



EMPLOYMENT TRIBUNALS

Claimant

Mr J Economou

v

Respondent

Mitchell's Motor Repairs Ltd

Heard at: Bury St Edmunds

On: 8 January & 12 March 2020

Before: Employment Judge S Moore

Appearances

For the Claimant: In person.

For the Respondent: Mr D Mitchell

JUDGMENT

The judgment of the Tribunal is that:

- (i) The claim for unlawful deduction of wages pursuant to section 13 of the Employment Rights Act 1996 succeeds in the sum of:
 - a. unpaid overtime of £276.00; and
 - b. an unpaid winching charge of £30.
- (ii) The claim for non-payment of on-call hours pursuant to section 13 of the Employment Rights Act is dismissed.
- (iii) The claim for refusal to permit the Claimant to exercise the right to rest breaks pursuant to regulations 12(1) and 30 of the Working Time Regulations 1998 is dismissed.
- (iv) The claim for refusal to permit the Claimant to exercise the right to daily rest pursuant to regulations 10(1) and 30 of the Working Time Regulations 1998 is dismissed.
- (v) The claim for compensation for untaken annual leave pursuant to regulation 14(2) and 30 of the Working Time Regulations 1998 succeeds in the sum of £399.60.
- (vi) The claim for unpaid pension contributions is dismissed.

The claim therefore succeeds to the total value of £705.60.

REASONS

Introduction

1. This is a claim of unlawful deduction of wages contrary to section 13 of the Employment Rights Act 1996, compensation for untaken annual leave pursuant to regulations 14 and 30 of the Working Time Regulations 1998, compensation under regulation 30 for refusing the Claimant daily rest and rest breaks contrary, contrary, respectively, to regulations 10 and 12 of the Regulations, and compensation for unpaid pension contributions.
2. The hearing was complicated by the fact that the relationship between parties had broken down so badly that they found it difficult to communicate with each other both inside and outside of court. For this reason, there was no agreed bundle and each party produced a great deal of their own documentation. Unfortunately, it was impossible to take a pragmatic or proportionate approach to a factually complex but relatively low value claim because each party accused the other of refusing to respond to emails, while inside the Tribunal they found it difficult to control their emotions and tempers.
3. I also record that I raised the issue of the appropriate regulatory framework. There was agreement that EC Regulation 561/2006, on the harmonisation of certain social legislation relating to road transport, did not apply because the Respondent's vehicles operate within 100km of their base and are thus excluded from that regulation by Article 3(f). Accordingly, the Working Time Regulations 1998 ("the Regulations") applied.

The Facts

4. The Respondent's business is running a vehicle recovery service for vehicles that have been involved in accidents or broken down. The service is provided 24 hrs per day, 365 days per year for a variety of clients, including private vehicle owners, the RAC, the AA, and various insurance companies. To this end the business operates nine 7.5 tonne recovery trucks the drivers of which work on shifts to ensure continuous cover. The Claimant was employed as a vehicle recovery driver between 4 June 2018 and 10 December 2018 and worked shifts that were normally 12 hours long (see further below).
5. The Claimant would wait to receive notification of a recovery job from home or a standby point on the road which notification was provided via his phone or a clip-on on-board satellite navigation system ("the MDT"). The Claimant had to be ready to go to a job from the start of his shift, although on some shifts he might wait for six hours between jobs on other shifts he would go straight from one job to another. If he was out on the road he had to remain with his vehicle whilst waiting for the next job. His general pattern of work was four days on followed by two days off and he submitted timesheets on a weekly basis. Each sheet had a box for each shift (i.e. four boxes) with space to specify each job number undertaken and its start and finish time.

There was also box for "Overtime Jobs" and a box for "Charges and Commissions". Generally, the Claimant put down the time he finished a job at its location, rather than the time he returned home (or to a waiting point) having completed a job, although this seems not to have been his invariable practice.

