EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr L Newstead	**v**	(1) Providing Limited (2) Moving Up Care Limited

Heard at: Bury St Edmunds **On:** 13 December 2019

Before: Employment Judge Laidler

Appearances
For the Claimant: In person (Assisted by his mother - Mrs A Newstead).
For the Respondent: Mr C Green, Solicitor Agent.

JUDGMENT

1. The Respondent is ordered to pay to the claimant the total sum of £837.40 in respect of £500 unauthorised deduction in respect of the Ipad and £337.40 unpaid mileage and sleep ins for January.

2. The claimant has not established an entitlement to all other sums claimed which are dismissed.

RESERVED REASONS

1. The claim form in this matter was received on 8 March 2019 in which the claimant brought various monetary claims. The respondent denied all claims in its response received on 4 June 2019. The matter had been issued in the Midlands East Region but was transferred to the South East Region (administrative centre at Watford) in view of the location of the claimant and where the work had been performed.

2. There was a telephone preliminary hearing before the Regional Employment Judge on 1 November 2019 to list the matter for trial.

3. The claimant gave evidence and Ms C Hayes, Recruitment and HR Manager of the first respondent. The Tribunal also had a bundle of

documents running to 165 pages. A few additional documents were provided at this hearing as follows: -

3.1 Computer notes of the claimant, 16 October 2018.

3.2 Other notes of hours worked provided by the claimant.

3.3 Copy of email Michael Rout to staff, 29 September 2018.

4. As a result of those emails the respondent then produced two emails from the claimant dated 15 September 2018 and 24 September 2018 recounting matters that took place on his shifts on those dates.

The Issues

5. The amounts that the claimant was claiming were not quantified in the claim form, but in an updated schedule of loss were categorised as follows (the claimant using gross figures) :-

"Time worked

1 September to 25 September 2018

Wages due £280.50

26 September to 25 October 2018

Differential in wages due £61.50

26 October to 25 November 2018

Total claimed £671.50

26 November to 25 December 2018

Total claimed £229.50

(In relation to the last two periods the claimant is claiming 50% uplift for caring for CO. This is disputed by the respondent who states that this was only payable to the end of October.)

26 December 2018 to 25 January 2019

Total claimed £288.83

26 January to 25 February 2019

Sleep ins and mileage totalling £337.40

Holiday Pay

This is based on the claimant being entitled to payment for the additional hours worked, and he has then recalculated that £236.48 is due in respect of holiday pay.

Unauthorised deduction from wages - £500

This is in respect of the iPad.

The claimant claimed a discretionary uplift for "the aggravating behaviour of my employer" but it was explained to him there seemed no legal basis for that claim.

6. From the evidence heard the Tribunal finds the following facts.

The Facts

7. The claimant was offered work by Providing Limited an agency that provides staff to Moving Up Care Limited who supplies support and training for young adults aged 16-18 who are in the care system. The claimant answered a job advert and was employed as an outreach support worker.

8. The claimant did not sign a contract and the Tribunal cannot be satisfied that it was ever provided to him. There is a document at page 72 of the bundle, but (as will be explained further below) as the claimant was not in receipt of the provided iPad in the first month of his employment and it appears that this document may have been sent to an email address he had to access on the iPad, there is no evidence that it did at that time come to the claimant's attention. It is not signed by either party.

9. This document stated that it is not an employment contract and did not confer employment rights on the claimant other than those to which workers were entitled. It stated there was no obligation on the company to provide the claimant with work and he would work on an as required basis. It provided he would be paid £8.50 which is known from the payslips he was, and he would be entitled to £35 per sleep over. There was a provision under which it said the company was entitled to deduct from the claimant's pay any money that might be owed to the company. The Tribunal does not find that clause of any binding effect as this agreement was never concluded.

10. Holiday pay was expressed as the equivalent of 5.6 weeks during each holiday year including bank holidays calculated on a pro rata basis depending upon the number of hours worked. It was the equivalent to 12.07% of the hours that were worked in each holiday year, with the holiday year running between 1 April and 31 March.

