EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4101953/2020

Held remotely on 1 September 2020

Employment Judge P O'Donnell

Mr G Thompson	**Claimant** **In Person**
Gavin Stevenson, Returning Officer, Dumfries & Galloway Council	**Respondent** **Represented by:** **Mr J MacEachern - Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is:-

1. The Claimant's complaints under the Equality Act 2010 are withdrawn and are hereby dismissed under Rule 52.

2. The Respondent's application to strike-out the claim on the grounds that it does not have reasonable prospects of success is refused.

REASONS

Introduction

1. The Claimant has brought a complaint of unlawful deduction of wages under Part 2 of the Employment Rights Act 1996 in that he alleges that he has not been paid in accordance with the National Minimum Wage ("NMW"). The Claimant had also ticked the box on the ET1 to indicate that he sought to pursue a discrimination claim.

2. The Claimant alleges that, when he was employed by the Respondent as a Presiding Officer by the Respondent at the General Election held on 10

December 2019, the fee of £235 paid to him divided by the number of hours spent in carrying out the work involved along with certain deductions which the Claimant believes should be made from the fee for the purposes of calculating NMW resulted in an hourly rate which was less than the NMW as it stood at the time.

3. The Respondent denies any unlawful deduction of wages and it is his case that the fee does produce an hourly rate in excess of the NMW. In particular, the Respondent disputes that hours spent training and travelling should not count as working time for the purposes of calculating the hourly rate and that the deductions which the Claimant says should be made from the fee do not fall within the scope of Regulation 13 of the National Minimum Wage Regulations 2015 ("the 2015 Regulations").

4. The Respondent has made an application under Rule 37 for the claim to be struck out.

Respondent's submissions

5. The Respondent's agent produced written submissions and supplemented these orally.

6. The written submissions set out the relevant Rules and authorities relating to strike-out and the Tribunal noted that the Claimant did not dispute these.

7. The application is made on the basis that the claim does not have reasonable prospects of success. It is accepted that strike-out is a draconian step and that there is a high threshold.

8. It was submitted that there was very little or no dispute regarding the central factual matters in this case and these are summarised at paragraph 21 of the written submissions.

9. In relation to the issue of the mobile top up fee, the Claimant had produced a document entitled "Expenses & Guidance Notes 2017" which at 9.9 deals with reimbursement of call costs and phone hire where appropriate and on the production of evidence. It is the Respondent's position that, other than small

cost of one call made by the Claimant on the day of the election, the rest of the £10 credit was, and still is, available for the Claimant to use.

10. It was submitted that the issue of the training fee was a red herring; this was not a fee or expense which the Claimant had incurred in attending the training but, rather, he was alleging that he should have been paid this over and above the fee paid for carrying out the work on election day. What the Tribunal should be looking at is whether the fee paid to the Claimant less any deductions and divided by the hours worked produces an hourly rate less than the NMW and not whether the Claimant should have been paid a further fee in respect of training.

11. In this regard, the Respondent's agent noted that the Claimant has made reference to other local authorities who specify a separate training fee in the contract. However, no evidence has been produced that this was a Cabinet Office requirement or that there was any requirement in law for this to be part of the contract.

12. It was explained that the application was not being advanced on the "vexatious" limb of Rule 37 because the Claimant has "parked" the 65 questions he submitted to the Respondent. The Respondent reserves the right to make a further application.

13. In relation to the issue of the time spent by the Claimant travelling and attending training on 2 December 2019, it was the Respondent's position that the terms of Regulation 46 of the 2015 Regulations excludes this time from the hours to be used in calculating the NMW because it requires that the Claimant would otherwise be doing work at the time the training takes place. The Respondent submits that the Claimant would not have been doing work for the Respondent at the relevant time.

14. The Tribunal sought to explore this further with the Respondent's agent on this point in order that it fully understood the argument being made.

15. It was submitted that the Claimant had to show that unmeasured work would be done at the time when the training occurred for this time to count in the

NMW calculation. Reference was made to paragraph 3 of the Respondent's written comments on the Claimant's submissions.

