Case Nos. 2410734/19
2411256/19
Code V

EMPLOYMENT TRIBUNALS

Claimants: Mr A Stott
Mr S Kendall

Respondent: J D MacAdam & Son (Rescue) Ltd

HELD AT: Manchester **ON:** 29 & 30 June 2020

BEFORE: Employment Judge Phil Allen

REPRESENTATION:

Claimants: In person
Respondent: Miss R Levene, counsel

JUDGMENT

The judgment of the Tribunal is that the claimants were not entitled to be paid standby payments for time at night when they were required to be available should they be called upon, and accordingly their claims for unlawful deductions from wages as a result of alleged non-payment of the national minimum wage in respect of standby payments does not succeed.

The above Judgment having been made on 30 June 2020, the respondent has requested written reasons and therefore the written reasons below have been provided.

REASONS

Introduction

1. The claimants were employed by the respondent as roadside recovery technicians, they both worked day shifts when they undertook work. In

addition, they were required to be on standby outside their normal shift hours, that is on call for emergency recovery jobs.

Claims and issues

2. Both claimants have brought a number of claims against the respondent. The issue to be determined at this Preliminary Hearing was very specific and related only to their claims for unlawful deductions from wages.

3. The issue was defined by Employment Judge Buzzard in a previous Preliminary Hearing held on 30 January 2020. He recorded, in the Case Management Order, that: "*a preliminary hearing was listed to determine whether the claimants were entitled to remuneration for hours when they were on standby. The Preliminary Hearing will not determine the amount of any potential standby payments owed, being limited only to consideration of whether standby payments were in principle payable*".

4. It was confirmed with the parties at the start of the hearing that this was the issue being determined and that was agreed. The claimants also confirmed that they were arguing that they were entitled to wages for the time spent on stand-by because they did not believe that they were being paid what they were entitled under the minimum wage legislation. The claimants were not arguing that they had been promised, or were otherwise contractually entitled to, payments for this time based on a commitment from the respondent.

Procedure

5. The claimants represented themselves throughout the hearing. On occasion Mr Kendall took the lead, but both gave evidence, both had the opportunity to cross examine the respondent's witness, and both made submissions. The respondent was represented by Ms Levene, counsel.

6. The Tribunal considered a bundle of documents which ran to 138 pages. Only pages referred to in the witness statements or expressly referred to by the parties were read by the Tribunal. In addition, some additional documents were appended to the claimants' witness statements and Mr Kendall provided the Tribunal with some pages during the first day of the hearing. These were added to the bundle and considered by the Tribunal.

7. On the first morning of the hearing the Tribunal read the witness statements of the witnesses, together with the relevant pages from the bundle.

8. The Tribunal heard evidence from each of the claimants. Mr Stott's statement of evidence consisted of three documents: a witness statement which was contained in an email; a document headed skeleton argument which was also in an email, which was treated as part of the claimant's witness statement as it contained additional evidence to that in the statement; and a further document prepared in response to an email which Mr Stott asked the Tribunal to read (albeit in fact this contained nothing material to the issues that the hearing needed to decide). Mr Kendall's witness statement was recorded in

an email. Each of the claimants were cross examined by the respondent's representative and were asked questions by the Tribunal.

9. The claimants also relied upon evidence in witness statements from Katrina Stott and Paul Norcross, albeit that those individuals did not attend the hearing. The respondent did not agree the content of those statements and, therefore, they would have been given limited weight by the Tribunal as the witnesses did not attend in person, but in any event their evidence did not assist the Tribunal with the issues to be determined in this hearing.

10. The Tribunal heard evidence, on behalf of the respondent, from Mr MacAdam, a Director of the respondent. He had prepared a witness statement. He was cross examined by each of the claimants and asked questions by the Tribunal.

11. On the second day of the hearing the respondent's counsel made oral submissions on behalf of the respondent. A skeleton argument had been prepared in advance of the hearing and was provided to the Tribunal in accordance with the orders made at the previous Preliminary Hearing. Each of the claimants made oral submissions. The Tribunal also considered Mr Stott's skeleton argument email which contained within it some submissions.

12. The "Code V" in the heading indicated that this is was a remote preliminary hearing which had not been objected to by the parties. This hearing was conducted by remote video technology (CVP). The form of remote hearing was fully by video (all remote, to which the public had access). It was not practicable for the hearing to be in person because of the Covid-19 Pandemic and it was practicable for all issues to be determined in a remote hearing.The Tribunal was grateful to all of the parties for the way in which they conducted themselves during the hearing, both in general terms, and also in the light of the challenges faced in conducting the hearing remotely.

