EMPLOYMENT TRIBUNALS

Claimants: Mrs J Frudd
Mr I Frudd

Respondent: The Partington Group Limited

Heard at: Manchester **On:** 10 May 2019

Before: Employment Judge Horne

REPRESENTATION:

Claimants: In person
Respondent: Ms A Del Priore, Counsel

JUDGMENT having been sent to the parties on 20 May 2019 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Procedural background and issue for determination

1. This claim has a long procedural history which can be briefly summarised. The claimants presented claims on 29 June 2015. At their heart was an assertion that they were not paid the National Minimum Wage for time they spent on call. The issue was whether or not the time on call was "time work" for the purposes of minimum wage legislation.
2. The on-call shift, in broad terms, began in the evening, lasted through the night and ended at 8am the following morning. Part of the on-call time therefore included the hour between 7am and 8am ("the morning hour").
3. Following a hearing, an employment judge initially found that it was not time work, but that decision was overturned by the Employment Appeal Tribunal

("EAT"). The case was remitted and heard by me over three days. In a reserved judgment sent to the parties on 2 February 2018, I declared that parts of the on-call period counted as time work and others did not. That judgment was accompanied by written reasons (the "February 2018 Reasons"). Following a reconsideration hearing, I varied the judgment in part. That order was sufficient to enable the parties to agree the terms of a consent judgment which was sent to the parties on 5 September 2018. The consent judgment left it open to the claimants to pursue a second appeal to the EAT, which they did.

4. By order dated 11 February 2019, His Honour Judge Richardson allowed the appeal on a narrow basis and remitted the case back to me to determine a further issue. As Ms Del Priore for the respondent helpfully pointed out, the transcript of the judgment identified more precisely the issue to be determined. Paragraph 31 of the judgment reads (with my emphasis):

> "The EJ … 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**…"

5. Further context for deciding that question was provided in the sentences which followed:

> 31. … 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 7.00am. 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…"

6. On remittal from the EAT, the case was considered by Regional Employment Judge Parkin. The mechanism by which the Regional Judge gave effect to the EAT's judgment was to list the claims for a reconsideration hearing before me. That is the hearing with which I am now concerned.

Relevant law

7. It appears to me that the relevant legal principle is already embodied in the question remitted to me. I remind myself that under the National Minimum Wage Act 1998, section 28(2), tribunals considering complaints of unlawful deduction

from wages are required to presume that a worker was not paid the national minimum wage unless the contrary is proved.

No further oral evidence

8. At the start of the hearing the parties disagreed about the scope of the evidence that I should consider. The respondent's primary case was that I should review the evidence that I had considered at the 3-day hearing and determine, in the light of that evidence, that the claimants had not made out their case that they were employed on time work during the morning hour. The claimants agreed with that approach, although their position, naturally, was that the evidence pointed towards the opposite conclusion. Had that been the full extent of the respondent's argument, the parties would have been in complete agreement as to how I should proceed. The dispute arose when the respondent attempted to advance an alternative case, in the event that I found that the existing evidence supported the claimant's case. In that event, the respondent indicated that it would wish to call witnesses to give oral evidence. Such evidence, would, the respondent submitted, demonstrate that the claimants were not doing time work during that morning hour.

9. After having heard the parties' arguments, I decided to refuse the respondent's request to rely on oral evidence. I gave my reasons orally at the time. Written reasons for that decision will not be provided unless a party makes a request in writing within 14 days of these reasons being sent to the parties.

10. My review of the evidence was therefore confined to the documents, witness statements and answers to questions that had been provided during the three-day hearing.

Facts

<u>Primary facts and inferences</u>

11. It was conceded by the claimants that there was no direct evidence that any particular task had been done during the morning hour. It was, however, their case that there were facts from which I could draw an inference that they were regularly doing work at that time. The respondent submitted that such an inference was not possible.

12. Inferences can only be drawn from facts. It is therefore important for me to set out the facts I took into account in deciding whether or not an inference was appropriate.

<u>Original findings</u>

13. I looked back at my original findings of fact recorded in the February 2018 Reasons. There is no need for me to repeat them here, but I revisit some of them in my conclusions.

