



EMPLOYMENT TRIBUNALS

BETWEEN

Claimant

Respondent

AND

Ms S Diamond

Reflections Supported
Accommodation Limited

HEARD AT Exeter ON

4 October 2019

BEFORE Employment Judge Goraj

REPRESENTATION

Claimant – In person

Respondent – Mr J Roddy, para – legal

JUDGMENT having been sent to the parties on 22 October 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

Background

1. By a claim form which was presented to the Tribunals on 24 March 2019 the claimant brought claims for alleged unauthorised deductions from pay and alleged associated unauthorised deductions in respect of holiday pay which claims are disputed by the respondent.

Witnesses

2. The Tribunal received witness statements and heard oral evidence from (a) the claimant and (b) Mrs Tracey Jayne Mitchell, managing director of the respondent.

Documents

3. The parties were unable, notwithstanding the directions of the Tribunal, to agree a joint bundle of documents. In the circumstances, and having regard to the overriding objective, it was agreed that the Tribunal would proceed on the basis of the individual bundles submitted by the parties and that any documents would be referred to by reference to R or C together with the relevant page number. In practice, neither party objected to the contents of the others bundle of documents and only a small number of documents were, in any event, relevant to the matters in issue.

The matters in issue

4. The Tribunal clarified the issues as follows:-

(1) The central issue in dispute between the parties is whether the respondent has made unauthorised deductions from the claimant's pay in respect of (a) monies paid for sleep in/on call duties from 1 August 2018 and (b) depending upon the answer to (a) whether the respondent has also failed to make payment of the claimant's associated holiday entitlement in respect of any underpayment of wages for sleep ins.

(2) The claimant confirmed that she does not pursue any complaint in respect of any wages paid during periods of sleep in/ on call when she was required to work for which she accepts that she was paid in accordance with her agreed hourly rate.

(3) The claimant had previously confirmed in correspondence with the Tribunal, and reconfirmed at the hearing, that she was aware/ appreciated the significance of the Court of Appeal judgment in **Royal Mencap Society v Tomlinson – Blake [2018] EWCA Civ 1641** including (a) that there is an impending appeal to the Supreme Court (which is due to be heard in February 2020) (b) the law as it presently stands does not provide the claimant with any entitlement to payment for periods of sleep in pursuant to the minimum wage legislation and (c) the claimant does seek to rely on such judgment in support of her case / wish the matter to be stayed pending the outcome of the above mentioned appeal.

- (4) The claimant's case is brought on the basis that she had a contractual right, in the light of the terms of the statement of terms and conditions of employment issued on or around 1 August 2018, to receive payment for all hours (including sleep ins which had previously been paid at a flat rate of £40) at an agreed hourly rate of £8.75 per hour.
- (5) The claimant is no longer seeking leave to amend her claim to include any claims in respect of pension payments or the deduction of her student loan.
5. Following the clarification of the issues, the respondent agreed to pay the claimant, without admission of liability, a sum of £96 net (already paid by the respondent but returned by the claimant on the grounds that she did not wish the acceptance of any such monies to be construed as settlement of all of her claims) plus a further sum of £20 in respect of outstanding payments for alleged holiday pay accrued in respect of sleep ins prior to 1 August 2018 which was accepted by the claimant in respect of such elements of her claim and accordingly recorded (by consent) as part of the Judgment.

FINDINGS OF FACT

The respondent

6. The respondent is a private provider of accommodation for young people over the age of 16. Mrs Mitchell is the managing director of the respondent and her sister Ms Manning is employed as the manager.

The claimant

7. The claimant was employed by the respondent as a support worker from 3 April 2018 until the termination of her employment by resignation on 11 December 2018.
8. The respondent interviewed the claimant for employment on 15 January 2018. The respondent's notes of the interview, which are at pages 45-47 of the R bundle, contain a note recording (page R 47) the basic contractual terms including that the claimant would receive an hourly rate of pay of £8.75 and that she would be required to work two sleep in duties per week for which she would receive a sleep in rate of £40 per night. The basic contractual terms were also confirmed in an exchange of emails which are at pages R 41-42.