16. The wording of Regulation 46 is clear and unambiguous; the Tribunal cannot seek to interpret it in terms of the intention of Parliament.

17. If the wording were otherwise then a worker could add any time they wished to their working hours as training.

18. The Tribunal asked whether the Respondent had any view on whether Regulation 19, particularly Regulation 19(2), had any impact on the interpretation of Regulation 46. Attention was drawn to paragraph 24 of the submissions where it is said that this Regulation is descriptive and not definitive because Regulation 46 goes on to describe when training will count.

19. The Tribunal also asked whether the words *"otherwise be working"* which appear in Regulation 19 and in a similar form in Regulation 46 meant "otherwise be working for the Respondent" or whether they meant otherwise be working for another person. It was submitted that they mean working for the Respondent because this claim is against the Respondent arising from a contract of employment between the parties; the 2015 Regulations create an obligation for an employer to pay the NMW to their workers and provide a remedy if they do not and if a worker has a variety of contracts then the right arises in respect of each relationship; the claim is not based on the Claimant having some other employment which he could have done.

20. In relation to the proposition that the effect of the Respondent's interpretation could be that training outside of working hours would fall out of the scope of the NMW, it was submitted that Regulation 46 was clear and unambiguous; time spent training only counts in the calculation of NMW where the worker would other be working for the employer is a consequence of the wording and the reference to uncertainty in Regulation 19(2) is not a reference to when the worker would not be working.

21. The Respondent's agent accepted that he could find no binding authority in relation to the interpretation of Regulation 46 (or other provisions of the 2015

Regulations which have almost identical wording). Similarly, the relationship between the returning officer and the presiding officer is unusual in the context of employer and employee as it only exists for the brief period of an election with no stipulated hours of work; no authorities addressing such a relationship could be found.

22. In rebuttal of certain matters raised in the Claimant's submissions, the Respondent's agent commented as follows:-

    a. The authorities did not say that strike-out could never occur if facts were in dispute.

    b. He noted that many of the examples given by the Claimant of the fee and training fee paid to presiding officers in other local authorities fell at or below the level of the fee paid to the Claimant (although one was more).

    c. The reference by the Claimant to the fee paid to him for the European Elections in May 2019 was different from the current circumstances as that contract specified an additional fee but the present contract does not and the Claimant accepts this.

    d. The reference by the Claimant to being compensated relates to matters which do not form part of the claim and the Tribunal has no jurisdiction to consider this as part of the NMW claim.

Claimant's submissions

23. The Claimant also provided written submissions and supplemented these orally.

24. He agreed with the Respondent that the authorities set in the Respondent's submission show that there is a high threshold for strike-out.

25. He accepted that much of the facts are agreed but that central fundamental disputes remain given that the Respondent disputes that time spent in relation to the training should not count for the NMW and the other matters set out in the submissions.

26. The Tribunal sought clarification as to whether these were disputes of fact or of law in the sense that the Respondent did not dispute that, for example, the time spent at the training was actually the time spent but, rather, disputed that this time counts for the purposes of the NMW calculation. The Respondent's agent clarified that these were disputes of law and that it was not factually disputed that the Claimant attended the training.

27. In relation to the mobile phone top-up, the Claimant accepted that he only made one call but he received a number of others. The issue is that there was a requirement to have some form of telephone communication and the expense is the cost of providing that, not the cost of individual calls. There was a need for immediate availability of a telephone if there were any emergencies. There was no guidance given to the Claimant about how this was to be achieved and he took his own initiative in purchasing the top up.

28. As regards the business passenger expense, the Claimant made reference to paragraph 45 of these submissions which set out the necessity in relation to this; his wife was the polling clerk and also had to attend the training so they shared the expense.

29. The question of a training fee was envisaged in his previous offer of employment in May 2019 and it was submitted that evidence has been provided that such a fee was required; the Claimant gave a number of examples of other local authorities which paid a training fee in additional to the fee paid for the role of presiding officer.