11. Another unsigned agreement that was seen by the Tribunal in the bundle was a document headed 'Liability Agreement'. This was from Moving Up Care Limited and it was to acknowledge receipt of an iPad provided by that entity. It recorded that the claimant was responsible for the iPad's safe keeping and if the device was lost, stolen or damaged then it was his responsibility to replace or repair it. In the event of equipment not being returned at the end of employment, the document stated:

> "You agreed to a deduction of £1,000 against my wages until the iPad is returned. If the iPad is broken beyond repair the same will apply. If the iPad screen is broken a deduction of £150 will apply."

12. Even on the respondent's case, the claimant was never employed by Moving Up Care Limited and the Tribunal is satisfied that this agreement had no effect whatsoever in those circumstances and further it was never entered into between the parties.

13. The Tribunal only heard from Ms Hayes on behalf of the respondent and she was not involved in line managing the claimant. The Tribunal therefore must accept the evidence the claimant gave as to the position regarding work and his hours during the months of his employment.

14. Firstly, the claimant was told to send a daily diary by email to Norfolk on Call every night but he had to use his personal email for this from his phone until he received the iPad. He was shown by Michael Rout how to do this on his iPad, but that was the extent of the claimant's training until December 2018. The claimant was given limited shadow shifts in view of the urgency for him to commence working.

15. The Tribunal further accepts that the claimant was unaware of Providing Limited and believed he was working for Moving Up Care Limited.

16. During the first month the claimant did not receive his payslip and neither did he receive the iPad. He did not receive the iPad till approximately 16 October 2018.

1 – 25 September 2018 – claim 144.5 hours - £280.50

17. It was the claimant's evidence that he had to keep his own record of his hours for the first month of employment. The claimant had not produced this previously, but as stated above produced two emails at this hearing, one headed 'Notes 16 October 2018' and another 'Work times and hours since starting'. That appeared to be from the start of his employment although it is headed 2nd 10.30pm to 8.00am. It appeared that that was however from the commencement of employment. This noted:-

> "2nd – 10.30pm to 8.00am
>
> 3rd – Saturday 12am (midday) to Monday 8.00am
>
> Saturday 12am to Tuesday 12am
>
> Thursday 12am to Saturday 14:00 hours
>
> Monday 8am – Tuesday 12am
>
> Awake 5 extra hour as had to take DG for food once as late payment…
> I have drove 47 miles during my days with YP from my start time to end time."

18. The other email recorded the number 12 next to the 26th but it is not clear what that referred to. There were then hours on 28th of 1300-0500am plus sleep in 29th. There was also the following mileage recorded:

> "Miles to mums and then Mansfield – 8 miles
>
> Miles to Kings Lynn from Hemsby – 72 plus 72 back
>
> 5th – 18 miles
>
> 6th – 68 miles
>
> 7th – 74 miles
>
> 8th – 62 miles
>
> 12th – 22 miles
>
> 13th – 108 miles
>
> 14th – 68 miles
>
> 15th – 92 miles"

19. The above mileage is shown on the respondent's time sheet for October and was included in the total of 1026 miles paid in November and shown on the payslip for 31 November 2018

20. The payslip that was eventually produced for September dated 30 September 2018 showed 111.5 hours paid at £8.50 per hour. For this period the claimant has claimed on his schedule of loss 144.5 hours. The Judge went through his email that he had produced and could not from that document find how he had arrived at 144.5 hours. The claimant was asked in evidence to explain how the claim for this period had been calculated. His evidence was that he had been helped by the Citizens Advice Bureau to prepare this document and had had about 15 different versions of it but was not able to assist as to why the hours did not add up to the 144.5 hours he is now claiming

Payment at time and a half

21. The Tribunal saw an email from Florence Hambrook, senior support worker to all staff on Sunday 7 October 2018 which stated as follows: -

> "We are offering time and a half pay for staff to work with CO in Kings Lynn as of immediate effect.
>
> There are shifts available Monday – Wednesday and over the next couple of weeks.
>
> As many of you know CO is a challenging YP and she is to be staffed 2:1. CO often keeps staff awake at night which is a continuous struggle. If this occurs past 0000-0100am staff are able to leave the property and return home – remaining on call for CO until the next day.

> I know this is an arduous process with CO but you will be fully supported whilst working in the property.
>
> Please let me know immediately if you are available."

