EMPLOYMENT TRIBUNALS

Claimant:		**Respondent:**
Ms I Opalkova	**v**	**Acquire Care Ltd**

Heard at: Reading **On:18 and 19 July 2019**

Before: Employment Judge Hawksworth
Mrs AE Brown

Appearances
For the Claimant: In person
For the Respondent: Mr A McPhail

RESERVED JUDGMENT

The unanimous judgment of the tribunal is as follows:

1. The respondent concedes that the claimant was paid less than the National Minimum Wage because she was not paid for actual travelling time between assignments. The claimant is awarded £1,304.39 in respect of this complaint.

2. The claimant's complaint for one week's pay for five days training in April 2017 fails and is dismissed.

3. The claimant's complaint that she was not paid increases in pay due under her contract of employment after the completion of 12 weeks probation and after completion of six months employment fails and is dismissed.

4. The claimant's complaint that the respondent unlawfully deducted tax and national insurance payments from insurance, road tax and car repair allowances fails and is dismissed.

5. The claimant's complaint that the respondent refused to permit her the right to daily rest of 11 hours in each 24-hour period succeeds. The claimant is awarded £1,000 in respect of this complaint.

6. The claimant's complaint that the respondent refused to permit her the right to a rest break where her working day was more than 6 hours long succeeds. The claimant is awarded £1,000 in respect of this complaint.

7. In total, the claimant is awarded the sum of £3,304.39.

REASONS

Claim, hearings and evidence

1. By a claim form presented on 20 October 2017 after a period of ACAS early conciliation from 22 August 2017 to 22 September 2017, the claimant brought complaints of unauthorised deduction from wages and breach of the Working Time Regulations 1998.

2. The respondent provides home care services for adults. The claimant was employed as a carer to deliver care to adults in their homes, travelling between assignments throughout the day. In essence, the complaints arise out of the respondent's working practices including pay, car scheme arrangements, travelling time and breaks.

3. There were preliminary hearings for case management on 3 September 2018 and 5 July 2019.

4. The full merits hearing took place on 18 and 19 July 2019 with a further day in chambers on 23 July 2019.

5. At the start of the full merits hearing the judge apologised and explained to the parties that, because of an oversight on the part of the tribunal, only the employment judge and one non-legal member were available to hear the claim. While a complaint of unauthorised deduction from wages can be heard by a judge sitting alone, a complaint of breaches of regulations 10 and 12 of the Working Time Regulations cannot be heard by judge sitting alone.

6. The judge explained that there was no member from the employee panel present, and so the hearing would be re-arranged, unless both parties wished to proceed with the panel of two. Both parties consented to the claim being heard by the panel of two members. A written consent under section 4(1)(b) of the Employment Tribunals Act 1996 was signed by the claimant and by Mr Boers for the respondent.

7. The respondent had prepared a bundle of 501 pages. The claimant had prepared a supplementary bundle of 100 pages. At the start of the hearing the parties also provided an agreed chronology of two pages.

8. At the hearing we heard evidence from the claimant and then from Mr Boers, the managing director and owner of the respondent, both of whom had prepared and exchanged witness statements and supplementary witness statements.

Issues to be determined

9. The issues to be determined were first set out in the case management orders dated 3 September 2018. On 2 November 2018 the claimant made an application to add another complaint to the list of issues and this was granted at the preliminary hearing on 5 July 2019.

10. The claimant confirmed at the start of the full merits hearing that the issue concerning the deduction of insurance, road tax and repair bills from her wages relates to the deduction of income tax and national insurance from these payments, not deduction of the allowances themselves.

11. The issues to be determined following the addition of one issue and clarification of another are therefore as follows:

12. Unauthorised deduction from wages - section 13 Employment Rights Act 1996

    12.1. The claimant claims that she was paid less than the National Minimum Wage because she was not paid for actual travelling time between assignments. She is not claiming for travelling time from home to the first assignment or back home after the last assignment or for any rest period taken during the course of the working day.

13. Unauthorised deduction from wages - section 13 Employment Rights Act 1996

    13.1. The claimant claims one week's pay for five days training in April 2017 at the start of her employment.

14. Unauthorised deduction from wages - section 13 Employment Rights Act 1996

    14.1. The claimant claims that she has not been paid increases in pay due under her contract of employment after the completion of 12 weeks probation and after completion of six months employment.

15. Unauthorised deduction from wages - section 13 Employment Rights Act 1996

    15.1. The claimant claims that the respondent unlawfully deducted tax and national insurance payments from insurance, road tax and repair bills from her wages in respect of her use of a company car.

16. Refusal to permit exercise of the right to daily rest - Regulations 10 and 30 of the Working Time Regulations 1998

    16.1. The claimant claims that the respondent refused to permit her the right to daily rest of 11 hours in each 24-hour period.

17. Refusal to permit exercise of the right to rest breaks - Regulations 12 and 30 of the Working Time Regulations 1998

17.1. The claimant claims that the respondent refused to permit her the right to a rest break on each occasion when her working day was more than 6 hours long.

