly, she was carrying out unmeasured work. The Court of Appeal held that the correct approach was for a Tribunal to look at all the facts, including the type of work that was involved, and then to ascertain whether the worker was paid by reference to the time for which the worker worked or by reference to something else. This is a question of fact for the Tribunal.

36. Accordingly, even if pay is described as being so much per day, this will not necessarily mean that the worker is engaged in 'time work' if, in reality, they are not being paid solely by reference to the time worked, but by reference to other matters, such as the difficulty of the work.

37. The National Minimum Wage Regulations 1999 gave an example of unmeasured work; if a worker was engaged in work in respect of which there were certain duties which have to be performed but no specified hours or times and the worker is required to work when needed or when work is available, then the worker is engaged in unmeasured work. The current 2015 Regulations do not contain this example.

38. The Tribunal sought to apply this case law to the facts.

39. According to a contract signed by both parties, the Claimant was engaged in unmeasured work. There was a Daily Average Agreement which stated in terms that it complied with Regulation 49 of the National Minimum Wage Regulations 2015. This

Agreement specified in terms the average daily hours of work the Claimant was likely to spend working where he was available to work for the full amount of time contemplated by the contract.

40. The Tribunal noted that there was a reference to an Inland Revenue National Minimum Wage Commission. The Respondent accepted before the Tribunal that it could provide no evidence as to the existence of any such body. Whilst this did not mean that the Tribunal was unable to place any reliance at all upon the written contract and Daily Average Agreement, it necessarily cast some doubt on the Respondent's understanding as to how the national minimum wage operates and on the reliability of the written contract.

41. In the view of the Tribunal, the crux of the case is that the Claimant was provided with a list of tasks with the time attached, but the time allowed for all of these tasks cumulatively added up to considerably less than 10 hours a day. According to the task timetable, the total time amounted to less than 7 hours. Accordingly, the Tribunal accepts the Respondent's evidence that this task timetable was no more than a general estimate. The Tribunal finds that the Claimant was also being paid to be present during that time. It was not disputed that his pay did not vary according to the hours of work he did, even if the parties did dispute the total of those hours.

42. Pursuant to *Focus Care Agency v Roberts*, this Claimant was not paid by reference to time worked or by outputs in a set time; this indicates that he was not engaged in time work. This is supported by the government guidance, although as government guidance is not something a Tribunal is required to take into account, this is far from determinative.

43. I find that this Claimant is in an analogous situation to the Claimant in *Walton*. He was paid a fixed daily rate and required to live in on a 24-hour basis. He was required to carry out a number of hours of active caring but was otherwise required to be available when required. Again, as in *Walton*, this included night work. As the Claimant's daily rate was based on 10 hours work in circumstances in which he worked less than 10 hours, according to the Daily Average Agreement, I cannot find that he was paid by reference to the amount of time he worked.

44. I am bolstered in this finding by the fact that the Claimant accepted that he was engaged in unmeasured work during the day. In contrast to daily tasks, the daily average agreement provided little if any reference to timings of work at night. There was only a reference to night time assistance of 15 minutes. In my view, there are less grounds to conclude that the Claimant was paid by reference the amount of time he worked at night than there are during the day.

45. Accordingly, the Tribunal finds that the Claimant was engaged in unmeasured work as pursuant to Regulation 44 of the 2015 Regulations at night, in the same way as he was during the day.

The Next Hearing

46. It was agreed between the parties and the Tribunal that the issues for the final hearing were (i) whether the Daily Average Agreement was a realistic estimate pursuant to Regulation 49 of the Regulations and (ii) what if any was the national minimum wage owing to the Claimant under Section 13 Employment Rights Act 1996.

47. The parties would provide dates to avoid following the hearing and the Tribunal would list.

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Employment Judge Nash
Date: 23 April 2019