22. A very similar email had been sent to all by Michael Rout, team manager on 29 September 2018. That had not been placed in the bundle but was provided by the claimant at this hearing. The wording was very similar save that it said that "there are shifts available IMMEDIATELY and over the next couple of weeks".

23. The Tribunal did not hear from any of the individuals involved in the matter at the time. What Ms Hayes explained however was that the meaning of the email was that it was short term i.e. temporary over the next few weeks from the date of the email and that the enhanced overtime pay finished on 25 October 2018.

24. On 3 December 2018 the claimant wrote to payroll that he was missing his payslips and had received the wrong pay for the hours worked that month. He said he should have received a lot more as he was getting time and a half for every shift for CO as he had not received an email or been notified that this was cancelled.

25. In reply someone from payroll stated that that arrangement had been cancelled from 25 October 2018. The claimant replied that had not been made clear to staff in written form and should still be due and payable to him. Again, he was advised by email that the time and a half pay period ended on 25 October 2018.

26. In the bundle the Tribunal saw an email from Michael Rout dated 3 December 2018 in which he stated:-

> "I have spoken to staff that work with CO when I was told the time and a half had ended by both Simon and Florence. Three staff members had told me they were still going to claim for this month and I informed Florence who confirmed that the pay had ended.
>
> I can assure you that I passed this message on after my holiday finished, October 9th. When I spoke to a staff member earlier today I told them it had ended but they said they had not had it in writing.
>
> Hope this clears my name in this situation as I have not tried to claim it myself.
>
> …"

27. The Tribunal has not heard from Michael Rout. It appears that he is suggesting that he had spoken to staff about the payment at time and a half as they were saying they had not had it in writing. This appeared also to be the claimant's position as his email of 3 December at 16:30 made it clear that they had not been told "in written form".

26 September – 25 October 2019

28. In the claimant's schedule of loss, he claimed 59 hours which he said were to be paid at the premium rate in the period 26 September to 25 October.

29. The claim is put in the schedule of loss as follows:

> Hours worked 256 of which 197 were to be paid at my basic wage of £8.50 per hour - £1674.50 and 59 hours agreed to be paid at premium rate 50% - £752.25
>
> Total to be paid for 9 sleep ins at £35 each - £315.00
>
> 57 miles at £0.28 - £15.96
>
> Total expected pay for the period - £2757.71
>
> Money actually paid - £2696.21
>
> Difference - £61.50

30. What the tribunal saw however from the respondent's timesheets was that the claimant worked and was paid for 286.50 hours and this was shown also on the payslip for 31 October 2018. He was paid for 7 sleeps and the mileage of 57. From the middle of October the claimant accepts he had the iPad and therefore the timesheets should be correct. It is the respondent's position that the claimant was paid correctly in October. The tribunal does not have evidence before it to demonstrate that the claimant was underpaid.

26 October – 25 November 2018

31. For this period the claimant states he worked 204 hours of which 156 hours should have been paid at the premium rate of £12.75. He calculates a shortfall for that period of £671.50. What is actually set out in the schedule of loss is:

> Hours actually worked by me 204 of which 156 should have been at my premium rate of £12.75 including hours with clients CO
>
> 77 hours at premium - £981.75
>
> 48 hours at 8.50 - £408
>
> 17 sleep ins at 35 each - £595
>
> Mileage – 1026 miles at agreed rate of £0.28 - £287.28
>
> Total which should have been paid - £3279.28
>
> Total actually paid - £2607.79

32. The difficulty with the claimant's figures is that there is no evidence before the tribunal to support the hours he claims should have been paid at the time and a half. For November the respondent says that the claimant did not complete the timesheet correctly, putting 1.5 in the box for hours and sleeps and this was corrected to 1 and the claimant notified

26 November – 25 December 2018

33. For the period 26 November to 25 December, the claimant again claims 58 hours to be paid at the premium rate of time and a half. He claims a shortfall for that period of £229.50. He states in the schedule of loss:

209 hours were paid at basic - £8.50 - £1776.50

58 hours were paid at premium rate of 50% - £739.50

14 hours were to be paid at double time - £238.00 [Christmas]

14 sleep ins at £35 each - £490

Mileage – 1077 miles at £0.28 - £301.56

Total expected pay - £3545.56

Total actually received - £3316.06

34. The payslip for December shows that the claimant was paid for 297 hours. 27 hours were deducted by the respondent from the hours the claimant submitted of 324 as it had been explained that time and a half was not applicable. The claimant accepted in evidence that it was categorically confirmed to him 3 December 2018 he was not entitled to claim time and a half.