<u>Further findings</u>

14. I also considered all the evidence that had been given and made the following further findings:

    14.1. The Park reception opened at 8.00am.

14.2. The task of re-setting the circuit breaker (February 2018 Reasons paragraph 47.1) arose when a caravan's electrical circuits had been overloaded. This would happen when the caravan occupant attempted to use multiple power-hungry devices, such as a toaster, kettle and hairdryer, all at the same time.

14.3. Gas bottles were sold in reception. Whilst there were some instances of Mr Frudd being called out in the evening or even at night to replace a gas bottle, I would be very surprised if that happened during the morning hour. People whose gas had run out between 7.00am and 8.00am would know that they had a maximum of an hour (and probably less) to wait before being able to buy a bottle from reception. I do not think that they would have bothered to disturb the duty Warden or Receptionist when the Park reception was about to open.

14.4. Records were not kept in relation to call-outs except at night, when those call-outs triggered an entitlement to payment. There is therefore nothing to document what if any work the claimants did during the evenings and mornings.

14.5. Some long-term residents used their caravan as their home on working days. There is no evidence about the proportion of caravans that were occupied for this purpose. In my view it is unlikely that the proportion would be high. Such working residents as there were would be likely to be awake and active during the morning hour. They would, however, have been self-reliant and would not need regular assistance (February 2018 Reasons paragraph 10).

14.6. Holidaymakers (whether visitors or owners) would be unlikely to be active before 8.00am. There is a possible exception, which relates to visitors on their final day. They would be required to vacate their caravan by 10.00am. Some of these visitors would be up and about before 8.00am.

14.7. One of Mrs Frudd's tasks was to put welcome packs together for caravan purchasers. This task could have been done at any time and would not require any work to be done between 7.00am and 8.00am when reception was closed.

14.8. At today's hearing Mrs Frudd very fairly conceded that she never had to issue keys to sublet visitors during the morning hour.

14.9. Mrs Frudd did not welcome visitors or show them the facilities during the morning hour.

14.10. I think it highly unlikely that Mrs Frudd ever showed a prospective purchaser round the site before 8.00am. It is just not the time when people would be out caravan-hunting.

14.11. The vast majority of the alarm calls to which the claimants responded were not in the morning hour. I found (February 2018 Reasons, paragraph 16) that by far the most common cause of an alarm call-out was the customer accidentally omitting to de-activate the alarm on arrival at their caravan. I find it highly unlikely that any customer would ever have returned to an alarmed caravan between 7.00am and 8.00am.

14.12. Mrs Frudd sometimes had to check details on the computer in response to police enquiries (February 2018 Reasons, paragraph 48.1). In my view it is unlikely that the police ever visited before 8.00am if the purpose of their visit was to check details. They would have waited for office hours to begin

14.13. Mr Frudd sometimes helped caravan occupants to light their fires. This could have been done at any time.

14.14. Mr Frudd had to challenge a resident who routinely broke the Park speed limit in his vehicle. There was no evidence about the time of day at which this had happened or when or how often Mr Frudd challenged the driver.

14.15. Mr Frudd on occasion had to deal with people who "turned up on the spur of the moment". According to his witness statement, which I accept, these encounters would happen between 6.00pm and 9.00pm.

14.16. From time to time, children on site would engage in disruptive or unruly behaviour and Mr Frudd would intervene. On some occasions they would be kicking a ball against the club wall. In his oral evidence, Mr Frudd adopted the example of children on a "sugar rush". I doubt very much that children would have either been playing ball games or have been on a sugar-induced high before 8.00am.

14.17. Mr Frudd once had to help a resident who had had his keys stolen. This was a call-out at night.

14.18. Mr Frudd had to help a child who was screaming. I do not know what time of day this occurred.

14.19. Whilst on-call, the claimants could not both go shopping at the same time. Their on-call work affected their ability to enjoy evening meals with family and friends. It did not affect their breakfast or their ability to enjoy the morning with overnight guests. Had on-call duties intruded into their lives in this way, I would have expected it to be specifically mentioned in the claimants' witness statements along with the specific examples that they actually did give and which I found at February 2018 Reasons paragraph 44.