13. Based on the evidence heard, and insofar as relevant to the issues that must be determined, the Tribunal makes the findings set out below.

Facts

14. Mr Stott worked for the respondent on a shift pattern of four days on and four days off. On the days he worked, his shift was from 8 am until 6pm. His evidence was that he worked additional days.

15. This hearing considered the standby or on call time spent by Mr Stott. Following each day shift, Mr Stott was on call from 6pm until 8am the following day. During this time he would have a company mobile with a PDA app and would be sent an alert if there was a job which he needed to do. He could accept the job. If he did not do so within around five minutes, he would be called on the work mobile phone. If there was no response, he would be called on his personal mobile. If the control room was unable to get hold of Mr Stott it would contact another Technician who was on call. Mr Stott's

evidence was that there could be up to three people on call at one time, although it varied. Mr MacAdam's evidence was that the claimants were expected to take every job whilst on call, and both of the claimants' evidence was that they usually did so.

16. Mr Stott retained the respondent's truck at his house while he was on call, which enabled him to respond to the call outs more quickly. He described this as being a fifteen-tonne truck which was thirty feet long. The respondent's evidence was that he was not obliged to have the truck at home, but he usually did so. On most occasions this meant that the claimant had no other form of transport and this limited his ability to leave his home, as it was common ground that there were difficulties in parking such a truck if, for example, visiting the shops.

17. Mr Kendall worked a slightly different shift pattern and this changed at his request during his employment (although not to the pattern that he requested). He had worked 8 am to 5 pm Monday to Friday until May 2019, and after that his pattern changed to 8 am to 5pm Monday to Thursday.

18. Mr Kendall was on call throughout an entire seven-day period. He would then not be on call for the subsequent seven days. His call outs involved attending police incidents, road traffic collisions, or to recover heavy vehicles such as buses. The method for contacting Mr Kendall while on call was the same as for Mr Stott, but it was Mr Kendall's evidence that there was not anyone else available within the region to undertake some of his work and (save for a very very limited number of exceptions) Mr Kendall's evidence was that he always accepted when he was called out.

19. Mr Kendall did not take the truck home with him, he travelled to the Colne depot when called out in order to collect the vehicle which he needed to use.

20. In terms of the on-call, the following is not in dispute:

    a. the claimants could be at home throughout the time on standby (except when they were actually undertaking a call out);

    b. the claimants could sleep during the time on standby, albeit Mr Stott highlighted the difficulties in doing so when on call and knowing when he could be called out;

    c. there were no restrictions placed on what the claimants could do at home, save that they must not consume alcohol. They could be with friends and family;

    d. the contracts of employment accepted by the claimants recorded that "*due to the nature of your role you will be required to be on call*" and both claimants accepted that the on call requirement was in place from the start of their employment;

e. There is a job card which the Tribunal has seen which records the rates paid for out of hours call out. In summary, and for the purposes of this decision, what is relevant is the call outs are paid on a time spent basis (for the time worked, being from leaving home to returning to home) - with additional sums paid for certain types of work, save for some police jobs which are paid on a per vehicle basis rather than a time spent basis; and

f. work could sometimes be undertaken by those from other depots.

21. Mr Stott's evidence was that whilst he was on call he could not relax, go shopping, drink beer, or walk the dog. His evidence was that he could not leave home due to the need to respond rapidly to a call, and because of the transport issue addressed at paragraph 16.

22. Mr Kendall's evidence was also that he did not leave home whilst on call.

23. Mr MacAdam's evidence was that the claimants could have left home had they wished to, when on call. He walked his own dog when on call. He was also clear in his evidence that technicians generally could contact control and inform them that they would not be available for a period, such as whilst eating dinner or attending the gym, which other technicians did as a matter of course.

24. Mr MacAdam's evidence was also that it was for each driver to determine when they had worked too many hours from a health and safety or working time perspective, and it was their responsibility to refuse call outs thereafter. There were no documents issued by the respondent which provided any such information or guidance.

25. There was some limited evidence provided to the Tribunal of occasions when each of the claimants had declined to undertake a call out. For Mr Kendall these appeared to relate to jobs during the working day which he declined as he would run beyond his finishing time. Mr Stott had declined a call out on 5 February 2019 because he said he had been working fifteen hours that day.

26. Neither of the claimants were ever formally disciplined for not accepting a call out and there was no credible and reliable evidence before the Tribunal that anyone else had been. However, the claimants had been called into a meeting with the controller to discuss occasions when they had not been uncontactable or had declined work. Mr MacAdam described these meetings as being about work management and ascertaining whether the relevant resource was available. Whatever Mr MacAdam's belief (as a senior manager), there is no doubt that the claimants perceived these meetings as effectively being a sanction and that they were required to accept calls.