Claimant's amendment application

18. On the second day of the hearing, during discussions about the travelling time national minimum wage claim, the claimant raised an issue about whether her travelling time should have been paid at her contractual hourly rate (£9.00 per hour when she first started working for the respondent).

19. The judge explained that this had not been included in the claimant's claim form or identified at the case management stage as one of the issues for determination by the tribunal. If the claimant wished the tribunal to consider this issue, she would need permission to amend her claim to include it and, as the hearing had nearly concluded, another hearing day would need to deal with it. The claimant made an amendment application. The respondent objected. We reserved our decision on the amendment application because of lack of time on the day of the hearing.

20. The key authorities on amendment are *Selkent Bus Company Ltd v Moore* [1996] ICR 836 and *Abercrombie v Argo Rangemaster Ltd* [2014] ICR 209.

21. A summary of the relevant tests to apply is also set out in the Employment Tribunals Presidential Guidance. It states that:

> *"In deciding whether to grant an application to amend, the tribunal must carry out a careful balancing exercise of all the relevant factors having regard to the interests of justice and the relative hardship that will be caused to the parties by granting or refusing the amendment."*

22. Relevant factors include the amendment to be made, time limits, and the timing and manner of the application. The tribunal draws a distinction between amendments which seek to add or substitute a new claim arising out of the same facts as the original claim and those that add a new claim entirely unconnected with the original claim.

23. We first considered whether it could be said that this was a claim already included in the original claim. Paragraph 29 of the Particulars of Claim states

> *"In addition I do not agree that I should not be paid my travel time as this can make up a number of hours each day. I'm working these hours so should be paid for them."*

24. However, that paragraph was under a heading "Failure To Pay National Minimum Wage" and a paragraph stating that the respondent was 'failing to pay me national minimum wage for my contracted hours'.

25. The claimant did not suggest in her claim form or Particulars of Claim that she should be paid for travel time at her contractual pay rate. The complaint was squarely put as a failure to pay national minimum wage. This is the basis on which the complaints were summarised in the list of issues prepared at the preliminary hearing and agreed by the claimant.

26. We conclude therefore that the claimant would require permission to amend her claim form to pursue a claim for contractual pay for travel time.

27. Although the statement that the claimant was not paid for travel time is included in the particulars of claim, the claimant seeks in her amendment application to include a claim for pay for travelling time on a different basis to that set out in the original claim form and the identified issues, ie pay at contractual rates, not national minimum wage rates.

28. The amendment sought is for a complaint which is now significantly out of time. It is over 18 months since the claim form was presented and since the claimant's employment terminated.

29. The claimant had legal advice before presenting her ET1 claim form. The issues were summarised in writing following the case management hearing in September 2018. The claimant made an amendment application in November 2018 in respect of a working time complaint. This was heard at a preliminary hearing at which the issues in her claim were discussed again.

30. If, after presenting her claim, the claimant had second thoughts about not including a claim for travel time to be paid at contractual rates, or was unsure whether she had done so, she could have raised this at the preliminary hearing in September 2018, or in her first amendment application, or at the second preliminary hearing, all of which were points at which the complaints in issue were being considered. She could also have sought additional legal advice at any stage.

31. The timing of the application, made during the second and last day of the full merits hearing was very late. It was not possible to decide the amendment application in the time available to the tribunal on that day, and it would certainly not have been possible to deal with the new complaint on that day had the amendment been allowed. The respondent had not prepared to respond to this complaint at the hearing.

32. We need to conduct a balancing exercise, weighing up the prejudice to the claimant of not allowing the amendment against the prejudice to the respondent of allowing it. In our view, there would be prejudice to the respondent. A further day's hearing would be required, and there could be further disclosure and witness evidence. Against that, there is little prejudice to the claimant; she was still able to pursue her complaint in respect of pay for travelling time under the national minimum wage framework. As she pointed out at the hearing, she retains the right to

pursue a claim for contractual pay for those hours in the county court if she wishes, and such a claim would not be out of time.

33. We also took into account the overriding objective and in particular the need to deal with cases in ways which are proportionate to the issues, and to avoid delay.

34. For these reasons, we have concluded that the balance of prejudice falls in favour of the respondent, and the application to amend is refused.

Findings of fact

35. We make the following findings of fact from the evidence we heard and read. The page numbers refer to the main bundle, those starting with an S refer to the supplemental bundle.

36. The respondent provides home care services for adults. Carers attend clients' homes to provide care, then travel between assignments. Assignments are usually around 30 minutes. The care provided is complex, and the clients can be vulnerable.

37. The claimant was made an offer of employment as a carer by the respondent on 10 March 2017.

Induction training, contract and rates of pay

38. The claimant was unable to start working until she had completed a period of induction training. The induction training, which was provided by the respondent, was compulsory and unpaid. The claimant understood that it would be unpaid.

39. The claimant attended the induction training from 10 to 13 April 2017. The claimant was required to take and pass the training in order to be offered employment by the respondent. At the end of the training week the claimant successfully completed an online test and received a Care Certificate.