<u>Inferences of work during the morning hour</u>

15. I now return to the question of whether I can infer that the claimants did any work during the morning hour and, if so, how much.

16. In order to decide whether or not such an inference was justified, I thought it helpful to divide the relevant facts into categories.

16.1. General indicators towards the claimants doing work during the morning hour;

16.2. General indicators away from working during the morning hour;

16.3. Identifiable tasks done in the morning hour;

16.4. Identifiable tasks done at other times;

16.5. Tasks that could have happened in the morning as well as at other times; and

16.6. Specific examples of the impact on the claimants' leisure time and home life at particular times of the day.

17. I ought to point out that, in my oral reasons, I labelled the categories slightly differently, to include a discussion of the evidence. For the purpose of these written reasons, however, I thought it important to keep a clear distinction between my findings of fact and the evidence I took into account. The re-labelled categories do not change my findings or change the facts that I took into account.

General indicators of work during the morning hour

18. Some of the general points in the claimants' favour have already been summarised by His Honour Judge Richardson. Between 7am and 8am, the Park was open and the claimants were effectively responsible for running it. Disturbances might be expected to occur more frequently in the morning hour than at night.

19. Another factor pointing towards work during the morning hour is the fact that, under the contract, there was no entitlement to payment for call-outs after 7.00am. For contractual purposes, at least, the morning hour was treated in the same way as on-call time in the evening. Having found that the period between 5.00pm and 10.00pm was time work, I would need a logical basis for distinguishing the morning hour from the evening time, when contractually they were treated in the same way.

General indicators away from work during the morning hour

20. A number of general factors diminish the importance of the claimants being responsible for the site during the morning hour:

20.1. This was a quiet site. Caravans were mostly either empty or occupied by their owners who were generally self-reliant.

20.2. Holidaymakers would not usually be active before 8.00am. Even if they were awake but they are unlikely to be doing the sorts of things that would require intervention from a warden or a receptionist.

20.3. The reception was closed until 8.00am.

20.4. The busiest time on call was between 5.00pm and 8.00pm (February 2018 Reasons paragraph 31).

21. Another general factor is the lack of any specific example of any work that was positively identifiable as having been done during the morning hour. I deal with this under the next heading.

Identifiable tasks done in the morning hour

22. The claimants accept that there are no specific examples of any work that they did in the morning hour. They argue, however, that this factor should not be given significant weight, for two reasons:

22.1. I ought to make allowances, as Judge Richardson did, for the fact that the claimants' primary case was that they were employed on time work for

the whole of the on-call period. They may not have realised the importance of breaking the on-call period down into separate time slots and saying what work they did in each one.

22.2. It is also true that there were no records of tasks done whilst on-call except at night, when a call-out payment was triggered. It was easier for the claimants to remember specific examples of things that they did at night, because they had the records to jog their memories. It would therefore be unsafe to assume, merely from the relatively large number of examples of night-time tasks, that nothing was happening at other times.

23. I acknowledge the need for care when drawing conclusions from the lack of examples. But in my view the claimants' arguments are overstated. Dealing with them in turn:

23.1. Whilst the claimants may not have thought that the morning hour would be considered separately, they nevertheless had the whole of the on-call period to choose from when thinking of examples of work that they had done. There is no reason to think that they would have discarded examples from the morning hour (if they had thought of any) on the ground that they were in any way less relevant than examples of work done at other times whilst on call. Indeed, Mr Frudd specifically mentioned the morning check of the Park during the closed season (which, of course, would not count towards time work during the open season).

23.2. The lack of records did not stop the claimants from giving numerous examples of things that had happened in the evening, before call-out payments were available. Nor would it have prevented them from recalling tasks done in the morning if they had happened.

24. Even making allowances for the claimants' arguments, I still think the absence of any specific instances of identifiable work in the morning hour is a telling indicator that very little work was actually going on at that time.