30. In response to a question from the Tribunal, the Claimant confirmed that he argued that the training fee was a deduction for the purposes of Regulation 13. He also accepted that the training fee and the inclusion of the hours spent at the training could amount to double counting so that either the hours count towards working time or the fee is treated as a deduction.

31. It was submitted that the work being "unmeasured work" is the nature of fee based work. There is an onus on an employer to ensure that any fee is realistic given the nature of the work and that it is compliant with the NMW.

As part of his role, he was required to attend training and pick up material as well as simply being present at the polling station on election day.

32. The tenor of the 2015 Regulations is to protect the employee when the employer requires them to train or travel. Regulation 46 is badly worded and it was submitted that Regulation 19(2) deals with cases where a worker is paid a fee and their hours are variable.

33. This is a case where the Claimant was paid less than a council officer who carried out election duties would be paid and who would also receive their pay from the council.

34. The situation is that training has always been considered work and that is why no authority exists in relation to the interpretation of the relevant parts of the Regulations.

35. The Claimant did not agree that Regulations 19 and 20 were descriptive and not definitive.

36. In relation to his claim under the Equality Act 2010, the Claimant confirmed that he did not intend to pursue this and the claim was withdrawn at the hearing.

Supplementary submissions

37. During the course of deliberating, the Tribunal came to the view that s28 of the National Minimum Wage Act could potentially have an impact on the application given that it creates an assumption in any proceedings about payment of the NMW that a claimant is entitled to NMW and that they have not been paid it placing the burden of proof on a respondent to rebut those presumptions.

38. This particular provision was not discussed at the hearing and so the Tribunal invited the parties to provide written submissions on whether s28 does have an impact and, if so, what impact it had on the application. Both parties provided submissions.

39. There was no dispute between the parties that the Claimant was entitled to the NMW and the issue was whether or not the fee he had received had been sufficient to meet the NMW.

40. The Claimant submitted that the burden of proof did have an impact and that the onus was on the Respondent to prove that he had received the NMW. It was submitted that the Respondent had not done so and he set out the various aspects of his arguments relating to the expenses incurred and the time spent travelling and training. In relation to each aspect, he submitted that the Respondent had failed to discharge the burden of proof.

41. The Respondent accepted that the burden of proof did lie with them and submitted that they had shown that they would be able to discharge this burden at a final hearing of the case.

42. In addition to addressing the question of the impact of s28, the Respondent raised two new issues in his supplementary submissions which did not relate to that question and which had not been addressed earlier.

43. First, it was submitted that the expenses which the Claimant argued should be deducted from the training fee did not amount to "wages" for the purposes of the claim under s13 ERA because expenses were excluded from the definition of "wages" in terms of s27(2) ERA. In these circumstances, it was submitted that it could not be said that these were deductions from wages for the purpose of the claim under s13 ERA.

44. Second, the Respondent seeks to resile from the concession made in the written submissions lodged in advance of the hearing that a sum of £63.45 could be deducted from the training fee in respect of travelling expenses involved in the work done by the Claimant in terms of Regulation 13. Rather, it was submitted that only deductions made by the employer or payments made by the worker to the employer fell within the scope of Regulation 13. In these circumstances, any travelling expenses could not be deducted from the fee paid to the Claimant and so, even assuming that the time spent at training and travelling for the purposes of the training was to count towards the hours for calculating the NMW, the unreduced fee divided by the total hours did not

produce an hourly rate below the NMW which applied at the time. It was, therefore, submitted by the Respondent that the Claimant's case had no reasonable prospects of success even if he succeeded in his arguments regarding the training and travelling time.

Relevant Law

45. The Tribunal has power to strike-out the whole or part of claim under Rule 37:-

"At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds—

(a) that it is scandalous or vexatious or has no reasonable prospect of success;

(b) that the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious;

(c) for non-compliance with any of these Rules or with an order of the Tribunal;

(d) that it has not been actively pursued;

(e) that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out)."