40. After successfully completing the training, the claimant was given a contract of employment to sign (page 179). The document was dated 14 April 2017 and provided in relation to start date:

> *"Your employment with us starts on 14 April 2017."*

41. The claimant signed the contract of employment on 13 April 2017.

42. The contract provided that the claimant would only be paid for contact time, ie time spent with clients. Under the contract, the respondent was not obliged to provide any hours of work, and the claimant was not obliged to accept any.

43. The respondent uses a local authority system called CM2000 which allows carers to 'log in' and 'log out' at the start of each assignment, using landline phones in the clients' homes. This records the carers' contact time. Times are logged manually by carers and sent to the respondent by email for assignments with clients who do not have land line phones.

44. The claimant said that the CM2000 system and the records generated by CM2000 were not always accurate. For example because of the way in which (where the client had a landline) the carer had to log out by telephone actually in the client's home, there would be a short period of time at the end of every assignment which was not recorded, during which the carer was leaving the house and locking up.

45. In addition, an inaccuracy sometimes arose on the occasions on which contact time was recorded manually by the carer sending an email with times because the client did not have a landline. Although the duration of contact time which was entered onto CM2000 was accurate, the start and finish times were sometimes entered wrongly. This occurs in the claimant's for example on 2 May 2017, where the email on page 62 indicates different times to the manual CM 2000 entries on page 223.

46. The contract provided for the claimant to be paid every 28 days in arrears. The contract provided that the claimant's hourly rate of pay would be £9.00 per hour flat rate and £13.50 on bank holidays. The claimant also received a document headed "pay rates" (page 482). This provided for a higher rate of pay after the 12 week probation period (an increase to a flat rate of £9.10) and another uplift after six months employment (to a flat rate of £9.35).

47. Initially, the claimant did not receive the 12 week uplift. However she did receive an uplift of pay to the £9.35 rate from 11 September 2017 (prior to the date on which she reached six months employment).

48. On 17 November 2017 the respondent calculated the shortfall in the claimant's pay as a result of not receiving the 12 week uplift and paid her a correcting payment. The claimant accepted in her evidence that she had received the additional pay due from both uplifts albeit later than she should have done, and only in respect of actual time worked. She was still not paid at all in respect of travel time even after the uplifts.

Car scheme

49. Carers need a car to be able travel between assignments. The respondent permits carers to use their own vehicle or, for those who do not have a car, the respondent provides one.

50. The claimant was asked to attend the respondent's office on 28 April 2017. This was the day before her first day of work for the respondent. She met Mr Boers, the managing director and owner of the respondent. She was told that she would spend some time shadowing a colleague. She was

given timesheets setting out her assignments for the next few days. She was given a personal number to log into the CM2000 system to record her contact hours.

51. At this meeting, the claimant and Mr Boers also discussed arrangements regarding the car. The claimant did not have her own car. She knew that she would need a car to work for the respondent, so that she could travel between assignments. Until this point the claimant had understood that she would be provided with a company car which would be owned, maintained and paid for by the respondent but which would be available for her to use to travel from home to her first assignment, between assignments and then to return home at the end of the day.

52. The claimant's understanding was reasonable because the contract of employment signed by her referred to 'using a company car'. Mr Boers has accepted that the terminology caused confusion and he has since amended the contracts and scheme wording to 'Employee car ownership scheme' rather than company car scheme.

53. The position regarding the car scheme was clarified to the claimant by Mr Boers at the meeting on 28 April 2017. The claimant was told by Mr Boers that she would be given a loan of £600 to purchase a car from the respondent. The loan was interest free and would be paid back to the respondent at the rate of £20 every four weeks which would be deducted from the claimant's pay.

54. The claimant and Mr Boers signed a car loan agreement document which set this out (page 306). The registration certificate for the car was transferred into the claimant's name. The claimant was also required to set up payments for business insurance and road tax for the car, both of which were in her name.

55. The claimant did not want to buy the car but felt pressured to sign the agreement. After she had signed the agreement the claimant and Mr Boers went to the car park and Mr Boers gave the claimant the car.

56. The respondent reimbursed the claimant for the amounts she paid in road tax and car insurance. These were paid to the claimant as allowances through the payroll and were recorded on her payslips. The claimant's road tax allowance was paid every four weeks from 2 June 2017 (page 454). There was a delay setting up the claimant's insurance allowance; this was not paid until 28 July 2017, and then a back payment for the earlier period was made (page 455).

57. When the claimant's car required repairs in August 2017, the respondent paid for the repairs. The payment was then put through payroll as a payment to the claimant. As the payment had actually been made by the respondent to the garage direct rather than to the claimant, the amount paid was included as a payment on the claimant's payslip ('Car Maintenance') and then as a deduction ('Advance').

58. The respondent deducted tax and national insurance payments from the road tax and insurance allowances paid to the claimant, and from the car maintenance payment.

59. The respondent also had a one page document headed 'Company Car scheme' which explained the car loan, the insurance and road tax allowances and the car maintenance arrangements (page 483). The claimant said that the respondent had manufactured this document specifically for the tribunal proceedings and that she had not been given a copy at the time.