6. When the Claimant started his employment, in June 2018, he was not given a written employment contract, although he was given a copy of the Respondent's Employee Handbook ("the Handbook"). It is common ground that shifts were normally 12 hours long and the Claimant was entitled to one hour's unpaid break and paid for 10 hours at a rate of £9.00 per hour. The Claimant understood that if he didn't take a full hour's break he would be paid for another ½ hr of work, but that Mr Mitchell insisted that at least ½ hr break must be taken. If the claimant had to work longer than his 12-hour shift he would be paid overtime at the rate of 1 & 1/3 of his normal rate; ("the first contract").
7. As regards the first contract, Mr Mitchell said at the hearing the shift from 3pm until 4am ("the nightshift") was a 13hr shift. Although employees including the claimant were still only paid for 10 hours, from midnight onwards they were allowed to wait at home for notification of their jobs. Mr Mitchell further said that the times and patterns of the shifts, including the 13hr shift were in the Handbook. The relevance of this is that the Claimant says that he never agreed to work a 13hr shift on this basis and that he is entitled to be paid overtime for the occasions he worked between 3am and 4am.
8. The Handbook states, under the heading Hours of Work:

"Your normal hours and working pattern will be specified in your Contract of Employment.
The fulltime contracted hours vary for different posts within the organisation. Rest breaks are unpaid, and a minimum of 30 minutes must be taken if you work more than six hours daily.
Mitchell's Motor Repairs Ltd reserves the right to vary your hours and pattern of working, following consultation and agreement with you."
9. Accordingly, contrary to Mr Mitchell's understanding, the Handbook did not contain the times and patterns of the Claimant's shifts and since this is the basis on which he thought the Claimant had agreed to work the nightshift described, I find that there was no such agreement. It follows that the agreement between the parties in respect of the first contract was that the Claimant would work 12hr shifts, as set out above, and that on the occasions when the Claimant worked the nightshift the 13th hour amounted to overtime pay because it was time worked in excess of his agreed contracted hours.
10. In July 2018 the Claimant told Mr Mitchell that unless his contract was changed, he would resign.

11. On 19 July 2018 he sent an email to Mr Mitchell stating that “I am happy to work at the same £9 ph for the full 12 hour or 13 hour shift, however I will not require any overtime payments at all which means that where it occurs I will work over my shift for free, or payments for skate use etc, those are part of the job in my view anyway and earnings can go to the company..”
12. Mr Mitchell responded the same date stating, “OK, the offer... You work a 13 hr shift rather than a 12, you get paid 12 hrs with an hrs break, if you have a short break or work any extra overtime payments WILL be made. I do not expect any extra for free, if you put in the hours you get paid...”; (“the second contract”).
13. There is an unsigned written contract in the bundle dated 17 July 2018 which appears to be of standard form (“the written contract”). As regards “hours of work”, it simply specifies “as per the rota...” Under “Rates of Pay” it provides “your hourly rate of pay will be £9.00 per hour with 10 hrs minimum pay per shift...Overtime rate of pay will be £12.00 per hour... Other payments will be made to cover “winching” off road charges; this would normally attract a payment of £30. This can ONLY be paid if the recovery club agrees to extra charges.” Mr Mitchell said that this written contract had been sent to the Claimant by post and he had been asked to bring in a signed copy on numerous occasions. The Claimant said he had never been sent the contract and queried why it would have been posted to him. Mr Mitchell said the contract was posted because he didn’t see the Claimant very often. The Claimant accepted that although he took his timesheets into the office all his payslips had been sent to him by post. He also accepted his shift times had been sent to him “by post or email and he couldn’t remember which”. The Claimant said he never asked for a written contract of employment because he had a verbal contract.
14. I find that the written contract was sent to the Claimant but that he never signed or returned it.

Wage Deductions

15. The Claimant gave evidence and was cross-examined in respect of a number of deductions from his pay. Mr Mitchell’s position was that the deductions related, variously, to an Attachment of Earnings Order, the fact that the Claimant had on one occasion claimed for the same shift twice and a charge to the Claimant in respect of lost or damaged equipment. This aspect of the claim took up a considerable amount of time on the first day of the hearing, however at the resumed hearing the Claimant stated that he was no longer pursuing this part of his claim.