9. There was a dispute between the parties as to whether the claimant was issued with a written contract at the time of the offer of employment. The claimant has been unable to locate a copy of such alleged contract but relies on a letter from the respondent dated 20 March 2018 (R48) and also on the notes of the meeting on 4 April 2018 in which it is recorded that a signed contract was issued (R 51). The respondent denied that any contract was issued at that time. The Tribunal is satisfied, on the balance of probabilities, having had regard in particular to the contents of the respondent's own documents referred to above, that a contract was issued at that time. The Tribunal is however unable to make any findings regarding the contents of such document in the absence of the provision of a copy by either party.
10. Further, the Tribunal is, in any event, satisfied that the absence of such contract does not make any material difference to the issues in this case as it was agreed between the parties that the claimant took up her employment with the respondent on the basis referred to at paragraph 11 below.
11. The claimant's normal working hours were 39 hours per week plus two sleep ins per week from 11 PM to 7 AM. The claimant was paid £8.75 per hour basic pay in respect of her working hours plus a £40 sleep in payment for the sleep in shifts. If the claimant was required to undertake work during the sleep in shifts she was however entitled to receive her normal rate of pay provided such duties were authorised by the respondent at the time they were undertaken or on the following morning. The claimant accepted that she was only required to undertake duties during sleep ins on a minimal number of occasions and does not make any complaint about payment in respect of any such duties.

The statement of terms and conditions dated August 2018

12. Following the successful completion of the claimant's probationary period the claimant was issued with a statement of terms of employment. A copy of this statement, which was signed by both parties (including by the claimant on 1 August 2018) ("the Statement"), is at pages R 34-37. The Tribunal has given careful consideration to the terms set out at page R34 including that it (a) makes no reference to any payments for sleep ins (b) records the claimant's normal hours of work as 39 hours per week (c) states that the claimant may be required to work additional hours including nights when authorised and as necessitated by the needs of the business and (d) states that the claimant would receive a rate of £8.75 per hour and that any authorised additional hours worked including nights would be paid at the claimant's basic rate of pay.
13. The above mentioned statement of terms and conditions were also issued to other staff at around the same time.

14. Following the issue of the Statement the claimant continued to be paid for sleep ins at the flat rate of £40.

The discussion on 20 September 2018

15. There was a discussion between the claimant and the respondent on 20 September 2018 regarding the claimant's entitlement to receive basic pay for sleep ins in the light of the terms of the Statement. In brief summary, the claimant contended that (a) she raised with the respondent on 20 September 2018 the right to receive an hourly rate for every hour worked (including sleeps in) in the light of the terms of the Statement including as it made no reference to the payment of a flat rate of £40 for sleeps in and (b) that during the discussion Mrs Mitchell conceded that the claimant and other staff were entitled to receive their normal basic rate of pay as the Statement did not make any reference to the sleep in payment of £40 and (c) that Mrs Mitchell further agreed to make payment on such basis, including arrears, pending the issue of revised contracts confirming the position regarding the flat rate payments. The respondent accepted that there was a discussion with the claimant regarding the above but denied that there was any acceptance of the entitlement to be paid as contended by the claimant and/or to make payment of such monies pending the issue of revised contracts.
16. Having weighed the conflicting evidence the Tribunal is satisfied on the balance of probabilities that (a) the claimant raised with the respondent a query regarding whether staff were entitled to receive normal basic rate of pay in respect of any sleep ins as the Statement did not make any reference to the flat rate sleep in payment of £40 (b) the respondent informed the claimant that the existing arrangements remained in place (c) Mrs Mitchell did not, as contended by the claimant, concede that the claimant and others were entitled to receive normal basic rate of pay for any sleep ins and/or agree to make outstanding payments on such basis pending the issue of revised contracts. When reaching the above conclusions the Tribunal has taken into account in particular:- (a) the conflict of evidence between the parties (b) the claimant continued to be paid for any sleep ins in accordance with the existing arrangements as referred to below and (c) there was no reference in any of the documentation before the Tribunal for the period prior to the termination of the claimant's employment or in the claimant's letter of resignation/acceptance by Mrs Mitchell to any entitlement to / any agreement to make payment of any additional payments for sleep ins.
17. The claimant continued to work on the original terms of employment until the termination of her employment and continued to receive payment of a flat rate payment of £40 for sleep in shifts in her September - November salary payments.