<u>Identifiable tasks done at other times</u>

25. Turning to the specific examples of on-call tasks that we do have, I have looked through them and found that most of them were not done during the morning hour. The examples that can be excluded from the morning hour include:

25.1. All the night-time call-outs;

25.2. Changing gas bottles;

25.3. Greeting "spur of the moment" visitors;

25.4. Mrs Frudd putting welcome packs together;

25.5. Mrs Frudd showing prospective purchasers around the site;

25.6. Mrs Frudd welcoming visitors and showing them the facilities;

25.7. Mrs Frudd welcoming late arrivals;

25.8. Mrs Frudd giving keys to sublet visitors;

25.9. Mrs Frudd responding to police enquiries;

25.10. Mr Frudd's evening check of the Park;

25.11. Mr Frudd dealing with the behaviour of "sugar rush" children and preventing ball games against the club wall;

25.12. The vast majority of the alarm calls to which the claimants responded;

25.13. The traveller incident (February 2018 Reasons, paragraph 31.7)

25.14. The first-aid incident (February 2018 Reasons, paragraph 31.8).

26. Needless to say, just because the claimants were working in the evening and at night, it does not follow that they were not also working in the morning. But where there is a finite list of examples of work that they did during the on-call period as a whole, the more tasks from the list that are identified as only having been done in the daytime, evening or night, the fewer can have added to any workload in the morning hour.

Tasks that could have happened in the morning as well as at other times

27. Some of the specific on-call tasks could have been done during the morning hour as well as at other times. These include:

27.1. Re-setting the circuit breaker. It is conceivable that, of the small population of working residents, some might be wanting to use power-hungry devices such as toasters during the morning hour. If they lived in the caravan to work, I would have thought they would tend to know the limits of the electrical system, and would know how to re-set the circuit breaker if they tripped it. Departing visitors might be less self-reliant, but they would be in a small minority (February 2018 Reasons, paragraph 10). I cannot think that they would have needed their circuit breaker to be re-set except on rare occasions.

27.2. Challenging the speeding driver. It is unclear how many times Mr Frudd had to speak to the speeding driver, but I would be surprised if there was a significant number of occasions before 8.00am. Very few people would have been outside their caravans and put in danger.

27.3. Lighting fires and unblocking drains. Unblocking drains was relatively rare (see February 2018 Reasons paragraph 49). These tasks would only tend to arise in the morning hour for working residents and for visitors on departure day (see above).

27.4. Dealing with a child screaming. This is a one-off occurrence. It might have happened in the morning hour, but there is nothing positively to suggest that it did. Children unfortunately can scream at any time of the day or night.

27.5. Responding to deliberate alarm calls. This could have happened in the morning hour, but was not, as I have found, the reason for the vast majority of alarm calls, which were caused by customers returning to their caravans.

Impact on leisure time

28. The claimants' on-call duties interfered with the claimants' leisure activities, but almost always in the evening. There could conceivably have been some early morning shopping trips foregone, or a missed opportunity to supervise grandchildren before 8.00am, but they had no difficulty in enjoying breakfast or

interference with early morning routines at home. This adds to the picture of the claimants having regular work to do in the evening, but very little to do in the morning hour.

Conclusions

29. Having taken into account all the factors, I cannot infer that the claimants were doing any significant amounts of work during the morning hour. Indeed, I am able to find positively that for the vast majority of the time they were not doing any work and the occasions on which they were called upon to work must have been rare. This is in stark contrast to the evenings, where the claimants were routinely kept busy doing the various tasks I have listed.

30. The very clear difference in workload between the morning hour and the evening does, in my view, provide a logical basis for distinguishing between those two periods, even if the contract treated them in the same way.

31. I now take a step back and ask myself the question specifically remitted to me. During the morning hour, were the claimants working, within the ordinary meaning of that word? I do not think that they were, except on rare occasions when called out to a specific task. In reality, during the morning hour, the claimants were available for work, and on the Park together, but they were not working.

32. I have considered whether or not the time that the claimants actually spent working on tasks would be of significance in determining whether the claimants were paid the National Minimum Wage or not. In my view, the occasions were, in all likelihood, so rare that they would not make any significant difference.

33. In my view, there is no reason to vary the consent judgment sent to the parties on 5 September 2018 and that judgment is affirmed. No further sums are due to the claimants.

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Employment Judge Horne

_____

21 June 2019

REASONS SENT TO THE PARTIES ON

5 July 2019

FOR THE TRIBUNAL OFFICE

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