Overtime

16. As regards overtime, the Claimant said that he had kept his own overtime records but had misplaced them a long time ago. Further, he did not fill in the overtime box on the time sheets because Mr Mitchell had told him that he paid overtime by reference to the Vehicle Activity Reports (VARs), which

came from the tracking device that was hard-wired into the truck. This timed each occasion the ignition was switched on and off and provided the location details of where the truck was at that time. Mr Mitchell stated that while he checked overtime claims against the VARs, he expected employees to fill in claims for overtime on their time sheets.

17. I do not accept the Claimant did not claim overtime because he believed Mr Mitchell would analyse every VAR himself to see if the Claimant was entitled to overtime. I find that Mr Mitchell told the Claimant, and the Claimant understood, that his overtime claims would be checked against the VARs. This finding is consistent with the fact that the Claimant did in fact regularly claim overtime on his timesheets. While I accept the Claimant may on occasions have forgotten to do so, where the claim is disputed and is not supported by his job record on the timesheet in question, it is difficult to reconstruct the claimant's movements on the day and/or for him to make good his claim now.
18. As regards the calculation of overtime, there was no evidence either party expected overtime to be calculated to the minute. Mr Mitchell stated he had a policy of rounding up or down to the nearest quarter of an hour. By contrast, in his claims for overtime the Claimant has on occasions rounded up to next quarter of an hour in circumstances where the policy would require him to round down. There was never any agreement by Mr Mitchell that overtime would always be rounded up and I find further that Mr Mitchell applied his overtime policy to the Claimant from the start of the first contract and the Claimant did not take issue with it during his employment. Accordingly, I find that Mr Mitchell's overtime policy was the contractual basis on which the Claimant was entitled to be paid overtime.
19. During the hearing the Claimant frequently contested the accuracy of the VARs, particularly where the information was at variance with that obtained from the MDT. Mr Mitchell stated that the VARs came from a device that was hardwired into the truck, whereas the MDT device could be unplugged from the dashboard. In the few circumstances where there is a discrepancy between the VARs and the MDT, I find there is no reason to doubt the reliability of the former.
20. In evidence the Claimant was given the opportunity to go through each and every claim he made for overtime which spanned a period between 7 June and 6 December 2018. My findings in respect of those claims are set out below.

Rest Breaks

21. As regards rest breaks, the Claimant stated that he estimated that he missed a break on about half of his shifts, however once he had analysed all the pages of VARs he found numerous occasions where he had not had a break within 6 hours of his shift starting. The Claimant initially said that at the time he didn't complain about not getting a break then later said that some days he would request a break and not get one. His claim was based

on all the occasions he had not been given a break within 6 hours following the start of this shift and he hadn't analysed whether he had been given a break later in the shift.

22. Mr Mitchell agreed that on occasions the Claimant had been told he couldn't have a break when he asked for one because sometimes he had spent the first part of his shift waiting at home for his first job and had only just got going, and other times the amount and urgency of the work was such that it wasn't possible to give the Claimant a break when he asked. However, the Claimant was always able to take a break at some point even if sometimes it had to be delayed.
23. As regards a shortened daily rest, the Claimant said that sometimes when he did overtime, he didn't get 11 hours rest before the start of his next shift. He said he frequently brought this to the attention of the Respondent and was essentially told that if he didn't like it, he could leave. The Claimant said he specifically had a conversation with Mr Mitchell in which he pointed out that he was not getting a proper rest between shifts. Mr Mitchell denied this was the case and said the Claimant had never said he hadn't had a long enough break before the start of his next shift, and that if the Claimant had complained he would have listened. As regards his shift patterns, the Claimant agreed that he generally did four days on followed by two days off, although, unusually, he once did five days on and one day off.
24. As regards payment for extra services, the Claimant said that sometimes extra services had to be provided like winching a car out of a ditch or jacking it up and putting skates under the wheels, and that he had been told he would be paid £30 for such extra services. Mr Mitchell said that employees were not entitled to be paid extra for the use of skates but were sometimes paid extra if they had to winch a car out of a ditch, namely if the Respondent's contract with the relevant client allowed. The Claimant said he wouldn't have claimed for the use of skates on his timesheets if he hadn't been entitled to the extra payment. Mr Mitchell said the position had been explained to the Claimant when he started his employment.
25. As regards the second contract, it was put to the Claimant that in his email of 19 July 2018 he had agreed to forego any payments for extra services such as skates in any event. The Claimant said that after the email exchange there had been a verbal agreement in which Mr Mitchell had agreed to pay him for such extra services. Mr Mitchell denied this.
26. Although the Claimant may have genuinely misunderstood the position, I am not satisfied that Mr Mitchell ever agreed that the Claimant would always be entitled to an additional payment of £30 for the use of skates or winching. Mr Mitchell was clear in his evidence that there was no extra payment for use of skates and an extra payment for winching was made only when the terms of the agreement with the relevant client allowed for it. Further this is consistent with the terms of the written contract, which although not signed, indicates the Respondent's position in respect of extra charges such as

