



EMPLOYMENT TRIBUNALS

Claimants: Mr A Addison
Mr G Halliday

Respondent: PossAbilities CIC

Heard at: Leeds **On:** 28 April 2021

Before: Employment Judge Cox

Representation:

Claimants: Mr Morgan, counsel

Respondent: Mr Searle, counsel

JUDGMENT

1. The claims of unauthorised deductions from wages fail and are dismissed.
2. In relation to the claims under Section 11 of the Employment Rights Act 1996, the Tribunal amends the written particulars provided to the Claimants by adding the following:

“If you are required to work on a Bank Holiday, you are entitled to time off in lieu at a later date as follows:

- (a) If the time you worked on the Bank Holiday was less than half your normal daily working hours: half of your normal working day

(b) If the time you worked on the Bank Holiday was more than half your normal daily working hours: one normal working day.”

3. All other aspects of the claims are dismissed on withdrawal by the Claimants.

REASONS

1. The Claimants work as support workers for the Respondent, which provides residential and social care to people who are elderly, vulnerable or have learning difficulties. They presented claims in relation to various aspects of their terms and conditions of employment that they alleged the Respondent was not observing or had changed.
2. During the course of the Hearing, the Tribunal gave Mr Addison leave to amend his claims to add a claim under Section 23(1)(a) of the Employment Rights Act 1996 (the ERA) in relation to underpayment for disturbances during sleeping-in duties and gave both Claimants leave to add claims under Section 11 ERA for declarations of their terms and conditions on time off in lieu for work done on Bank Holidays. The Respondent did not oppose these applications to amend and the Tribunal was satisfied that it was in the interests of justice to allow them: the revised claims could be decided on the basis of the evidence already prepared for the Hearing and within the time available, and it was in the interests of justice to resolve the outstanding disputes between the parties, particularly since the Claimants are still in the Respondent's employment. The Claimants withdrew various aspects of their original claims during the course of the Hearing, either during the clarification of the issues or at the conclusion of the evidence, and they did not object to these being dismissed on withdrawal.
3. By the conclusion of the Hearing, the claims that the Tribunal had to decide were: claims under Section 23 ERA of unauthorised deductions from wages in relation to payment for disturbances during sleeping-in duty; and claims under Section 11 ERA for declarations in relation to entitlement to time off for working on Bank Holidays.
4. At the Hearing, the Tribunal heard oral evidence from the Claimants and from Miss Tipper, Human Resources Director for the Respondent. The Tribunal was also referred to various documents in a file of documents produced for the Hearing and certain provisions of the National Agreement on Pay and Conditions of Service concluded by the National Joint Council for Local Government Services (“the Green Book”).

5. The Green Book sets out some of the terms that govern the employment of local government employees. These were relevant because the Claimants were originally employed by Calderdale Council. Their employment was transferred from the Council to Horton Housing in April 2014 and then from Horton Housing to the Respondent in May 2017. The parties agreed that both those transfers were “relevant transfers” under the Transfer of Undertakings (Protection of Employment) Regulations 2006, and that the Claimants’ terms and conditions were protected under Regulation 4 of those Regulations.
6. By the end of the Hearing, the Claimants’ position was that the terms that the Respondent should have been observing were those that applied to them at the time of their transfer from Calderdale to Horton Housing in April 2014. They did not allege that their terms were changed during their time working for Horton Housing between April 2014 and their transfer to the Respondent in May 2017, nor did they allege that the Respondent had changed their terms during their employment with it. Rather, they alleged that the Respondent had not respected the terms that they had had with Calderdale at the time of the transfer to Horton Housing.

