



EMPLOYMENT TRIBUNALS

Claimant: Ms K Wadmore

Respondent: Expertise Homecare (Central & West Kent) Ltd

Heard at London South Employment Tribunal by CVP

On: 9 December 2020

Before: EJ L Burge

Representation

Claimant: In person

Respondent: Ms N Webber, Counsel

RESERVED JUDGMENT

The judgment of the Tribunal is that:

1. The Respondent has not made an unlawful deduction from the Claimant's wages in respect of the Claimant's on-call work, attendance at a recruitment event and overtime pay;
2. The Respondent has made an unlawful deduction for annual leave from the Claimant's wages and is ordered to pay the Claimant the gross sum of £107.92, in respect of the amount unlawfully deducted; and
3. The Respondent was not in breach of contract by failing to pay the Claimant for her period of notice.

REASONS

Claims and Issues

4. At the start of the hearing the Claimant confirmed that her claims were for arrears of pay (on-call pay, overtime, and attendance at a recruitment event), unlawful deductions from wages and notice pay:
 - a. On-call pay - the Claimant said that she was paid “£128 for 64 hours constant work” and claimed payment of £129.31 per day for each weekend worked in the period November 2018 - August 2019. She said that the rate of pay was therefore lower than the National Minimum Wage.
 - b. Overtime – the Claimant said she worked an additional three hours every Friday from 9 November 2018 - 30 August 2019 and claimed 60 hours pay for this at a total of £492.
 - c. Recruitment event – the Claimant said that she attended the event in July 2019 and that she should have been paid for this in her final payment of wages.
 - d. Unlawful deduction from wages - the Claimant said that the Respondent had made an unlawful deduction from her final payment in that they had “deducted back” paid compassionate leave.
 - e. Notice pay - the Claimant said that she should have been paid notice pay.

Procedure, documents and evidence heard

5. There were two bundles of documents containing 175 pages and 182 pages respectively. Only the 175 page bundle was used at the hearing, with the exception of one document at pages 12 – 13 in the second bundle. The Tribunal did not read the second bundle. The Claimant’s Further and Better Particulars at pages 24 – 27 were treated as her evidence in chief and Natasha Gleadle gave evidence on her behalf. Natalie Richards, Managing Director, and Claudia Pooke, Customer Liaison Supervisor, gave evidence for the Respondent. Ms Webber gave oral closing submissions on behalf of the Respondent and the Claimant gave closing submissions on her own behalf.

Fact Findings

6. The Respondent is a home care agency provider which provides domiciliary care services for people with learning disabilities, mental health conditions and the elderly.
7. The Claimant was first employed by the Respondent on 7 September 2015 until 2 November 2016 as a Carer. She then recommenced her employment with the Respondent on 11 September 2017 as a Carer. She was promoted to Supervisor on 22 May 2018. The Claimant was then promoted to Line Manager on 1 September 2019 and was in the process of becoming Registered Manager, and

worked in this role until 9 September 2019, when she requested to step back down to a Carer role.

8. Relevant terms in the Claimant's contract (pages 33 – 38) are as follows:

Hours

6. Your normal hours of work are 37.5 per week to be worked as follows:

9am to 5pm for 5 days per week including 30 mins break

The company operates 365 days per year, and so normal working hours will include evenings, weekends and bank holidays.

You may be required to work additional hours as necessitated by the needs of the business.

You will also be required to work under the "out of hours, on call" rota – further details of which will be provided to you separately. This is a contractual requirement.

By accepting this contract of employment, you agree that your working time, including overtime, may exceed an average of 48 hours for each seven days in any period of 17 weeks. You may at any time give us three months' notice in writing to bring this clause to an end.

Holiday

7. Your holiday entitlement is 20 days per annum, plus the 8 normal bank / public holidays (pro rata).

Our holiday year runs from 1st April – 31st March. Our rules for booking holiday are in the Employee Handbook. You will only be permitted to take holiday where you have asked for and received prior authorization according to our rules. We may require you to take holiday on specific days which we shall notify to you in advance. If your employment ends during the holiday year, we will calculate your holiday entitlement up to that date. If you have taken more holiday than your entitlement, we will make a deduction from your final payment. If you have taken fewer holidays than your entitlement we will pay you in respect of the untaken holiday.