winching. I am therefore not satisfied that the Claimant was entitled to extra charges for the use of skates under either the first or second contract.

27. As regards extra charges for winching, I note that in his email of 19 July 2018 the Claimant offered to forego "payment for skate use etc", which might also include winching. However, Mr Mitchell did not respond to this part of the Claimant's offer and the Respondent's position in respect of extra charges for winching appears to have remained as set out in the written contract. It follows that the Claimant remained entitled to a payment of £30 in respect of winching under the second contract where that payment was allowed under the relevant client agreement.

Conclusions

Unlawful Deduction of Wages

28. The claims for unpaid overtime and unpaid charges for the use of skates/winching are claims under section 13 of the Employment Rights Act 1996. By reason of section 23 of that act such a claim has to be presented before the end of the period three months beginning with the date of the payment of wages from which the deduction was made. However, where the complaint is brought in respect of a series of deductions, the period of three months does not start to run until the date of the last deduction.
29. No point was taken by the Respondent that the claims might be out of time, however since it goes to the jurisdiction of the Tribunal it is a matter I have had to consider. I note the claims refer to alleged regular incidents of unpaid wages between 7 June and 6 December 2018. Since there is a degree of commonality between the basis for many of them, I find they form part of a series of deductions within the meaning of section 23(3)(a). It follows that since the claim form was submitted, with an Early Conciliation Certificate, on 22 February 2019, the claims have been made in time and I have jurisdiction over them.

Overtime

30. The claims for overtime fall into the following categories:
31. First, claims for overtime now accepted by Mr Mitchell: namely: 25 June 2018 claim for ¼ hr (£3); 6 July 2018 claim for ¼ hr (£3); 14 July 2018 claim for ¼ hr (£3); 19 July 2018 claim for ½ hr (£6); 24 August 2018 claim for ½ hr (£6); 24 September 2018 claim for ¼ hr (£3); 7 October 2018 claim for 1 & ½ hrs (£18); 29 October 2018 claim for 1 hr (£12); 31 October 2018 claim for 1 hr (£12); 11 November 2018 claim for 1 ½ hr (£18). This is a total of £84.00
32. Secondly, when, during the first contract, the Claimant worked between 3am and 4am ("the nightshift claim"). These claims are for one hour's overtime (£12) and relate to shifts started on: 18 June 2018; 19 June 2018; 20 June 2018; 21 June 2018; 30 June 2018; 1 July 2018; 2 July 2018; 3 July 2018;