60. We find that it is more likely that the document was in existence at the time the claimant joined the respondent. This is because it has a similar heading to the pay rates document on page 482 which the claimant accepts she received while in employment. Also, the car scheme document is headed 'Company Car Scheme'. Mr Boers has accepted that this terminology caused confusion and he has since amended the contracts and scheme wording to 'Employee car ownership scheme'. If the document had been created specifically for the tribunal proceedings, it could have omitted the reference to 'company car scheme' to put the respondent in a better light.

61. However, we accept the claimant's evidence that she did not receive this document at the time. It is clear that she was confused by the car scheme and the payments she would receive under it, and she may have been clearer if she had received the document at page 483.

62. The claimant made a number of complaints to the respondent about the car scheme during her employment. The respondent made it clear to her that she could leave the scheme and make other arrangements if she wished: for example on 27 July 2017 the claimant was told that she could buy her own car (page 120), and on 30 November 2017 the respondent's HR manager set out a number of options for the claimant including leaving the company car scheme arrangement (page 146). The claimant did not take any of these up.

<u>Contact time and travel time</u>

63. The claimant's first day of work for the respondent was 29 April 2017. She spent that day shadowing a colleague. The following day, 30 April 2017, was the claimant's first day working for the respondent on her own.

64. The claimant was given timesheets by the respondent providing a list of the clients she had to visit. Although she received timesheets covering the first few days at the beginning of her employment, generally the claimant only received her timesheets the day before, usually in the afternoon and often while she was working. It was difficult for her, with short notice and while she was working, to contact the respondent and agree any changes she wished to seek to the timesheet.

65. There were however some occasions on which the claimant asked the respondent to change her assignments, and they did so, for example of 7 October 2017.

66. The itinerary set out on the timesheet also included time between assignments for the claimant to travel between locations. The claimant was not paid for travel time, only for contact time ie time when she was actually with a client.

67. The travel time allowed on the timesheets was usually five minutes. The respondent based its travel times on the distances between assignments (taken from the AA route planner) calculated at a speed of 30 mph.

68. The claimant found that the five-minute travel times were often insufficient to drive from one client's location to the next. This meant that the claimant's days were often longer than set out on the timesheet. She also frequently ran late between two clients, and she found this stressful. It also made it difficult for her to take breaks during the day.

69. The claimant raised her concerns about the five-minute travel time with the respondent on a number of occasions. The respondent explained that the timesheets allocated short travel time so that carers could be given more clients to fit more hours of contact time (for which they would be paid) into the day. The respondent said in an email: "If you want more travel time between clients you will have less work and less pay."

70. The claimant produced a schedule setting out the total amount of actual travel time during the whole period in which she worked for the respondent (page 2017 onwards). The total figure for travelling time during the whole of her employment was calculated by the claimant as 355.94 hours. This does not include travel from home to the first assignment or to home after the last assignment.

71. The respondent, without making any concession on this point, agreed to an award for unauthorised deductions in relation to the failure to pay national minimum wage arising from non-payment of travel time based on the claimant's calculations as to the number of hours of travel time during the whole period of her employment.

72. The respondent prepared a schedule using the claimant's figure of 355.94 hours to calculate the national minimum wage shortfall. It showed that when the claimant's travelling time was included, there was a national minimum wage shortfall of £1,304.39 for the whole period for which the claimant worked for the respondent.

73. This figure was arrived at by:

    73.1. adding up the claimant's contact hours and travel time hours for the period during which she carried out work for the respondent;

73.2. adding up the total pay the claimant received from the respondent during her employment (not including the allowances paid to the claimant in respect of car insurance, road tax and car maintenance);

73.3. dividing pay received by the hours worked to identify the average hourly pay, which was found to be below the national minimum wage rate (this was £7.50 during the time the claimant worked for the respondent); and

73.4. multiplying the shortfall in the average hourly rate paid to the claimant by the number of hours worked.

74. The shortfall calculation prepared by the respondent was not agreed by the claimant but she did not put forward any alternative way of calculating the national minimum wage shortfall or suggest any other figures.

75. We accept that the figure of £1,304.39 put forward by the respondent represents the shortfall required for the respondent to meet its obligations to pay the claimant at national minimum wage rates for the full period of the claimant's employment with the respondent, when travelling time as calculated by the claimant is included in hours worked.

Daily rest in 24 hour periods

76. There were a number of occasions on which the claimant finished work late in the evening, for example at 9.00 or 10.00pm, and then started work early the following day, at say 6.00 or 7.00am. As a result, on some days she had a break of less than 11 hours in a 24-hour period. For example on 30 May 2017 the claimant finished work at 21.21 and she started work the following day at 06.53, an overnight break of nine hours and 32 minutes.

77. The dates on which the claimant had a break of less than 11 hours in a 24 hour period were set out by the claimant in an email dated 19th of October 2018 at page 42 of the bundle and in a schedule at page S22.

78. The claimant's start times and finish times for each working day were shown on CM 2000 (page 223). The respondent produced a summary of start and finish times from CM2000 (the document starts at page 193 of the bundle). The start and finish times from CM2000 and the respondent's schedule show that the claimant's analysis is correct.