46. A Tribunal should be slow to strike-out a claim where one the parties is a litigant in person (*Mbuisa v Cygnet Healthcare Ltd EAT 0119/18*) given the draconian nature of the power.

47. Similarly, In *Anyanwu and anor v South Bank Student Union and anor 2001 ICR 391 HL*, the House of Lords was clear that great caution must be exercised in striking-out discrimination claims given that they are generally

fact-sensitive and require full examination of the evidence for a Tribunal to make a proper determination.

48. In considering whether to strike-out, the Tribunal must take the Claimant's case at its highest and assume she will make out the facts she offers to prove unless those facts are conclusively disproved or fundamentally inconsistent with contemporaneous documents (*Mechkarov v Citibank NA 2016 ICR 1121, EAT*).

49. Section 13 of the Employment Rights Act 1996 (ERA) provides that an employer shall not make a deduction from a worker's wages unless this is authorised by statute, a provision in the worker's contract or by the previous written consent of the worker.

50. The National Minimum Wage Act 1998 provides that a worker shall not be paid less than the national minimum wage and goes on to set out provisions relating to qualification for the NMW, powers for Regulations to be made setting out how the NMW is to be calculated, provisions relating to enforcement of the NMW and other miscellaneous provision related to the NMW.

51. Section 28 of the Act reverses the burden of proof in any civil proceedings relating to an alleged failure to pay the NMW and provides as follows:-

"(1) Where in any civil proceedings any question arises as to whether an individual qualifies or qualified at any time for the national minimum wage, it shall be presumed that the individual qualifies or, as the case may be, qualified at that time for the national minimum wage unless the contrary is established.

(2) Where—

(a) a complaint is made—

(i) to an employment tribunal under section 23(1)(a) of the Employment Rights Act 1996 (unauthorised deductions from wages), or

(ii) to an industrial tribunal under Article 55(1)(a) of the Employment Rights (Northern Ireland) Order 1996, and

(b) the complaint relates in whole or in part to the deduction of the amount described as additional remuneration in section 17(1) above, it shall be presumed for the purposes of the complaint, so far as relating to the deduction of that amount, that the worker in question was remunerated at a rate less than the national minimum wage unless the contrary is established.

(3) Where in any civil proceedings a person seeks to recover on a claim in contract the amount described as additional remuneration in section 17(1) above, it shall be presumed for the purposes of the proceedings, so far as relating to that amount, that the worker in question was remunerated at a rate less than the national minimum wage unless the contrary is established."

52. The National Minimum Wage Regulations 2015 (NMWR) set out the provisions to be used in calculating the NMW.

53. Regulation 13 deals with deductions or payments which reduce the amount of wages for the purposes of calculating the NMW. The Regulation states:-

(1) Subject to the exception in paragraph (2), the following deductions and payments are to be treated as reductions if the deduction or payment is paid by or due from the worker in the pay reference period—

(a) deductions made by the employer as respects the worker's expenditure in connection with the employment;

(b) payments—

(i) paid by or due from the worker to the employer as respects the worker's expenditure in connection with the employment, or

(ii) to any other person on account of such expenditure.

(2) The payments referred to in subparagraph (1)(b) are not to be treated as reductions if the expenditure is met, or intended to be met, by a payment paid to the worker by the employer.

54. Regulation 19 states:-

(1) In this Part, references to "training" include hours when the worker is—

(a) attending at a place other than the worker's normal place of work, when the worker would otherwise be working, for the purpose of receiving training that has been approved by the employer;

(b) travelling, when the worker would otherwise be working, between a place of work and a place where the worker receives such training;

(c) receiving such training at the worker's normal place of work.

(2) In paragraph (1), hours when the worker would "otherwise be working" include any hours when the worker is attending at a place or travelling where it is uncertain whether the worker would otherwise be working because the worker's hours of work vary either as to their length or in respect of the time at which they are performed.