12 July 2018; 13 July 2018; 14 July 2018; 15 July 2018; 20 July 2018; 21 July 2018. This is a total of £168.00.

33. Thirdly, a number of individually disputed claims which are set out below. In each case the date in question is the date on which the shift in respect of which overtime is claimed, started.
- (i) 9 June 2018: claim for 30 minutes (£6) OT between 23.00-23.30. The VAR shows the truck arriving at the Claimant's home at 23.06 but the ignition not being switched off until 23.26. The Claimant said he needed to check and secure the truck. Further the relevant time sheet gives the finish time of the Claimant's last job as being 23.20. Overall, I accept the claim for £6.
 - (ii) 12 June 2018: claim for 1 hr (£12) OT between 17.00- 18.00. The VAR shows the ignition being switched off at 17.42, however Mr Mitchell pointed out that the VAR also shows that the vehicle wasn't moved between 17.14 and 17.42. The Claimant claimed the VAR system was faulty and he couldn't have driven from Colchester (where the VAR system indicated he was at 16.44) to Springwood Drive, Braintree (where the system indicated he was at 17.14) in 30 minutes. Mr Mitchell did not accept that assertion and there is no evidence to support it. Since the timesheet gives the Claimant's finish time for his last job as 16.25 and the VAR shows the claimant arriving at his destination at 17.14, I find the Claimant is entitled to an overtime payment but only in respect fifteen minutes, namely £3.
 - (iii) 29 June 2018: claim for ¼ hr (£3) OT between 18.00 and 18.16. The VAR shows the ignition switched off at 18.16 however Mr Mitchell said that it also showed that the vehicle had been parked up at the services for 20 minutes immediately beforehand. The Claimant said he couldn't now remember why he had been at the services and he might have been getting fuel. Notably on his time sheet the Claimant claimed overtime for 29 June 2018, but only for two hours up until 18.00, indeed he appears to have initially claimed 2 & ¼ hrs but deleted the ¼. This claim is therefore dismissed.
 - (iv) 8 and 9 July 2018: on each day a claim for ¼ (£3) OT. No evidence was led as to what these claims relate, and they are therefore dismissed.
 - (v) 21 July 2018: (another) 1 & ½ hrs OT (£18) between 04.00 – 05.30. The VAR shows the ignition between switched off at 05.31, however Mr Mitchell said that the VAR indicated the Claimant had spent that time transporting his own car to the truck depot. Notably the Claimant didn't claim overtime on his timesheet and his last recorded job finished at 03.40. Since the timesheet does not support the Claimant's assertion that he was working between 04.00-05.30, this claim is dismissed.

- (vi) 24 July 2018: 1 hr (£12) OT between 21.00-22.00. Mr Mitchell submitted the VAR showed the Claimant arriving home at 19.54 and then going back out at 21.02 after his shift had finished. Further no corresponding job was recorded on the timesheet and in any event the Claimant wouldn't have been issued with a job after the end of his shift. The Claimant said the job in question may have been cancelled before he got there. I am not satisfied there is sufficient evidence that the Claimant was working between 21.00-22.00 and therefore this claim is dismissed.
- (vii) 27 July 2018: 1 & ¾ hrs (£21) OT between 21.00-22.45. Mr Mitchell paid ½ hr OT (21.00-21.30), but 1 & ¼ hrs (£15) remains in dispute because, although the VAR shows the ignition being switched off at 22.35 it also shows Claimant parked at services from 20.53-21.32. Further, the timesheet records the Claimant's last job as having been completed at 21.20 and no claim for overtime was made. I am not satisfied there is sufficient evidence to support the claimant's assertion he was required to work beyond 21.30 and this claim is therefore dismissed.
- (viii) 28 July 2018: claim for ¼ hr OT (£3) between 21.45-22.00. The VAR shows the ignition between switched off at 21.49. According to the overtime policy, the Claimant was not entitled to an overtime payment and this claim is dismissed.
- (ix) 8 August 2018: claim for ¼ hr OT (£3) between 04.00-04.15. The VAR shows the ignition being switched off at 04.21, however Mr Mitchell submitted that it also showed the vehicle being parked up in a lay-by for several hours before being driven back to the depot, so there was no reason for the Claimant to be working late. The Claimant said that if he had left the stand-by point early enough to make his allotted finish time he would have been told off by the controllers. Mr Mitchell said that if that were true then the Claimant would be entitled to overtime in respect of every shift. The Claimant did not claim overtime on his timesheet, and I am not satisfied there is sufficient evidence to show he was required to work between 04.00 -04.15. This claim is therefore dismissed.
- (x) 26 August 2018: claim for 1 ½ hr OT (£18) between 18.00-19.30. The VAR shows the ignition being switched off at 19.25, however Mr Mitchell said that it also shows the vehicle arriving at the yard at 18.02, and the vehicle not moving but the ignition being switched on and off until 19.25. Further the timesheet showed that the Claimant's last job finished at 14.30. The Claimant said he must have been doing something at the yard, such as assisting another driver. Again, I note the Claimant didn't claim overtime on his timesheet and I am not satisfied there is sufficient evidence that he was required to work between 18.00-19.30. This claim is therefore dismissed.