79. We find that the claimant had had daily rest of less than 11 hours when she started work in the morning of each of the following dates in 2017: 30 April, 2 May, 4 May, 5 May, 6 May, 8 May, 13 May, 14 May, 15 May, 20 May, 21 May, 22 May, 31 May, 1 June, 2 June, 5 June, 9 June, 10 June, 11 June, 14 June, 18 June, 23 June, 24 June, 25 June, 29 June, 2 July, 8 July, 9 July, 15 July, 16 July, 20 July, 21 July, 22 July, 23 July, 28 July, 1 August, 2 August, 6 August and 13 August (39 occasions).

80. On many of these occasions, the shortfall in the 11 hour daily rest was in the region of 1-2 hours, not merely minutes.

81. On some of these dates the claimant had a break after her first period of work which, when added to her overnight rest period, would have given total rest of more than 11 hours. This occurred on the following dates: 5 May, 6 May, 21 May, 31 May, 2 June, 5 June, 10 June, 11 June, 8 July, 21 July, 28 July and 13 August.

82. Sometimes the break was in the morning, for example on 2 June, when the claimant started work at 07.16 then had a break of 1 hour 33 minutes at 09.37. This occurred on 5 May, 6 May, 2 June, 5 June and 28 July. On the other dates, the break was not until after midday, for example on 31 May when the claimant worked from 06.53 to 14.01 after overnight rest of only 9 hours 32 minutes.

Rest breaks during the day

83. There were a number of occasions on which the claimant worked a shift of longer than six hours without a rest break.

84. The claimant produced a schedule of the occasions when she worked a shift of more than six hours without a rest break. This was at page S23. The evidence of Mr Boers in his supplementary witness statement was that on some of these occasions the claimant had a gap of one hour or more between assignments during which she could have taken a rest break. We accept the respondent's evidence on this.

85. The respondent produced further rest break analysis in a schedule (page 497) which set out other days on which, after travelling time was taken into account, the gap between assignments would have been sufficient for the claimant to take a 20 minute rest break. Again, we accept the respondent's evidence on this.

86. This gap between assignments would have been set out on the claimant's time sheet, so she would have been able to identify in advance when she could take a rest break.

87. When the dates set out in Mr Boers' supplementary statement and the schedule which starts at page 497 are taken into account, there remain a number of days when (as the respondent accepts) the claimant did not have a rest break of at least 20 minutes when she was working more than 6 hours.

88. These are (all in 2017): 24, 27, 30, 31 May, 3, 8, 9, 10, 11 June, 6, 17 July, 25, 31 August, 6, 8 September, 6, 9, 10, 11 October, 6 November (20 occasions). On most of these occasions, the claimant had no rest break at all, not a curtailed break.

89. There were also days on which the claimant had two periods of work of more than six hours each in one period of 24 hours, and had a gap between the two periods of work of more than 20 minutes (after discounting travel time).

90. The claimant raised concerns with the respondent about her working pattern, including the inability to take rest breaks and insufficient daily rest periods, for example on 20 July 2017 (page 115), 8 August 2017 (page 125), 15 August (page 130) and 4 September (page 137).

The law

Unauthorised deduction from wages – Employment Rights Act 1998

91. Under section 13 of the Employment Rights Act 1998 it is unlawful to make deductions from the wages of a worker.

92. Section 14 sets out excepted deductions, to which section 13 does not apply. It includes the following:

> *"Section 13 shall not apply to a deduction from a worker's wages made by an employer in pursuance of a requirement imposed on the employer by a statutory provision to deduct and pay over to a public authority amounts determined by that authority as being due to it from the worker if the deduction is made in accordance with the relevant determination of that authority."*

The National Minimum Wage Regulations 2015

93. The National Minimum Wage Regulations 2015 provide for a national minimum wage which at the time the claimant was working for the respondent was £7.50.

94. Regulation 30 defines time work as including work that is not salaried and is paid for under a worker's contract by reference to the time for which a worker works.

95. For a worker doing time work, the assessment of whether the national minimum wage has been met is carried out by calculating the amount of pay received for national minimum wages purposes, calculating hours worked for national minimum wage purposes and dividing pay by hours to arrive at an average hourly rate of pay. If this is less than the national minimum wage, there has been a breach of the regulations. The worker is entitled to be paid the sum that brings their average pay for total hours worked up to the national minimum wage hourly rate.

96. Regulation 10 provides that benefits in kind do not count towards satisfying the employer's obligation to pay the national minimum wage.

97. Regulation 27 sets out what hours of work are included. They include travelling time for the purpose of working, but not 'commuting time' ie the journey from home to work and the journey from work to home.

98. Regulation 33 deals with training time and provides

> *"The hours a worker spends training, when the worker would otherwise be doing time work, are treated as hours of time work."*

The Working Time Regulations 1998 (WTR)

99. The WTR implement the Working Time Directive (Council Directive 93/104/EC, amended and consolidated as Council Directive 2003/88/EC). It is well established that the WTR should be construed to carry out the obligations of, and not be inconsistent with, the underlying directive.

100. It is also important to bear in mind the purpose of the WTR and of the directive which is, broadly, to provide a satisfactory working environment and health and safety conditions for workers.