55. Regulation 20 states:-

In this Part, references to "travelling" include hours when the worker is—

(a) in the course of a journey by a mode of transport or is making a journey on foot;

(b) waiting at a place of departure to begin a journey by a mode of transport;

(c) waiting at a place of departure for a journey to re-commence either by the same or another mode of transport, except for any time the worker spends taking a rest break; or

(d) waiting at the end of a journey for the purpose of carrying out duties, or to receive training, except for any time the worker spends taking a rest break.

56. Regulation 46 states:-

The hours when a worker is training, where the worker would otherwise be doing unmeasured work, are to be treated as hours of unmeasured work.

57. Regulation 47 states:-

The hours when a worker is travelling for the purposes of unmeasured work are to be treated as hours of unmeasured work.

Decision

58. Before turning to the strike-out application, the Tribunal will address the Equality Act claim. This was withdrawn at the hearing and no submissions were made that it should not be dismissed. In these circumstances, the Tribunal dismisses the claim under the Equality Act 2010 in terms of Rule 52.

59. Turning to the NMW claim, the Tribunal reminded itself that the power to strike-out is a draconian one which should be exercised with caution. The Tribunal considered that this was particularly true in this case for two reasons.

60. First, the Tribunal had not heard any evidence or made any findings in fact. Although there may not be a significant factual dispute in relation to the case, the Tribunal did consider that there were matters such as the question of the amount of any expenses which should be treated as a reduction in terms of Reg 13 (if any) which would require evidence and findings in fact for the matter to be determined.

61. Second, this is a case where the burden of proof lies on the Respondent and not on the Claimant. There is a statutory presumption created by s28 of the 1998 Act that the Claimant is entitled to NMW (which the Respondent concedes) and that he has not been paid it. It is for the Respondent to rebut that presumption. The effect of this is that, in considering whether to exercise the power to strike-out, the Tribunal is, in effect, having to consider whether

the Respondent has reasonable prospects of rebutting that presumption and not whether the Claimant has no reasonable prospects of proving that he was not paid the NMW. In the Tribunal's view, this is a subtle but important distinction.

62. The Tribunal also considered that this was a case where it needed to be satisfied that the Respondent would be able to show that the Claimant was paid the NMW as a whole for the Tribunal to be prepared to strike-out rather than striking any of the particular aspects of the claim. The Claimant presents various arguments as to why he says the proper calculation of his hourly rate produces something less than the NMW and if some of those argument find favour at a final hearing but others do not then the claim has a whole may not fail and it would just be a question of how much of a shortfall there was rather than whether there was a shortfall at all.

63. With that being said, the Tribunal does need to consider those various aspects and will deal with each of them in turn.

64. First, there is the issue that the Claimant says that there should have been a separate training fee for the time spent training for the role over and above the fee paid for the work done on election day. The Claimant relies on the fact that other local authorities pay such a fee and that such a fee has been paid to him in the past (for example, at the European elections).

65. The Tribunal does consider that this argument has no reasonable prospects of success. This is a matter of pure contract law; if the parties to the contract have not agreed such a fee then no such fee is payable. The Tribunal does not consider the fact that a training fee was paid at early elections or that other local authorities pay this creates any implied term of the contract that such a fee is payable; the engagement as a Presiding Officer is a new engagement each time there is an election and so a new contract is created each time with parties free to agree different terms and conditions if they wish; the practices of other employers does not create a custom and practice which implies a term into any contract between the Claimant and Respondent especially where there is no consistent practice in terms of the sums paid as training

fees. Finally, the Claimant did not produce any statutory or other legal authority that created an obligation on the Respondent to pay a training fee.

66. In these circumstances, the Tribunal considers that there are no reasonable prospects of success in the argument that the Claimant should have been paid a training fee over and above the fee paid to him. However, the Tribunal notes that this argument was always an alternative to the issue relating to whether the time spent training (including travelling) should be included in the hours of work for the purposes of calculating his hourly rate. This issue will be addressed below.

67. Second, there is the issue of the expenses incurred by the Claimant in carrying out the work of Presiding Officer which he says should be subtracted from the fee paid to him in terms of Regulation 13 NMWR and the reduced figure used to calculate his hourly rate. There are various different expenses he seeks to subtract from the fee; travelling expenses for attending training; travelling expenses for collecting and returning ballot boxes; the cost of a mobile phone top-up.