Payment for disturbances during sleeping-in duty

7. During the course of their work, the Claimants were required on occasions to sleep at the residential premises where the Respondent’s service users lived. They alleged that they had been underpaid or not paid at all for time during which they were disturbed during these sleeping-in duties.
8. It is unlawful for an employer to make unauthorised deductions from a worker’s wages (Section 13(1) ERA). A deduction arises if the total amount of wages paid on any occasion by the employer to the worker is less than the total amount of the wages properly payable to the worker on that occasion (Section 13(3)).
9. In order to decide whether the Claimants had been paid less than the amount properly payable to them for disturbances during sleeping-in duties, the first issue that the Tribunal had to decide was the conditions under which payment would be made. The Claimants said that they were entitled to be paid for any time that they were prevented from sleeping beyond 30 minutes by any disturbance, from whatever source, whether that source was inside or outside the home. The Respondent said that they were entitled to be paid only if disturbed by being called on to work during that time.
10. The relevant provision of the Green Book is in Part 3 “Other national conditions” and in Section 2 of that Part, headed “Working arrangements”. It reads as follows:

Sleeping-in duty

*Employees required to sleep in on the premises shall receive an allowance. .
. This allowance covers the requirement to sleep in and up to 30 minutes call
out per night, after which the additional hours provisions will apply.*

11. The provisions on additional hours read as follows:

Additional Hours

*Employees who are required to work additional hours beyond their working
week are entitled to receive enhancements on the following basis:*

Monday to Saturday Time and a half

Sundays and Public and Extra Statutory holidays Double time (min 2 hours)

12. The Tribunal interprets the clause on “Sleeping-in duty” as meaning that an employee will be paid for any time they are called out in excess of 30 minutes. The phrase “call out” clearly indicates, on its normal meaning, time when an employee is called upon to perform their duties, which in the Claimants’ case is their duties as support workers. On no reasonable interpretation could it be viewed as meaning that the employer will pay the employee for any disturbance to their night’s sleep of whatever kind. Wherever an employee is sleeping, whether on an employer’s premises or at home, they can potentially have their night’s sleep disturbed by a car alarm or a noisy party. If an employer is agreeing to pay for that disturbance, the Tribunal would expect there to be very clear words to establish that.
13. The Claimants relied on the fact that, in practice, during the time they had worked for Calderdale and Horton Housing and for the first two years of their employment with the Respondent, they had been paid for any time during which they had been disturbed. They argued that that established a contractual right to be paid on that basis, derived from custom and practice. If Calderdale and Horton in fact paid them on that basis, the Tribunal is in no doubt that that was because of a misunderstanding by the relevant managers of the contents of the Green Book. Whilst the Respondent paid them on that basis initially, the Tribunal accepts Miss Tipper’s evidence that, once the Respondent realised that the Claimants were recording the hours during which they claimed to have been disturbed as “extra hours”, indicating that they were overtime, rather than hours of call out, they were challenged about that and told to record the hours as hours of call out. They were then expected to evidence the work that they had been called upon to do. There was no note in the diaries kept to record events in the house and events affecting individual service users to indicate that they had been called out. As a result, they were not paid for the hours because the Respondent was not satisfied that they were hours during which the Claimants had been called out to work. The Tribunal does not accept the fact that the Respondent initially paid the Claimants for the hours they claimed was evidence that the

Respondent accepted that it was contractually required to pay them on that basis, nor that payments on that basis had become part of the Claimants' contractual entitlement by custom and practice whilst at Calderdale or indeed at any time afterwards.

Rate of payment

14. The next issue for the Tribunal was the rate at which any time during which the Claimants were called out during a sleeping-in duty should be paid. The Claimants allege that they were entitled to be paid at 1.4 times their normal rate of pay. The Respondent's position was that they were entitled to be paid at their normal rate of pay only. The Green Book provision set out above states that the rate should be the same as additional hours, that is, at either 1.5 or 2 times the normal rate of pay, depending on the day on which the work is done. This is clearly not consistent with either the Claimants' or the Respondent's position. The Claimants were working in a unionised environment at Calderdale, and the Tribunal concludes that some sort of local agreement must have been reached with the recognised unions to amend the rate of payment to 1.4 times the normal rate of pay.
15. The Respondent's position that only the normal rate of pay is payable appears to rest solely on the information given to it on the terms and conditions of transferred employees provided at around the time of the transfer to the Respondent from Horton Housing. That information was that employees were entitled to "their normal hourly rate" if disturbed during the night. At the same time, however, Miss Tipper accepted that the Respondent was bound by the terms and conditions that applied at Calderdale. Whilst the Tribunal is satisfied that there must have been a local agreement to reduce the applicable rate to 1.4 times the normal rate of pay, because that is what the Claimants accept, in the absence of evidence the Tribunal does not accept that there was a local agreement to reduce the applicable rate to normal pay only. The Tribunal is strengthened in that conclusion by the fact that the Respondent accepts that the "additional hours" rate was 1.4 times the normal rate of pay if applied in its usual context of overtime rates.