101. The relevant provisions of the WTR are as follows:

> *"10(1) An adult worker is entitled to a rest period of not less than 11 consecutive hours in each 24-hour period during which he works for his employer*
>
> *12(1) Where an adult worker's daily working time is more than six hours, he is entitled to a rest break.….*
>
> *(3) Subject to the provisions of any applicable collective agreement or workforce agreement, the rest break provided for in paragraph (1) is an uninterrupted period of not less than 20 minutes, and the worker is entitled to spend it away from his workstation if he has one."*

102. The EAT considered the question of entitlement to rest breaks in *Corps of Commissionaires Mangaement v Hughes* [2009] ICR 345 EAT. Examining the wording of regulation 12, the EAT overturned the tribunal's conclusion that regulation 12(1) provides for one rest break for each and every period of six hours worked and concluded that it was clear that a worker is entitled to one rest break however long in excess of six hours he or she works.

103. Part III of the WTR contains some exemptions from the provisions of Regulation 10 and Regulation 12. Regulation 21(c) disapplies Regulations 10(1) and 12(1) where the worker's activities involve the need for continuity of service or production. Regulation 22 applies to workers engaged in activities involving periods of work split up over the day. An example is given of where this might apply, which is cleaning staff. Where regulation 22 applies, regulation 10 (but not regulation 12) is disapplied.

104. Regulation 24 provides that where a worker is required to work during a period which would otherwise be a rest period or a rest break, the employer shall, wherever possible, allow an equivalent period of compensatory rest.

105. Compensatory rest was considered by the Court of Appeal in *Crawford v Network Rail* [2019] EWCA Civ 26 CA. The Court of Appeal concluded that compensatory rest should have the same value in terms of contribution to well-being as the rest being compensated for. Whether the rest afforded in any given case is equivalent is a matter for the tribunal.

106. Regulation 30 of the WTR deals with remedies. It states:

> *"(1) A worker may present a complaint to an employment tribunal that his*
> *employer-*
>
> *(a) has refused to permit him to exercise any right he has under-*
> *(i) Regulation 10(1) or (2), 11(1), (2) or (3), 12(1) or (4), 13 or 13A…*
>
> *(2) Subject to regulations 30A and 30B, an employment tribunal shall not consider a complaint under this regulation unless it is presented-*
>
> *(a) before the end of the period of three months (or in a case to which regulation 38(2) applies, six months) beginning with the date on which it is alleged that the exercise of the right should have been permitted (or in the case of a rest period or leave extending over more than one day, the date on which it should have been permitted to begin), or, as the case may be, payment should have been made;*
>
> *(b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three or, as the case may be, six months…*
>
> *(3) Where an employment tribunal finds a complaint under paragraph 1(a) well founded, the tribunal –*
>
> *(a) shall make a declaration to that effect; and*
> *(b) may make an award of compensation to be paid by the employer to the worker.*
>
> *(4) The amount of the compensation shall be such as the tribunal considers just and equitable in all the circumstances having regard to -*

(a) the employer's default in refusing to permit the worker to exercise his right; and
(b) any loss sustained by the worker which is attributable to the matters complained of."

Conclusions

107. We have applied the relevant legal principles to our findings of fact and reach the following conclusions.

Travel time

108. We have concluded that the claimant works time work for national minimum wage purposes. Her contract provided for her to be paid by reference to the contact time she worked.

109. The claimant claims that she was paid less than the National Minimum Wage because she was not paid for actual travelling time between assignments. She is not claiming for travelling time from home to the first assignment or back home after the last assignment or for any rest period taken during the course of the working day.

110. The respondent concedes that the claimant was paid less than the National Minimum Wage because she was not paid for actual travelling time between assignments.

111. We have accepted that the figure of £1,304.39 put forward by the respondent represents the shortfall required for the respondent to meet its obligations to pay the claimant at national minimum wage rates for the full period of the claimant's employment with the respondent, when travelling time is included in hours worked. This figure is based on the claimant's calculation of travelling time worked, which the respondent has agreed to use.

112. The claimant is awarded £1,304.39 in respect of this complaint.

Pay for initial training

113. The claimant claims one week's pay for five days training in April 2017 at the start of her employment.

114. Some training time is included in hours worked for national minimum wage purposes. Regulation 33 provides that training time is treated as hours of time work when it is time spent training and when the worker would *otherwise be doing time work*.

115. We have found that the claimant was not employed by the respondent until after she had completed her initial training. The training was compulsory and the claimant could not be employed by the respondent until she had completed it.

116. During the period from 10-13 April 2017 when the claimant was attending the initial training, if she had not been attending that training, she would not have otherwise been doing time work. This is because she did not work for the respondent at that time, and would not have been able to do time work.

117. The time spent by the claimant on the initial training during 10-13 April 2017 does not therefore fall within regulation 33, and for this reason we have concluded that the time spent by the claimant at initial training does not count as time worked for national minimum wage purposes.

118. We have also considered whether the claimant was entitled to be paid for the time at initial training at contractual rates of pay. We have concluded that she was not. The terms of her contract provided that she would only be paid for contact time, ie time with clients. The claimant was aware that her attendance at training would be unpaid.