THE LAW AND THE CONCLUSIONS OF THE TRIBUNAL

The law

18. The Tribunal has had regard in particular to the following statutory and associated provisions :- (a) sections 1 (particulars of employment) and 13 – 27 (unauthorised deductions from pay) of the Employment Rights Act 1996 (“the Act”) and (b) sections 221 – 224 of the Act (week’s pay) and Regulations 13- 16 of the Working Time Regulations 1998 relating to holiday pay.

The conclusions of the Tribunal

19. The Tribunal has considered first the claimant’s claim for alleged arrears of pay, which is pursued as an unauthorised deduction from pay, for the difference between the £40 flat rate paid for sleep ins and the claimant’s basic hourly salary rate of £8.75 in respect of the twice-weekly sleep ins undertaken by the claimant from 1 August 2018 onwards.

20. Having given the matter careful consideration, the Tribunal is not satisfied that the respondent has made any unauthorised deductions from the claimant’s pay in respect of such monies.

21. When reaching its conclusions, the Tribunal has taken into account in particular, the following matters: –

(1) The Tribunal is satisfied in the light of its findings at paragraph 11 above, that the initial contractual terms which were agreed and accepted by the claimant were that (a) she was entitled to receive £8.75 per hour in respect of her normal working hours of 39 hours per week (b) that she was also required to undertake 2 sleep in shifts per week for which she received a flat rate payment of £40 per shift and (c) if the claimant was however, required to undertake work during the sleep ins she was entitled to receive her normal basic rate of pay for such duties provided that they were duly authorised by the respondent.

(2) The Tribunal is not satisfied that the Statement gave the claimant any contractual entitlement to be paid for sleep ins including as the Statement (a) states that the claimant’s normal hours of work are 39 hours per week for which she will receive £8.75 per hour (b) does not make any reference to sleep ins/does not confer any right to be paid a

basic hourly rate in respect of sleep ins (c) states that any authorised additional hours worked including nights will be paid at the claimant's basic rate of pay but does not confer any such entitlement when work was not undertaken by the claimant and authorised by the respondent.

- (3) There was no evidence before the Tribunal that there were any changes to the claimant's working arrangements/ conditions of employment following the issue of the Statement and the claimant continued to be paid pursuant to such terms (including the £40 flat rate for the hours of sleep in) during September-November 2018.
- (4) The Tribunal is not satisfied, in light of its findings at paragraphs 15-17 above, that the Respondent agreed in September 2018 to make payment of any additional monies for sleep ins or that the arrangement was subject to any further query or complaint by the claimant during her remaining period of employment with the respondent.

22. In all the circumstances, the claimant's claim for unauthorised deductions in respect of alleged arrears of pay for sleep ins from August 2018 is dismissed.

The claimant's associated claim for holiday pay

23. As stated above, the claimant brings an associated claim for unauthorised deductions from pay in respect of the alleged outstanding holiday pay arising in respect of the respondent's failure to make payment of all sleep ins at a basic hourly rate of £8.75 per hour from 1 August 2018.
24. The Tribunal is not however satisfied, having regard to the findings above regarding the claimant's claim for unauthorised deductions in respect of sleep ins, that the claimant is entitled to any further monies in respect of any associated holiday pay. This claim is therefore also dismissed.

Employment Judge Goraj

Dated 3 December 2019

Reasons sent to parties: 10 December 2019

FOR THE TRIBUNAL OFFICE