27. Mr Kendall, in both his evidence and his submissions, placed particular emphasis on occasions when he had not been fairly allocated police recovery work which was more lucrative. He described a weekend when he had been

on call for police work for the entire period and was unhappy that he had not been called out when others had been. In his submissions he also explained that, for financial reasons, he needed to undertake the on-call work when he was called. Whilst the Tribunal notes that both of the claimants appeared to be very conscientious in responding to and attending on-calls, it is clearly the case that they both wished to accept on-call work because of the financial benefits of doing so.

Frequency of call out

28. The Tribunal had very limited evidence about the frequency of call out, which partly reflected the fact that the hearing was not listed to determine the precise hours worked or the time spent on call. It was common ground that call outs are sporadic and variable, by the very nature of the work being undertaken.

29. Mr MacAdam gave evidence, when answering a question, about there being two consecutive nights in the week prior to the hearing, in which on one there were fifty call outs in the area, and on the next night only seventeen. Mr MacAdam felt unable to give any evidence about what would be the normal frequency of call out.

30. Mr Kendall's evidence was that he was called out more or less every night, but as described at paragraph 27 above, he also evidenced weekends when he was not called out at all.

31. Mr Stott's oral evidence, although not his statement, was a little more specific. He said he was called out thirty times in ten days in January 2019, eighteen times in seventeen days in February 2019, and thirty-two times in twenty-three days in March 2019.

32. The Tribunal finds, from that evidence, that on average the claimants would be called out at least once a night, but on occasion the call outs were more frequent.

Rules about the time to respond to a call out

33. The claimants were adamant that they had to respond to jobs within a particular time. Mr Kendall's evidence was that he had to respond to be at a police job within thirty minutes. There was no evidence which was presented which either demonstrated this requirement, or showed a driver being disciplined or sanctioned for not doing so.

34. Mr MacAdam's evidence was that: there was no such rule; the police jobs required a 45 minute response time on average; and the heavy work undertaken by Mr Kendall could often be responded to after a longer period.

35. The Tribunal finds that the need to respond quickly did inhibit both the claimants from doing things whilst they were on call, but the Tribunal also finds that there was no specific rule in place imposed by the respondent.

Other matters

36. Mr Stott's evidence was that he wore uniform at home, Mr MacAdam demonstrated the uniform. There was no obligation on Mr Stott to wear uniform when not actively working on a call, but clearly he felt it easier to wear uniform when at home whilst on call.

37. Mr Kendall placed some reliance upon phone assistance, which he had provided from time to time from home. There was very little evidence about this led by Mr Kendall and it was not referred to in his witness statement. The Tribunal accepts that on occasion Mr Kendall would have provided some phone support and, inevitably, the response to a call would be undertaken at home by PDA or phone. However, the Tribunal does not find that this phone time was a significant issue or involved a substantial amount of time.

38. The calls out for some police work were paid per vehicle recovered and not based on time.

Irrelevant factors

39. The Tribunal heard evidence about working time limits and drivers' hours. The issues to be determined (as explained above) at this hearing were not about working time limits or breaks or drivers limits or EU drivers' rules. The Tribunal was slightly surprised by Mr MacAdam's evidence that the check in place on breaks and drivers' hours was that the drivers were themselves responsible for their own health and safety by saying no to jobs, however those matters were not considered material to the decision and were not taken into account.

40. The respondent introduced in evidence a letter from the Association of Vehicle Recovery Operators. This corroborated the respondent's contention that its approach to on call and payments was an industry standard, albeit the claimants' themselves raised in questioning examples of organisations who they said may not follow that approach. The letter goes on to suggest that there would be serious ramifications for the industry if those on call out of hours, were entitled to the minimum wage when on call. The Tribunal has not taken this into account at all. The Tribunal's role is to determine the law and whether it applies to the claimants before it, not to disapply the law because of the challenges that might present for any particular industry.

The law

41. The relevant law is laid out in the National Minimum Wage Regulations 2015.

42. Regulation 17 provides that:

> "*In regulation 7 (calculation to determine whether the national minimum wage has been paid), the hours of work in the pay reference period are the hours worked or treated as worked by the worker in the pay reference period as determined-*

(a) for salaried hours work, in accordance with Chapter 2;

(b) for time work, in accordance with Chapter 3;

(c) for output work, in accordance with Chapter 4;

(d) for unmeasured work, in accordance with Chapter 5.