119. We have concluded therefore that there was no unauthorised deduction from the claimant's wages in respect of the failure to pay her for the initial training period.

Pay increase

120. We have found that, although the claimant did not receive a pay increase after the completion of 12 weeks probation, she did receive a back-payment on 17 November 2017 to correct this. As the claimant received the 12 weeks pay increase, this complaint cannot succeed.

121. The claimant received the pay increase to the rates payable after completion of six months employment. This was paid to the claimant from 11 September 2017 (before she had completed six months employment). As the claimant received the six months pay increase, this complaint cannot succeed.

Tax and national insurance deductions

122. There was an understandable degree of confusion on the part of the claimant about the arrangements the respondent was going to make to provide her with a car. The arrangements were clarified by Mr Boers on 28 April 2017, although the claimant was not happy about the basis on which she was provided with a car by the respondent.

123. The payments that the respondent made to the claimant in respect of car insurance, road tax, and car maintenance were benefits in kind. As such the respondent was required to deduct tax and national insurance from these payments and pay the deductions to HMRC under the statutory PAYE scheme.

124. Accordingly, we conclude that the deductions from the car insurance, road tax, and car maintenance allowances are permissible exceptions which can be deducted from wages under section 14 of the Employment Rights Act.

125. We appreciate that this meant that the claimant was out of pocket in relation to car expenses, because she had to pay tax on them but the deduction of tax and national insurance from these payments by the respondent was not unlawful. On the contrary, the respondent was obliged to make these deductions under the statutory tax scheme.

Right to daily rest

126. We have found that there were 39 occasions when the claimant did not benefit from daily rest of 11 hours in a 24-hour period. On the face of it this amounts to a breach of regulation 10.

127. Counsel for the respondent submitted that the fact that the claimant had control over when she worked, and could refuse shifts, was a relevant factor. As we understood it, the respondent was suggesting that it was up to the claimant to check, when she received her timesheets, that she had been given the right daily rest, and if not to call in and ask the respondent to change her itinerary. The respondent also relied on the fact that the respondent had not actually refused any request by the claimant.

128. We have found that the claimant did raise concerns about daily rest and rest breaks with the respondent. In any event, we do not accept that the onus was on the claimant to rearrange her timesheets or to request proper breaks. In *Grange v Abellio London Ltd* 2017 ICR 287 EAT, the EAT held that an employer's failure to make provision for rest breaks can amount to a 'refusal' to permit them, even in the absence of a specific request by the worker. In the EAT's view, it was clear from the ECJ's decision in *Commission of the European Communities v United Kingdom* that the entitlement to rest breaks under the Working Time Directive was intended to be respected by employers, for the protection of workers' health and safety. It was said that employers have an obligation to afford rest breaks and the entitlement to such breaks will be 'refused' if they put into place working arrangements that fail to allow such breaks. Although there are EAT decisions to the contrary on this point, we prefer the analysis in *Grange* since it seems to us that it better reflects the purpose of the directive as a health and safety measure.

129. We have next considered whether either of the provisions at regulation 21 or 22 of the Working Time Regulations apply here. Both disapply regulation 10, and provide instead for compensatory rest.

130. Regulation 21 relates to continuity of service. It is the continuity of the service provided by the worker which must be continuous, not the continuity of the service provided by the employer (*Gallagher v Alpha Catering Services Ltd* [2004] EWCA Civ 1559). We accept that the

respondent and its clients would prefer to have the same carers visit the same clients as much as possible. However, the respondent's contractual arrangements, whereby carers can decline assignments or chose not to work, do not suggest that the respondent regards continuity of service by the individual worker is needed, rather than just a preference.

131. Regulation 22(1)(c) relates to shift work and workers engaged in activities involving periods of work split up over the day. The example given in the regulation is cleaning staff.

132. We conclude that regulation 22 applies here. The claimant performed assignments which were split up over the day, often into two periods of assignments, those in the morning and those in the afternoon/evening.

133. Where regulation 22 disapplies regulations 10, compensatory rest under regulation 24 must be provided instead. We have therefore considered whether the claimant was given compensatory request as required by regulation 24. We recognise that the nature of compensatory rest is that it is not identical to the rest which it replaces. We consider that in the claimant's case, a short break in the morning after a daily period of rest of less than 11 hours, which brings the overall period of rest to more than 8 hours might be said to be an equivalent period of compensatory rest within the meaning of regulation 24. That occurred on 5 occasions.

134. We do not, however, consider that a break later in the afternoon could be said to be an equivalent period of rest such that it amounts to compensatory rest. We did not consider that this would have the same value in terms of contribution to well-being as a longer break overnight, as the claimant would have to work for a significant period of time before benefiting from a further period of rest.

135. There were therefore some 34 occasions where the claimant did not have a period of daily rest or a period of compensatory rest as required by the regulations.

<u>Right to rest breaks</u>

136. We have found that there were 20 occasions when the claimant did not benefit from a rest break when her working day was more than 6 hours long.