68. The Respondent initially accepted that some expenses could be subtracted from the fee in terms of Regulation 13 and the dispute related to the amount to be subtracted. If that remained the position then the Tribunal would have been of the view that this aspect of the case required evidence and findings of fact in relation to the amount of expenses to be subtracted from the fee meaning that the Tribunal would not have considered that this aspect of the case did not have reasonable prospects of success.

69. However, the Respondent's position shifted when they lodged the supplementary submissions and it was now argued that no expenses at all fell to be subtracted from the fee in terms of Regulation 13 NMWR on two bases; that s27(2) ERA excludes expenses from the definition of "wages" for the purposes of a claim under s13 ERA and so these expenses cannot be a deduction of wages; that Regulation 13 NMWR only applies to payments made to or deductions made by the employer and the expenses in question were not paid to the Respondent. The Tribunal requires to address these

arguments given that, if the Respondent is right on either of these, the expenses cannot be subtracted from the fee and so, even if the Claimant won on other aspects of the claim (for example, the inclusion of the hours spent training) then his hourly rate would still be above the NMW that applied at the time.

70. In relation to the argument flowing from s27(2) ERA, the Tribunal considers that the Respondent has proceeded on the basis of two fundamental errors.

71. The first error is that they have mistakenly conflated two completely separate statutory provisions. There is no argument that expenses are not "wages" for the purposes of a claim under s13 ERA and if an employer did not reimburse a worker for expenses which they had agreed to pay then the worker could not pursue a claim under s13 ERA to recover such expenses (although they may have a remedy elsewhere). However, the provisions of Regulation 13 NMWR relate to the calculation of the hourly rate and states that certain deductions or payments made in relation to the work reduce the amount paid to the worker for the purposes of that calculation. These are not "deductions" in the same sense as that word is used in s13 ERA where a deduction of wages occurs when the employer pays the worker less than they are legally entitled to be paid. The Tribunal considers that s27(2) ERA has no bearing on Regulation 13 NMWR and does not mean that expenses cannot be subtracted from the sum paid to the Claimant in calculating his hourly rate for the purposes of determining whether he was paid NMW.

72. The second error is that the Respondent appears to misunderstand the Claimant's case. It is not that the Claimant is arguing that the Respondent should have reimbursed him for the expenses he says were incurred in carrying out the role of Presiding Officer and seeks to recover those sums by way of a claim under s13 ERA. If it was then the Respondent would right that such sums are not "wages" for the purposes of a s13 ERA claim.

73. Rather, the claim under s13 ERA proceeds on the basis that the Claimant says that the hourly rate paid to him for carrying out the work of Presiding Officer was less than the NMW which applied at the time. It is the shortfall in

the hourly rate which is the deduction of wages (and not the failure to reimburse expenses). The expenses are relevant to the calculation of the hourly rate applying the provisions in the NMWR and, in particular, Regulation 13.

74. The second argument made by the Respondent is that only payments made to the Respondent can count for the purposes of Regulation 13 NMWR. The Tribunal considers that this argument is fundamentally flawed as it completely ignores Regulation 13(1)(b)(ii) which very clearly states that payments made to third parties are within the scope of that Regulation. The Tribunal considers that the expenses which the Claimant argues should be subtracted from the fee paid to him are capable of falling within Regulation 13(1)(b)(ii) although it will be a question of evidence to be determined at any final hearing whether the expenses in question do fall within the scope of Regulation 13.

75. In these circumstances, the Tribunal does not consider that there are no reasonable prospects of success in this aspect of the defence insofar as it is said that the expenses which the Claimant says should be subtracted from the fee paid to him are not capable at all of falling with the scope of Regulation 13.

76. This puts matters back in the original position that there needs to be evidence heard and findings of fact made in order for it to be determined which, if any, of the expenses which the Claimant says he incurred in the course of carrying out his work should be subtracted for the purposes of Regulation 13.