43. The respondent's representative provided to the Tribunal the Court of Appeal decision in **Royal Mencap Society v Tomlinson Blake; Shannon v Jaikishan and Prithee Rampersad (trading as Clifton House Residential Home) [2018] EWCA Civ 1641** and placed emphasis on much of the content of that judgment, which the Tribunal has carefully considered. The judgment provides guidance on the application of the National Minimum Wage Regulation provisions. That case has been appealed to the Supreme Court and judgment is awaited, however in reaching this decision the Tribunal has assumed that the focus of that appeal will be on sleep-in work, and, in any event, this Tribunal must follow the law as it stands and as is laid down in the Court of Appeal judgment.

44. The Regulations themselves make clear the steps to consider, but the Court of Appeal in **Mencap** provides guidance on how those steps should be applied.

45. The first question is what type of work is it that the individual undertakes? The claimants undertook Time work, with the possible exception of some of the police call out work which the respondent contended would be output work if it was not time work.

46. Regulation 30 addresses the meaning of Time work, and says:

> "*Time work is work, other than salaried hours work, in respect of which a worker is entitled under their contract to be paid – (a) by reference to the time worked by the worker"*.

47. Regulation 31, which is headed "*Determining hours of time work in a pay reference period*" says:

> "*The hours of time work in a pay reference period are the total number of hours of time work worked by the worker or treated under this Chapter as hours of time worked in that period."*

48. The central question is whether the claimants were undertaking actual work under Regulation 30? **British Nursing Association -v- Inland Revenue [2002] EWCA Civ 494**, is an example of such a case where workers at home during a night shift were undertaking actual work. Notably, those workers could sleep, and that did not preclude that from being working time.

49. If the claimants were undertaking actual work when on call, that would be sufficient for their claims to succeed.

50. However, if the claimants were not undertaking actual work, the Tribunal would then need to go on and consider Regulation 32. That is a deeming provision. That is, it describes some circumstances where on call time which is not otherwise actual work, should be treated as working time.

51. Regulation 32(1) says this (with the Tribunal's emphasis added):

> "*Time work includes hours when a worker is available, and required to be available, at or near a place of work for the purposes of working* ***unless the worker is at home***".

52. In the **Mencap** decision, that section was summarised by Underhill LJ at paragraph 38 and he said this:

> "*Its effect is that, where a worker is required to be available for work but is at home, the hours in question (awake or asleep) will not count for the purposes of the National Minimum Wage. The thinking is understandable: the effect of a requirement to be available for work might reasonably be judged to be qualitatively different if the worker can be in his or her own home*"

53. He also, at paragraph 100, went on to expand upon that and to explain that a little more, where he said:

> "*any agreement to be available for work at a particular place necessarily involves a restriction on liberty, but the regulations chose to treat that differently for national minimum wage purposes where the place in question is the worker's home*".

54. In summary, the deeming provisions cannot apply if the individual is able to be at home (whatever the restrictions which apply and whether or not the claimant or an individual is able to leave their home). Work at home can be actual work, but it cannot be working time where it is time spent being available for work. This issue was central to the claimants' arguments. They contended that it is unfair and asked why should they not be paid for the lengthy periods of time which they spent available and ready to work whilst at home. Nonetheless, as a result of the provision reproduced at paragraph 51 and as the meaning of that provision has been explained by the Court of Appeal, that is exactly what the law provides (in determining that the respondent does not have to pay minimum wage for such a period of time).

55. The **Mencap** judgment, does refer back to the Low Pay Commission and the reasons for the distinction, and the respondent's representative placed emphasis on those aspects. This Tribunal has not considered those elements as part of this judgment. This judgment is reached based on the law as contained in the Regulations and as applied by the Court of Appeal in **Mencap**.

56. Regulation 32(2) limits where the deeming provision (in Regulation 32(1)) applies. That Regulation says:

> "*In paragraph (1), hours when a worker is 'available' only includes hours when the worker is awake for the purposes of working, even if a worker by arrangement sleeps at or near a place of work and the employer provides suitable facilities for sleeping*."

57. That limitation did not apply to this case.

58. It is relevant to consider that in the **Mencap** case, the Court of Appeal decided that both Mr Tomlinson-Blake and Ms Shannon were not actually working or entitled to rely on the deeming provision when they were asleep, even though they could be called upon throughout that time.

59. In his skeleton argument, Mr Stott emphasised that the **Mencap** case is about care workers. He is quite right. What is important is that this Tribunal applies the law to these claimants' own personal working arrangements, albeit it is still right for this Tribunal to take account of the general legal principles applied by the Court of Appeal in **Mencap**.