...

11. You may bring your employment to an end by giving us written notice as follows:

<i>Length of service</i>	<i>Notice</i>
<i>During your probationary Period</i>	<i>Four weeks</i>
<i>Thereafter</i>	<i>Three months</i>

...

If you terminate your employment without giving or working the required period of notice, as indicated in this contract of employment, you will have an amount equal to any additional cost of covering your duties during your notice period not worked deducted from any termination pay due to you.

...

Deductions

16. We may deduct from any payment we make to you and in particular from your final salary payment any sums which you owe to us. This includes, without limitation:

*- the amount of any overpayment of salary, bonus or other benefits;
... - the amount of any overpayment of holiday pay;
... - any sums you owe to us in respect of training courses, fees etc.*

9. Ms Richards managed the Claimant from September 2017 until her resignation on 15 September 2019 with the exception of the period from December 2018 to April 2019 when Shweta Dowlot Maulayah (Operations Manager) acted as the Claimant's Line Manager whilst Ms Richards was on maternity leave.
10. Over the course of the Claimant's employment, and in accordance with clause 6 of her contract of employment (as set out above), she was additionally required to work the "out of hours, on call" rota.
11. Working on-call involved being responsible for the on-call phone out of hours either during the week from 5pm to 9am the next day or at the weekend from 5pm Friday to 9am Monday. The person with the on-call phone needed to be reachable to resolve any issues with service users or employees. In her witness statement Ms Richards said that employees and service users were told it was for emergencies only, for example, if an employee called in sick and their work needed covering, or if a service user had a fall and required hospital admission. She said that there was no requirement to stay at home whilst on-call, the employee who was holding the on-call phone need only be reachable. The Claimant was paid £128 flat rate for a weekend on-call, and was paid a further amount if she had to attend work.
12. The evidence between the Claimant and Respondent was starkly different in relation to how much work was undertaken during the weekend on-call shifts and how much of a disruption it was on weekend activities. The Claimant and Ms Gleadle said that the work was non-stop, the Claimant saying that that on-call weekends were "64 hours of constant work". The Claimant and Ms Gleadle said that being on call meant you could be contacted at any time during the day or night and there was no way you could, for example, go out to a supermarket. Conversely, Ms Richards said it was fine to go about normal weekend activities and when she was on-call tended to receive only a few calls.
13. When asked by the Claimant in cross examination about the Respondent's business advertising a 24 hour service, Ms Richards said she did not know where that was stated. She further said that she would put the phone on quiet during the night and that she would check it when she woke in the morning. She said that clients were advised to phone emergency services if there was an emergency at night and that carers calling at night would not be tolerated. The Tribunal does not find it credible that as Managing Director Ms Richards did not know that the Respondent advertised a 24 hour service. It was surprising that Ms Richards thought that it was appropriate to put the phone on quiet when service users were not told that the Respondent would be uncontactable overnight. The Tribunal finds as a fact that Ms Richards did not tell the Claimant or Ms Gleadle that they did not have to be contactable overnight.

14. The account provided by the two parties was so different that it was difficult to ascertain where the truth lay. Looking at the documentary evidence, the mobile telephone records showed that when on-call the Claimant would make many calls and send many text messages throughout the day, on the whole starting at around 06.00 and ending at around 22.00 (although on 17 March records go to 23.26). There would often, however, be lengthy gaps throughout the day at different points. There would be a handover meeting every Monday morning in order to catch up with relevant staff members on what had happened over the weekend. Brief notes were made and then everything was communicated to the office staff at a subsequent handover meeting, so anything that needed actioning could be carried out.