- (xi) 4 October 2018: claim for ½ hr OT (£6) between 22.00-22.30. The VAR shows the Claimant arriving home and switching off the ignition at 20.37 and this is consistent with his time sheet which records his last job finishing at 18.10. The Claimant relies on the MDT going off-line at 22.24 and says he may have had a job after the last one on his timesheet, which was cancelled and therefore unrecorded. Again, I note the Claimant didn't claim overtime on his timesheet and I am not satisfied there is sufficient evidence that he was required to work between 22.00-22.30. This claim is therefore dismissed.
 - (xii) 6 October 2018: claim for ¼ hr OT (£3) between 22.00-22.15. Mr Mitchell said the VAR showed the Claimant arriving home and switching off the ignition at 22.00. The Claimant relies on the MDT going off-line at 22.15. Although the relevant page of the VAR appears to be missing from the bundle, the time sheet is in the bundle and it records the Claimant's last job finishing at 19.00. I also note that the Claimant didn't claim overtime on his time sheet. I am therefore not satisfied there is sufficient evidence the Claimant was required to work between 22.00-22.15. This claim is therefore dismissed.
 - (xiii) 18 October 2018: claim for 1 hr OT (£12) between 04.00-05.00. The last page of the VAR is missing but the penultimate page shows the Claimant at location CB21 5DA at 03.24, about 40 minutes from the Claimant's home. The MDT report went off-line at 04.25 and the Claimant has written beside it, "missing details, finished at 05.00". The Claimant did not claim overtime on his timesheet and I am not satisfied there is sufficient evidence that the Claimant was required to work between 04.00-05.00. This claim is therefore dismissed.
 - (xiv) 27 November 2018: claim for ¾ hr OT (£9) between 18.00-18.45. There is no VAR in the bundle for this day, but the MDT is recorded as going off-line at 18.46. The timesheet records the Claimant's last job as finishing at 16.40 and the Claimant said that his journey home took him 2 hrs. Since there is no VAR report to contradict the MDT, I accept the claim of £9.
 - (xv) 29 November 2018: claim for ½ hr OT (£6) between 18.00-18.30. Again, there is no VAR in the bundle, and the MDT is recorded as going off-line at 18.25. Further the time sheet records the Claimant's last job as finishing at 18.00. I therefore accept the overtime claim of £6.
34. In the light of all the above, the claim for unpaid overtime succeeds to the extent of £276.00.

Claim for use of skates and winching

35. The Claimant has claimed for use of skates on 13 occasions and for winching on one occasion (11 November 2018). As stated above, I am not satisfied the Claimant was entitled to extra charges for the use of skates under either the first or second contract.
36. As regards the winching claim, the Claimant should have been paid £30 if that payment was allowed under the relevant client agreement. Since the Claimant made a claim for winching on his timesheet and at the hearing Mr Mitchell did not say that the payment not allowed under the relevant client agreement, I accept the claim of £30 for winching.
37. It follows that the Claimant's claim for unpaid charges in relation to the use of skates and winching succeeds to the extent of £30.