60. In his verbal submissions Mr Stott also relied upon **Truslove v Scottish Ambulance Service UKEAT/0053/13**. That is a case which has some factual similarities to these cases. It involved paramedics on call. They were required to reside within a three mile radius of the relevant station and the question was whether time spent there on call was working time. This Tribunal however has not drawn anything from that judgment in reaching its decision, because that case is about the Working Time Regulations, when this one is about the National Minimum Wage Regulations. Factually there was also one potentially important distinction, the paramedics were not able to be at home in that case - they were in alternative accommodation at, or in close proximity to, the station.

61. The respondent's representative referred to the rules under the National Minimum Wage Regulations as being straightforward. With all due respect to her, the Tribunal considers them to be anything but straightforward. What has added to the confusion for the claimants, is the fact that the rules which relate to working time under the Working Time Regulations and under the National Minimum Wage Regulations, are quite different. The respondent's representative submitted that the Tribunal should not place any reliance on the Working Time Regulation cases as the rules and objectives of the two pieces of legislation are quite different. In that respect, the Tribunal agrees with respondent's representative. That is reinforced by what was said by Underhill LJ in the **Mencap** decision. It is fair to say that the difference does not assist a lay person in understanding the law.

62. The other categories of work are: output work; and unmeasured work. The latter is a catch-all category and it applies only when the others do not. As the respondent accepted that this work was output work (if not Time work), Regulation 36 and the following Regulations would apply. Under those provisions the same question with regard to whether the claimants were doing

actual work applies as for Time work, but there is no deeming provision equivalent to Regulation 32.

63. The Tribunal has not addressed everything that was said in all the parties' submissions, but has taken them into account even if it is not referred to.

Conclusions – applying the law to the facts

64. The Tribunal finds that the claimants were not actually undertaking work when they were on standby at home.

65. This is because of the following reasons:

(a) The claimants weren't actually doing their work at home. Their work was recovering vehicles, which involved work outside the home;

(b) The claimants could sleep during their time on standby, albeit the Tribunal would accept that it is entirely understandable, that for any person on call, sleep (and relaxation) may be inhibited by the knowledge that there might be a call - particularly if there is usually a call or more each night;

(c) There were no restrictions placed on what the claimants could do at home, the leisure time was their own (save only for not consuming alcohol - but that single restriction cannot on its own change the time into being actual work);

(d) The claimants were able to leave their homes, even if they chose not to do so (for quite understandable reasons); and

(e) The respondent's employees were able to notify the controller that they would be unavailable for a short period, such as when in the gym (even if these claimants themselves did not do so).

66. This was not actual work, even were there to be an absolute requirement on the claimants to undertake each call out they were given. However, in this case, the fact that there were no formal sanctions for not responding to a call out, adds some further support to the conclusion that this was not time spent actually undertaking work. That factor is not an important part of the decision reached (and, in any event, it was weakened by the claimants' own perception of the pressure to accept a call out).

67. In terms of the frequency of call out, that must potentially have an impact upon whether time at home is actual work, albeit that even very frequent call outs do not necessarily lead to the conclusion that the limited time in between must be actual work. These claimants were likely to be called out each time they were on standby and they might be called out more frequently. However, in the circumstances of this case, the Tribunal does not find that this means that the claimants were actually working when at home waiting for the next

call out (albeit of course the claimants were working when they were actually called out).

68. In terms of Regulation 32 and the deeming provision, the claimants were able to be at home. As a result of the inclusion of the words in Regulation 32(1) which the Tribunal has highlighted in paragraph 51 above ("*unless the worker is at home*"), as the workers are able to be at home that is fatal to the claimants' claims that their time available to work should be deemed to be working time. Whilst the Tribunal can understand why the claimants disagree with that wording, it is in the Regulations and it does determine that part of the claimants' case.

69. It is not necessary to go on and determine the sleep exception to the deeming provisions, as it does not apply to the facts of this case. However the fact that the claimants could sleep, as is confirmed above, is a material factor in deciding whether the time spent on call is time spent actually working.

70. Whilst the **British Nursing Association** case referred to above determines that time at home sleeping can be working time, the circumstances in these claims is very different to the facts of that case. Servicing a telephone service from home is very different from being on call to recover vehicles. The Tribunal believes that it is self-evident on the ordinary use of English language (to use Buxton LJ's language in the **British Nursing Association** case) that the claimants in this case were not actually working when on call.

Conclusion

71. Therefore, for the reasons given above, the Tribunal's conclusion is that the time spent on call or on standby at home by the claimants, was not time for which the national minimum wage needed to be paid.

Employment Judge Phil Allen
3 March 2021

JUDGMENT AND REASONS SENT TO THE PARTIES ON
4 March 2021

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