15. The following shows the (agreed) total length of outgoing calls made during the Claimant's on-call time (with the numbers of calls logged in the Claimant's notes in brackets):
 - a. 31 December 2018 (the Claimant was only on call from 15:17 onwards this day): 10.35 minutes (8 calls)
 - b. 1 January 2019: 42.3 minutes (16 calls)
 - c. 2nd January 2019: 60.35 minutes (3 calls)
 - d. 18 January 2019: 34.27 minutes (no calls logged)
 - e. 19 January 2019: 67.72 minutes (18 calls)
 - f. 20 January 2019: 30.36 minutes (16 calls)
 - g. 21 January 2019 (only call times before 9am are included as this was a normal working day): 7.33 minutes (2 calls)
 - h. 15 March 2019: 28.81 minutes (18 calls)
 - i. 16 March 2019: 62.99 minutes (18 calls)
 - j. 17 March 2019: 51.44 minutes (1 call logged)
 - k. 18 March 2019: 52.41 minutes (1 call logged)
 - l. 31 May 2019: 20.43 minutes (3 calls)
 - m. 1 June 2019: 19.96 minutes (5 calls)
 - n. 2 June 2019: 12.08 minutes (7 calls)
 - o. 3 June 2019: 60.6 minutes (1 call logged)
 - p. 14 June 2019: 45.8 minutes (no calls logged)
 - q. 15 June 2019: 47 minutes (9 calls)
 - r. 16 June 2019: 58.25 minutes (11 calls)
 - s. 17 June: 26.2 minutes (1 call)
 - t. 12 July 2019: 105.73 minutes (6 calls)
 - u. 13 July 2019: 21.63 minutes (9 calls)
 - v. 14 Jul 2019: 10.65 minutes (7 calls)

16. These call records only detail the outgoing calls. There would no doubt have been many incoming calls too. The Tribunal believes the Claimant (and finds as a fact) that her notes of the weekend's activities would only describe the most important events and she would also need to look up numbers on the system, notify appropriate people, try to arrange cover and update the system. However, the Tribunal finds that the Claimant worked intermittently throughout the days and did not work through the night. The amount of minutes spent on outgoing calls, even tripled to include incoming calls, text messages and finding/inputting on the system, comes no-where close to constant work. The Tribunal finds as a

fact that the Claimant worked no more than 14 hours over the course of an on-call weekend. It was necessary for her to remain at home for large periods of the day but not all day and certainly for not longer than 14 hours over the weekend.

17. Clause 6 (detailed above) of the Claimant's Contract of Employment stated that the Claimant may be required to work additional hours as necessitated by the needs of the business. The Claimant stated that she stayed every Friday for 3 hours to help with the rotas.
18. In Ms Richards' witness statement, she stated that the Respondent did not encourage staff to work overtime as they were not paid additional sums for any overtime worked. She stated that although the Claimant may have had to carry out some additional overtime on occasion, she was never compelled to do so and should have been able to carry out all of her duties within her contracted hours. Ms Richards provided evidence showing a breakdown of the overtime that the Claimant worked between January 2019 to August 2019 (pages 102-105). This summary was a detailed breakdown of data extracted from their software which recorded all key strokes made by users of the system. According to these records, the Claimant worked a total of 16 hours 25 minutes of overtime during 2019:
 - a. January 2019: 2 Hours 13 minutes
 - b. February 2019: 1 hour 41 minutes
 - c. March 2019: 3 hours 9 minutes
 - d. April 2019: 1 hour 22 minutes
 - e. May 2019: 37 minutes
 - f. June 2019: 45 minutes
 - g. July 2019: 6 hours 11 minutes (this is inclusive of on-call time)
 - h. August 2019: 55 minutes.
19. The Claimant's case was that she worked 3 hours overtime every Friday. She said in evidence that she may have logged in on a different account on some occasions and so this work would not show up in the above key stroke calculation. Ms Pooke, who was previously line managed by the Claimant, says that she did the rotas and that the Claimant rarely stayed. The Tribunal finds as a fact that the Claimant occasionally stayed late on a Friday to assist with the rotas.
20. In April 2019 the Claimant's father passed away which was understandably very upsetting for her. Again, the evidence between the Claimant and Respondent is starkly different. The Claimant says that she spoke to Ms Richards from the hospital and that Ms Richards said she could take time off as compassionate leave, which would be paid. When the dispute arose on resignation the Claimant immediately emailed Ms Richards and said that she had verbally agreed to pay her for compassionate leave. Ms Richards says that there was no telephone conversation with the Claimant and that it was another staff member who she spoke to and agreed that the Claimant could take annual leave instead of compassionate leave as it was paid and compassionate leave would not be. There was a handwritten leave sheet with staff leave recorded. This sheet detailed that the Claimant had taken the period as annual leave. However, the Claimant said that she did not write the entry and it remained unclear at the