77. The third and final aspect of the case is the question of whether the time spent by the Claimant in attending training for the role (including time spent travelling to and from the training) should be included in the Claimant's hours of work for the purposes of calculating his hourly rate under the NMWR.

78. The Respondent's position is, in summary, that the literal and unambiguous reading of the relevant provisions of the NMWR) is that the hours spent training can only be used in the calculation if the Claimant would otherwise be doing work for the Respondent. Given that the Claimant was employed to work only on the day of the election, the Respondent argues that he would

not be working at any other time and so this time cannot be included in the hours of work for the NMW calculation.

79. The Tribunal notes that there has been no consideration of this wording of the relevant provisions by the higher courts (or any consideration of the similar wording used in other provisions of the NMWR dealing with time work or output work) and so it is an entirely novel point as to whether training which the employer arranges to be done at times when a worker is not working falls outwith the scope of the hours of work to be used for calculating whether the NMW has been paid.

80. The Tribunal also notes that the role of Presiding Officer is an unusual one in both how the work is organised and how the work is remunerated; there is a payment of a flat fee for all work done in relation to the role and this work is mainly done on the day of the relevant election. It is not one which falls easily into the various categories of work described in the NMWR and parties agree that it has to be treated as "unmeasured work" as being the default category for work which does not fall into the other categories.

81. In considering this aspect of the case, the Tribunal takes account of the following matters:-

a. The wording of the relevant provisions of NMWR state that time spent training when the worker would otherwise be working is deemed to be working time for the purposes of the NMW calculation but does not state that this must be when they would be working for the same employer as that providing or approving the training. The Respondent's agent urged the Tribunal to read the provisions as meaning working for the same employer but the Tribunal considers that if this is what had been meant then Parliament would have said that.

b. The definition of "training" in Regulation 19 is non-exhaustive; the use of the word "including" in that Regulation clearly indicates that the scenarios listed are examples and that there could be other scenarios which count as "training" for the purposes of the NMW.

c. The Tribunal considers that the purpose of Regulation 46 is to include time spent training during working hours in the context of unmeasured work. However, it does not mean that time spent training at other times is excluded from working hours; the wording of the Regulation only addresses the inclusion of time spent training when the worker would otherwise be working and is silent on the question of whether training done at any other time is excluded.

82. Taking all of these matters into account and bearing in mind that the burden of proof lies on the Respondent, the Tribunal is not persuaded that there are no reasonable prospects of success in relation to this aspect of the claim. In particular, the Respondent's argument is founded on the proposition that Regulation 46 excludes training which is not done during working hours; the Tribunal considers that, in the absence of a specific wording in the Regulation to this effect, it is not prepared to read Regulation 46 in this way, particularly given the non-exhaustive definition of "training" in Regulation 19.

83. Further, when the nature of the Claimant's role is analysed then it is clear that he is agreeing to do "unmeasured worked" in the sense that he agrees to carry out the duties and functions of Presiding Officer. It is part of those duties that he must attend mandatory training and the Tribunal sees no reason why the time involved in that training (including travelling time) cannot be considered to be working time for the purposes of carrying out the "unmeasured work" in terms of Regulation 45 NMWR without the need to consider whether Regulation 46 deems that time to be included.

84. In conclusion, the Tribunal does not consider that it can be said that the claim does not have reasonable prospects of success overall. In particular, if the Claimant is successful in his arguments as to the extent of the expenses which should be subtracted from the fee in terms of Regulation 13 NMWR then this would be sufficient on its own for the claim to succeed. The Tribunal considers that the expenses issue is a matter which does require evidence to be heard and findings of fact to be made before it can be determined and so it would not be in keeping with the overriding objective or the interests of justice for the Tribunal to exercise its power to strike-out the claim.

85. For all these reasons, the Tribunal refuses the Respondent's application to strike-out the claim.

Employment Judge: Peter O'Donnell
Date of Judgment: 30 October 2020
Entered in register: 28 November 2020
and copied to parties