Evidence of deductions

16. Having decided what the Claimants' contractual terms were, the next issue for the Tribunal was whether they had in fact been paid less than what was properly payable to them under those terms on any particular dates. The Tribunal was not presented with the evidence to establish the dates of the unauthorised deductions, the dates on which it was alleged that the Claimants were called out to perform work during sleeping-in duties or the length of time they spent on those call outs.

17. The Tribunal was therefore not able to be satisfied that the Claimants had been paid less than what was properly payable to them. Their claims of unauthorised deductions were therefore dismissed.

Time off for work on Bank Holidays

18. The relevant provision of the Green Book on time off for working on Bank Holidays reads as follows:

Public and Extra Statutory Holidays

Employees required to work on a public or extra statutory holiday shall, in addition to the normal pay for that day, be paid at plain time rate for all hours worked within their normal working hours for that day. In addition, at a later date, time off with pay shall be allowed as follows:

Time worked less than half the normal working hours on that day Half Day

Time worked more than half the normal working hours on that day Full Day

19. The Claimants alleged that they were entitled to time off with pay equivalent to the hours they worked on the Bank Holiday so that if they worked more than their normal working hours on that day they were entitled to the full number of hours they had worked off in lieu. The Respondent's position was that the reference to "full day" in the Green Book meant in effect one normal working day for the employee concerned.
20. The Tribunal accepts the Respondent's construction of the normal meaning of "Full day". That was the construction given to it by Calderdale's HR Contracts and Payroll Administrator when the Respondent asked Calderdale to clarify the position. He said that "the day back and the day worked have no relation in hours" but added "managers at the council interpret this in different ways". The Tribunal views the reference to different interpretations as no more than a tactful indication that some managers at Calderdale might be misinterpreting the meaning of the provision.
21. The Claimants rely on an email sent to the Respondent by Horton Housing confirming transferred employees' terms and conditions at around of the time of the transfer in May 2017. This states: "Bank holiday enhancement: salary plus hours worked at plain time (plus *equivalent* time off in lieu)" (the Tribunal's emphasis). Again, the Tribunal considers that if this intended to mean that employees are entitled to the same amount of time off in lieu as the hours worked on the Bank Holiday, it is not an accurate summary of the contractual position. Likewise, the Tribunal does not accept that the fact that the Claimants might have been allowed the same number of hours off in lieu as they had actually worked whilst employed by Calderdale and Horton Housing reflects that those employers accepted that that was their entitlement when at Calderdale; it is

more likely than not that it was due to the relevant managers misapplying the contractual provision. The Tribunal was not satisfied that it was evidence that Calderdale had accepted by custom and practice that this was part of the Claimants' contractual entitlement.

22. The Tribunal therefore declares that the statement of the Claimants' entitlement to time off in lieu of hours worked on a Bank Holiday that should have been included in the statement of initial employment particulars provided by Calderdale reads as follows:

If you are required to work on a Bank Holiday, you are entitled to time off in lieu at a later date as follows:

If the time you worked on the Bank Holiday was less than half your normal daily working hours: half of your normal working day

If the time you worked on the Bank Holiday was more than half your normal daily working hours: one normal working day.

Employment Judge Cox
Date: 28 April 2021