Tribunal hearing who had completed the log. The Respondent deducted the amount of £1032.80 from the Claimant's final pay as they said she had taken an excess of 11.67 days of annual leave. The Claimant's gross final payment was to be £251.92 (£539.25 less £160 parking fine, less £63.33 mobile phone charge, less £64.00 on-call fee paid but not worked). Accordingly the Claimant received nil pay and the Respondent requested that she pay the balance. This was explained to her in the letter from Ms Richards to the Claimant dated 25 September 2019.

21. It is common ground that there is no compassionate leave policy. However, the Tribunal does not view that as definitive - as Managing Director Ms Richards would have been able to agree that a staff member suffering a bereavement of a close family member could continue to be paid while not attending work. The Tribunal prefers the Claimant's version of events. The Claimant's evidence on this issue was consistent throughout, from her further particulars, the correspondence when the deduction from wages was made and her evidence to this Tribunal. The Tribunal finds as a fact that Ms Richards agreed that the Claimant could take two weeks' paid leave on compassionate grounds and that this was not annual leave.
22. In July 2019 the Claimant attended a recruitment event and claims that she was not paid for it. The letter from the Respondent to the Claimant setting out her final pay quotes £221.15 as the amount owed for office hours including the recruitment day. On her final payslip, the same amount appears as a credit. The Claimant said that the money for the recruitment day had not been paid but did not provide any further evidence such as how much she was seeking and why the £221.15 did not include that payment. The Tribunal prefers the Respondent's evidence and finds that the Respondent paid for the Claimant's attendance at the recruitment day within the payment of £221.15.
23. The Claimant and Ms Richards had arranged a meeting on 10 September to discuss rotas moving forward. However, on 15 September 2019 the Claimant telephoned Ms Pooke and resigned. She was unhappy with the shifts that she had been allocated and the way that she had been treated by the Respondent. In the Claimant's Further and Better Particulars she said that she was "told it was ok not to serve notice". At the hearing she said that she was only resigning the carer role without notice and that she was prepared to work her notice for the supervisor/manager role. The Tribunal does not accept the Claimant's evidence on this. There is nothing in the contemporaneous correspondence to show that the Claimant did anything other than resign with no notice. Both the Claimant and Ms Pooke confirmed that notice was not discussed in their conversation. On 15 September 2019 Ms Richards emailed the Claimant stating that she understood she had decided to resign without working her notice. The Claimant confirmed her resignation to Ms Richards in writing in an email on 25 September 2019 and did not mention notice. Nor did she attend work to work any notice period. The Tribunal finds as a fact that the Claimant resigned without notice on 15 September 2019.