Claim for on-call hours

38. The Claimant submitted that he ought to have been paid for his on-call hours. While he was at home or at a roadside point waiting to be notified of his next job he was effectively working since he had to be ready to dispatch within 10 minutes of receiving notification of a job. I accept the assertion that whilst the Claimant was waiting to be notified of his next job he was "working". However, it does not follow from this that he was entitled to be paid more under his contract, and can make a claim for unlawful deduction of wages, unless the amount he was paid for the hours he worked fell below the National Living Wage (NLW).
39. Under the first contract each shift was 12 hrs, comprising 11hrs work and 1 hr of unpaid break for which the claimant was paid £90 (10 x £9/hr). This amounts to an hourly rate of £8.18. This is above the NLW at the relevant time, which from April 2018 was £7.83 for those aged over 25 yrs. Further on the occasions that the Claimant only had 30 minutes break he was paid another £4.50, so that his wages would still have been above the NLW.
40. Under the second contract each shift was 13 hrs, comprising 12hrs work and 1 hr of unpaid break for which the Claimant was paid £108 (12 x £9/hr). This is an hourly rate of £9.00, which again is above the relevant NLW.
41. From the above it follows that this aspect of the claim is dismissed.

Rest Breaks

42. Under regulation 12(1) of the WTR, where a worker's daily working time is more than 6 hrs he is entitled to an uninterrupted period of not less than 20 minutes rest.

43. However, regulation 21(c) provides that, subject to regulation 24, “where the worker’s activities involve the need for continuity of service or production”, regulation 12(1) does not apply. Regulation 21(c) sets out a number of examples of activities that involve the need for “continuity of service or production” and those examples do not include recovery drivers. However that list is not exhaustive.
44. I find that the activities of recovery drivers such as the Claimant are activities that involve the need for continuity of service. The activities of recovering vehicles that have either broken down or been involved in an accident is frequently urgent and important work, necessary to ensure the free flow of the highways as well as the safety of the occupants of the vehicle in question. Further, since the timing and volume of the work, in particular it’s ebb and flow within any particular period, is not within the Respondent’s control, the Respondent could not have ensured that the Claimant (or his fellow workers) had a break within 6 hrs of starting his shift simply through better organisation of their working time.
45. Accordingly, since I find that regulation 21(c) applies the next question is whether regulation 24 is satisfied. Regulation 24 provides that where the application of regulation 21 (or 22) is excluded, and a worker is required by his employer to work during a period which would otherwise be a rest break, “(a) his employer shall where-ever possible allow him to take an equivalent period compensatory rest, and (b) in exceptional cases in which it is not possible, for objective reasons, to grant such a period of rest, his employer shall afford him such protection as may be appropriate in order to safeguard the worker’s health and safety.”
46. Mr Mitchell’s evidence, which I accept, was that the Claimant’s breaks were not declined, just on occasion delayed. Furthermore, specific provision for rest breaks was incorporated into both contracts and the Claimant himself stated that Mr Mitchell had emphasized the importance of taking breaks. In addition, the Claimant did not submit evidence to support an argument (and indeed did not appear to make an argument) that he was denied rest breaks altogether, only that on occasions he did not take a rest break within 6hrs of starting his shift. It follows that I find that where the Claimant was refused a rest break within 6 hrs of starting his shift, the Respondent did, where-ever possible, allow him to take an equivalent period of compensatory rest and that regulation 24(a) is satisfied.
47. It follows that the Claimant’s claim for refusal to permit him to exercise his right under regulation 12(1) to rest breaks is dismissed.

Daily Rest

48. Under regulation 10(1) a worker is entitled to a rest period of no less than eleven consecutive hours in each twenty-four hour period during which he works for his employer. However, regulation 21(c) provides that, subject to regulation 24, “where the worker’s activities involve the need for continuity of service or production”, regulation 10(1) does not apply.