26 December – 25 January 2019

35. The claimant claimed in his schedule of loss £288.83 calculated as follows:

Hours worked 95 times agreed rate per hour £8.50 - £807.50

Sleep ins 20 at £35 - £700

12 hours at £17 - £204

I was not reimbursed agreed mileage – miles 504.1 at 28 p - £141.15

36. The pay slip for 31 January 2019 shows that the claimant was paid for 115 hours and the 20 sleeps and 504 miles were paid for. No evidence has been heard to support the contention that the sum claimed is due.

26 January 2019 – 25 February 2019

37. The claimant claimed £337.40 comprising 8 sleeps ins and mileage of 205 miles. These are shown on the timesheets for January but do not appear in the payslip for February which only list annual leave. The tribunal accepts this amount to be due and owing.

Claimant's grievance

38. The claimant raised a grievance on 6 December 2018. A meeting was set up in early December 2018 so that Phillip Gallivan, Operations Manager could hear the grievance.

39. On 16 January the claimant chased the outcome up and Mr Gallivan replied that it had taken longer than anticipated but he was investigating. A date was eventually agreed for a meeting on 5 February 2019. By letter of 6 February 2019 Mr Gallivan wrote to the claimant as follows:-

> "As discussed I have concluded that I feel it was adequately noted on more than one occasion that the time and a half was not to continue beyond the end of October pay period.
>
> Given you did not appear to understand or receive this message for whatever reason despite both your personal and company emails used as demonstrated to you on all communications I am willing to pay you an additional 15 hours as a goodwill gesture.
>
> Following on from this I will ensure that management are more specific in their message to staff timescales will be dated rather than use of vernacular terminology.
>
> I trust you are happy with this outcome however please confirm in writing by 1700 hours on Friday February 8, 2019."

40. The claimant did not accept this offer.

Conclusions

1 – 25 September 2018 – claim 144.5 hours - £280.50

41. The burden is on the claimant to explain the basis of his calculations. He produced documents at this hearing not previously disclosed. He was then unable to demonstrate to the tribunal how they supported his claim for

these hours. He has not established that this sum is due, and this aspect of the claim fails and is dismissed.

Time and a half.

42. The Tribunal has not heard from Michael Rout. The claimant has given clear evidence that he did not know that the time and a half had ended. The email that is relied upon is vague. It only says that it was available for next couple of weeks. It was the respondent that allocated shifts. If the time and a half was to have ended it should have made clear to all staff in writing that it was no longer payable. The Tribunal has therefore had to conclude that the claimant continued working very challenging shifts with CO on the basis that he believed he was still being paid at time and a half. However, it is impossible to reconcile the claimants schedule of loss and no evidence has been submitted in support of the hours claimed. The tribunal is therefore not able to award further sums in this respect

43. The tribunal has had to come to the same conclusion in respect of the other periods of claim. The burden rests upon the claimant to establish what he claims, and he has not satisfied that burden. The tribunal cannot be satisfied from the evidence heard as to the hours worked for CO and that further sums are due.

44. It does find that the claimant was not paid £337.40 for mileage and sleep ins from January and that sum must be paid.

45. The respondent had no authority to make a deduction from wages in respect of the iPad. S13 of the Employment Rights Act 1996 is very clear. Any deduction must be authorised by the contract or previously agreed to be the employee in writing. Neither of those occurred on the facts of this case. The employer, Providing Limited had no signed contract of employment with the claimant. The so called iPad Liability Agreement, drafted as being between Moving Up Care Ltd and the claimant was never signed by him. The £500 was an unauthorised deduction and must be paid to the claimant. The iPad was returned to the respondent at this hearing.

46. There are no circumstances on the facts of this case entitling the claimant to a 25% or any uplift and the claim for that is dismissed.

47. The total award to the claimant is £837.40

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Employment Judge Laidler

Date: 31 December 2019…….

Sent to the parties on: .....

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For the Tribunal Office