24. Regulation 2(1) of the Working Time Regulations 1998 defines 'working time' as including any period during which a worker is working, at his/her employer's disposal and carrying out his/her activity or duties. Time spent 'on call' may or may not satisfy this definition depending upon the particular facts including the degree of control exercised by the employer and whether the worker is able to enjoy the quality of rest which he/she is entitled to have.
25. The National Minimum Wage Regulations 2015 set out the circumstances in which a worker is entitled to be paid at an hourly rate not less than a defined hourly National Minimum Wage calculated over a pay reference period. Salaried hours workers and time work workers will be regarded as working when they are 'on call', in other words when they are available at or near a place of work for the purpose of doing work and are required to be available for such work, unless they are at home (Regs 27(1)(b) and 32(1)).
26. Section 13(1) of the Employment Rights Act 1996 ("ERA") provides that an employer shall not make a deduction from wages of a worker employed by him unless the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract or the worker has previously signified in writing his agreement or/ consent to the making of the deduction. An employee has a right to complain to an Employment Tribunal of an unauthorised deduction from wages pursuant to Section 23 ERA. The definition of "wages" in section 27 ERA includes pay and holiday pay.
27. An employer will be in breach of contract if they fail to pay the employee for working the notice period as set out in the contract of employment. The aim of damages for breach of contract is to put the claimant in the position they would have been in had the contract been performed in accordance with its terms. Damages for breach of contract are, therefore, calculated on a net basis, but may need to be grossed up to take account of any tax that may be payable on the damages. Damages relating to notice pay are subject to tax.

Conclusions

Pay for On-call/National Minimum Wage

28. The parties agree that the Claimant could work from home while on-call and was not required to be at or near her place of work. The Tribunal has found that the Claimant worked no more than 14 hours while on call over a weekend and that during the rest of the time the Claimant was able to go about her normal weekend activities. Only hours spent working are hours that qualify as work for the National Minimum Wage (Reg 27(1)(b) National Minimum Wage Regulations).
29. The burden of proof is on the Respondent to show that the Claimant was paid the National Minimum Wage (s.28 National Minimum Wage Act 1998). The Claimant was paid £128 per weekend on-call. The Tribunal has found that the Claimant worked no more than 14 hours while on call which equates to £9.14 per hour. The National Minimum Wage rate from November 2018 - March 2019 was £7.83/hour and was £8.21 per hour from April - August 2019. The Claimant's hourly rate was therefore in excess of the National Minimum Wage.

Overtime

30. There is no statutory right to be provided with or paid for overtime. It is a matter of construing the express and implied terms in the contract (*Driver v Air India Ltd* [2011] EWCA Civ 830, [2011] IRLR 992). The Claimant has the burden of proving that she worked the overtime and was entitled to be paid for it. She has not discharged that burden.
31. The Claimant's contract of employment states that the Claimant's pay is £23,000 per annum (Clause 5). Clause 6 sets out the Claimant's normal hours as 37.5 hours per week, and that she "...may be required to work additional hours as necessitated by the needs of the business". The Tribunal has found that the Claimant did occasionally work late on a Friday night to help with the rotas. However, there is no express or implied term entitling the Claimant to pay for overtime. The Tribunal concludes that when the Claimant did work late, this was such "additional hours as necessitated by the needs of the business" and as such did not attract pay.

Holiday pay

32. Clause 7 of the Claimant's Contract of Employment sets out the Respondent's leave year as 1 April - 31 March, and annual leave entitlement as 20 days, plus bank holidays. Clause 16 of the Contract of Employment allows the Respondent to make deductions from pay for overpaid annual leave. The Respondent was therefore contractually entitled to deduct money for overpayment of annual leave. However, the Respondent should not have deducted the sum of money equivalent to 10 days leave because this was agreed to be paid leave for compassionate reasons, not as part of the Claimant's annual leave entitlement. The Respondent told the Claimant that 11.62 days' leave equated to £1032.80. It therefore follows that 10 days paid leave equates to £888.81.
33. The Claimant's pay should only have been deducted by the amount of £144.00 (1.162 days). The Claimant's final gross pay amounted to £251.92 (£539.25 less £160 parking fine, less £63.33 mobile phone charge, less £64.00 on-call fee paid but not worked), the Respondent withheld the whole amount. The amount of wages properly payable was **£107.92** (£251.92 less the authorised deduction of £144.00 for overpayment of annual leave).

Recruitment event

34. The Claimant was paid for attending the recruitment event as detailed in her final payslip and so she is not entitled to any further payment.

Notice pay

35. The Claimant was not paid notice pay because she resigned without notice and so she was not entitled to notice pay.

Employment Judge L Burge

Date 11 December 2020