137. We conclude, based on the decision of the EAT in *Corps of Commissionaires Mangaement v Hughes,* that where the claimant had two periods of work of more than six hours each in one period of 24 hours, and the gap between the two periods of work was more than 20 minutes (after discounting travel time), this was sufficient to meet the requirement to provide a rest break and there was no breach of regulation 12 in respect of these days. Regulation 12 does not provide for one rest break for every period of six hours worked in one day.

138. Our conclusion in relation to the issue of whether the onus was on the claimant to request breaks or arrange her timesheets so that she could take rest breaks is as set out above in relation to regulation 10.

139. We have next considered exclusions. The exclusion at regulation 22 does not apply in relation to regulation 12.

140. In relation to regulation 21 (continuity of service), we have reached the same conclusion as in respect of regulation 10, namely that the contractual arrangements with carers do not suggest a need for continuity of service by the individual worker in this case. The possibility of compensatory rest therefore does not apply in the claimant's case in relation to rest breaks under regulation 12.

141. We have concluded therefore that there was a breach of the claimant's right to a rest break on 20 occasions.

Remedy under WTR

142. In respect of the breaches of the WTR, we need to consider what award of compensation it would be just and equitable to make in all the circumstances of this case. We have considered the factors set out in regulation 30(4) and have reached the following conclusions.

143. We first considered the employer's default under regulation 30(4)(a). This requires consideration of the period of time during which the employer was in default, the degree of default, and the "amount" of the default in terms of the number of hours the employee was required to work and was to be given as rest periods (*Miles v Linkage Community Trust* [2008] EAT).

144. In *Corps of Commissionaires Management Ltd v Hughes*, the Employment Appeal Tribunal accepted that compensation for an employer's failure to provide compensatory rest could only be awarded in respect of the period three months prior to the commencement of the claim. This reflects the time limit for bringing the claim. We consider (and counsel for the respondent accepted) that the impact of Acas early conciliation should be included in this assessment.

145. In relation to the regulation 10 complaint, the relevant period is the period from 23 May 2017 (3 months before the date of notification to Acas for early conciliation) to 13 August 2017 (the date of the last breach). Twelve of the dates on which we have found there was a breach fall outside this period, leaving 22 breaches.

146. In relation to the regulation 12 complaint, that period is the period from 23 May 2017 (3 months before the date of notification to Acas for early conciliation) to 20 October 2017 (the date on which the claim was presented). One occasion on which there was a breach falls outside this, leaving 19 breaches.

147. The respondent was in default of its WTR obligations throughout the major part of the claimant's employment.

148. In terms of the degree of default, this was significant in that the claimant was denied both rest breaks and daily rest periods. There were regular and repeated breaches, these were not just 'one offs'. In the period under consideration, there were 22 breaches of regulation 10 in respect of which we have found that compensatory rest was not provided. There were 19 breaches of regulation 12 in the relevant period. The respondent's systems were not set up to ensure daily rest and rest breaks for workers.

149. Further, the claimant had raised concerns with the respondent about the failure to provide rest breaks and daily rest on a number of occasions. The respondent might have considered in response to those concerns whether its working arrangements met the requirements of the WTR.

150. The amount of the default in respect of regulation 10 is not insignificant, being in many cases in the region of 1-2 hours, not merely minutes. The amount of the default in respect of regulation 12 is also significant. On most occasions where there was a breach, the claimant had no rest break at all, not a curtailed break.

151. We have next considered the losses sustained by the claimant in accordance with regulation 30(4)(b). The claimant did not suffer any financial loss. She was paid for all of her hours of work and the proper provision of rest breaks and daily rest would not have made any difference to her financially (and indeed may have made her financially worse off as it may have reduced her paid contact time).

152. As to non-financial loss, in *Santos Gomes v Higher Level Care Ltd*, the EAT concluded that compensation within regulation 30(4)(a) of the WTR could not include injury to feelings. The EAT reached this conclusion after recording that the position adopted by counsel for the Appellant in the case was that 'loss' within regulation 30(4)(b) cannot include injury to feelings:

> *"In my judgment the position adopted by [counsel for the Appellant] that on its domestic law construction 'loss' within regulation 30(4)(b) cannot include injury to feelings, does not justify its inclusion in regulation 30(4)(a)"*

153. The EAT commented in paragraph 70 of the judgment that 'loss' within regulation 30(4)(b) may however include non-financial loss:

> *"If an employer repeatedly refused rest breaks, an employee may become exhausted and ill. In my judgment it may be argued that the loss to which an employment judge may have regard under regulation 30(4)(b) in awarding compensation could include compensation for injury to health caused by the employer's default."*

154. In this case, although the claimant did complain to the respondent about being exhausted, we did not have any medical evidence to suggest the breaches caused ill health.

155. Taking all these factors into account, we conclude that it would be just and equitable to award the claimant compensation in the sum of:

155.1. £1,000 in respect of the breaches of regulation 10; and
155.2. £1,000 in respect of the breaches of regulation 12.

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Employment Judge Hawksworth

Date: 11 August 2019

Judgment and Reasons

Sent to the parties on: .....02.09.19.....

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For the Tribunal Office