49. Since I have found above that regulation 21(c) applies, the next question is whether regulation 24 is satisfied. As stated above, regulation 24 provides that where the application of regulation 21 (or 22) is excluded, and a worker is required by his employer to work during a period which would otherwise be a rest break, "(a) his employer shall where-ever possible allow him to take an equivalent period compensatory rest, and (b) in exceptional cases in which it is not possible, for objective reasons, to grant such a period of rest, his employer shall afford him such protection as may be appropriate in order to safeguard the worker's health and safety."
50. The Claimant has specified 17 occasions when he did not receive 11 hrs rest between finishing one shift and starting another, amounting to 22.25 hrs of lost rest in total during the course of his employment. The reason for the lack of daily rest is the fact the Claimant was sometimes required to work overtime on one shift which meant there was less than 11 hrs between the end of one shift and the start of his next shift. Further, in the course of that second shift the Claimant was not given any compensatory rest for his missed daily rest. However, apart from one occasion, the shift pattern was always four shifts "on" followed by two consecutive rest days, i.e. a period of 48 hours during which the Claimant did not work at all. He therefore had time off that was sufficient to compensate for any missed daily rest during his working days, as well as satisfy the requirements of regulation 11 in relation to weekly rest periods. Further, although the Claimant was not paid for his two rest days, the Regulations make a distinction between annual leave, which must be paid at the worker's normal rate, and rest periods, which need not be. The purpose of the Regulations is to ensure that workers do not work for excessive periods without a rest, and a shift pattern of four shifts followed by two rest days ensured this did not happen. I therefore find that the Respondent allowed the Claimant an equivalent period of compensatory rest within the meaning of regulation 24(a).
51. Further, if I am wrong and the Claimant's two rest days were not sufficiently proximate to his missed daily rest to constitute compensatory rest, then I find that by having a shift pattern that allowed the Claimant two days off after every four shifts the Respondent granted the Claimant appropriate protection to safeguard his health and safety within the meaning of regulation 24(b). In this respect, the reason the Claimant, on occasions, did not get his full 11 hours daily rest between shifts and could not then take an equivalent period of compensatory rest during his next shift, was the urgent and unpredictable nature of his work.
52. It follows that the Claimant's claim for refusal to permit him to exercise his right under regulation 10(1) to daily rest is dismissed.

Compensation for untaken annual leave

53. The parties agreed that the Claimant's employment generated an entitlement of 13.7 days annual leave. It was established that in October 2018 the Claimant took and was paid for 4 days holiday. Further in his final payslip dated 31 January 2019 the Claimant was paid a further 6 days

holiday. Mr Mitchell therefore accepted that since the Claimant had only been paid 10 days holiday, he was entitled to be paid for another 3.7 days, namely £399.60.

54. On being taken through the evidence, the Claimant accepted the above but then queried certain deductions that had been made in his final pay slip and his penultimate pay slip dated 31 December 2018. However these deductions were not related to the Claimant's holiday pay and had not formed part of the Claimant's claim for deduction of wages (which, apart from the overtime claim, his claim for the use of skates/winching, and his claim for on-call hours he had abandoned by the resumed hearing in any event).
55. I therefore find that the Claimant claim for compensation for untaken annual leave succeeds in the sum of £399.60.

Unpaid pension contributions

56. The Claimant seeks to claim pension contributions from the Respondent in respect of his first three months of his employment. However, the Employment Tribunal has no jurisdiction to deal with such a claim under either the Pensions Act 2008 or the Employment Rights Act 1996. In this latter respect section 27(2)(c) excludes from the definition of wages "any payment by way of a pension, allowance or gratuity in connection with the worker's retirement."

Conclusions

57. In the light of the above:
 - (i) The claim for unlawful deduction of wages pursuant to section 13 of the Employment Rights Act 1996 succeeds in the sum of:
 - a. unpaid overtime of £276.00; and
 - b. an unpaid winching charge of £30.
 - (ii) The claim for non-payment of on-call hours pursuant to section 13 of the Employment Rights Act is dismissed.
 - (iii) The claim for refusal to permit the Claimant to exercise the right to rest breaks pursuant to regulations 12(1) and 30 of the Working Time Regulations 1998 is dismissed.
 - (iv) The claim for refusal to permit the Claimant to exercise the right to daily rest pursuant to regulations 10(1) and 30 of the Working Time Regulations 1998 is dismissed.

(v) The claim for compensation for untaken annual leave pursuant to regulation 14(2) and 30 of the Working Time Regulations 1998 succeeds in the sum of £399.60.

(vi) The claim for unpaid pension contributions is dismissed.

The claim therefore succeeds to the total value of £705.60

Employment Judge S Moore

Date: 07 April 2020

Sent to the parties on: ...10 July 2020....

...S Bloodworth.....
For the Tribunal Office