Appeal No. UKEAT/0209/20/RN

EMPLOYMENT APPEAL TRIBUNAL

ROLLS BUILDING, 7 ROLLS BUILDINGS, FETTER LANE, LONDON EC4A 1NL

At the Tribunal
On 6 May 2021

Before

HIS HONOUR JUDGE AUERBACH

(SITTING ALONE)

MS I OPALKOVA — APPELLANT

ACQUIRE CARE LTD — RESPONDENT

Transcript of Proceedings

JUDGMENT

FULL HEARING

APPEARANCES

The Appellant	MR IAN BROWNE (of counsel) Instructed by: Ms I Opalkova (The Appellant)
For the Respondent	MR NICK BOERS (Managing Director)

SUMMARY

Unlawful Deduction From Wages – National Minimum Wage

The Claimant was employed by the Respondent to provide home-based care to its clients. She claimed that she was entitled to be paid the National Minimum Wage in respect of her time spent attending induction training. The Employment Tribunal, relying upon regulation 33 of the **National Minimum Wage Regulations 2015**, and its conclusions that the Claimant was not employed by the Respondent at that time, and would not have been permitted to carrying out caring duties until she had completed the training, dismissed this claim. The Tribunal erred because it failed to consider (a) whether the Claimant had entered a contract with the Respondent at the relevant time under which she was a worker within the meaning of section 54 **National Minimum Wage Act 1998**; and, if so, (b) whether her attendance at this induction training fell, in all the circumstances of the case, to be treated as work, having regarding to all the relevant provisions of the 2015 regulations, not just regulation 33.

The Claimant bought a car from the Respondent which she used for work. The Respondent reimbursed or covered her in full in respect of the car tax, insurance and maintenance costs. It processed those payments through PAYE. The Tribunal had correctly concluded that this did not amount to an unlawful deduction from wages. In particular, as the Claimant owned the vehicle, and was fully entitled to use it for personal as well as work purposes, and the Respondent covered the whole of these costs, these amounts could not be said to have been incurred wholly, exclusively and necessarily in the performance of the duties of the employment.

HIS HONOUR JUDGE AUERBACH

Introduction – the Tribunal's Decision

1. I will refer to the parties as they were in the Employment Tribunal ("the Tribunal") as Claimant and Respondent.

2. The Respondent provides home care services for adults. In the spring of 2017 it began employing the Claimant as a carer. As we shall see, she attended and completed what was described as 'induction training' in April, and began carrying out assignments with the Respondent's clients at the end of April. She was required to visit clients and provide them with care in their homes. Under her contract, the Respondent retained a discretion as to how much work to give her and when. In respect of a given day's work, she would have a roster of timetabled assignments. She drove by car from her own home to the first assignment, and then from assignment to assignment, before driving home after the last one was completed.

3. In October 2017, when she was still in the Respondent's employment, the Claimant presented a claim form raising complaints about wages, including the National Minimum Wage. Following preliminary hearings, and some amendment, the matter came to a full merits hearing in July 2019. With the consent of the parties, it was heard by a judge and a single lay member: Employment Judge Hawksworth and Mrs A E Brown. The Claimant appeared in person. The Respondent was represented by Counsel, Mr McPhail. The Tribunal heard evidence from the Claimant and Mr Boers, managing director and owner of the Respondent.

4. In its reserved decision the Tribunal determined six complaints. The Respondent conceded a complaint that the Claimant was not paid the National Minimum Wage in respect of travelling time when travelling from one daily assignment to the next. She also succeeded in

Working Time Regulations 1998 complaints relating to entitlement to daily rest not having been honoured on certain occasions, and to rest breaks not having been given on certain working days which lasted more than six hours. She failed in her complaint that she had not been paid increases in her hourly rate, triggered first by her completing her 12-week probation period and, later, by her completing six months' service, as the Tribunal found that such payments had been made, albeit in relation to one of them by way of a late back-payment.

5. The Grounds of Appeal that are before me relate to the two remaining complaints. The Tribunal Judgment in relation to them was as follows. At para. 2 it held:

> **"2. The claimant's complaint for one week's pay for five days training in April 2017 fails and is dismissed."**

At para. 4 it held:

> **"4. The claimant's complaint that the respondent unlawfully deducted tax and national insurance payments from insurance, road tax and car repair allowances fails and is dismissed."**

6. The Tribunal's salient findings of fact regarding induction training were these:

> **"35. We make the following findings of fact from the evidence we heard and read. The page numbers refer to the main bundle, those starting with an S refer to the supplemental bundle.**
>
> **36. The respondent provides home care services for adults. Carers attend clients' homes to provide care, then travel between assignments. Assignments are usually around 30 minutes. The care provided is complex, and the clients can be vulnerable.**
>
> **37. The claimant was made an offer of employment as a carer by the respondent on 10 March 2017.**
>
> **<u>Induction training, contract and rates of pay</u>**
>
> **38. The claimant was unable to start working until she had completed a period of induction training. The induction training, which was provided by the respondent, was compulsory and unpaid. The claimant understood that it would be unpaid.**
>
> **39. The claimant attended the induction training from 10 to 13 April 2017. The claimant was required to take and pass the training in order to be offered employment by the respondent. At the end of the training week the claimant successfully completed an online test and received a Care Certificate.**

40. After successfully completing the training, the claimant was given a contract of employment to sign (page 179). The document was dated 14 April 2017 and provided in relation to start date:

"Your employment with us starts on 14 April 2017."

41. The claimant signed the contract of employment on 13 April 2017."

7. Regarding the car scheme the Tribunal found as follows:

"49. Carers need a car to be able travel between assignments. The respondent permits carers to use their own vehicle or, for those who do not have a car, the respondent provides one.

50. The claimant was asked to attend the respondent's office on 28 April 2017. This was the day before her first day of work for the respondent. She met Mr Boers, the managing director and owner of the respondent. She was told that she would spend some time shadowing a colleague. She was given timesheets setting out her assignments for the next few days. She was given a personal number to log into the CM2000 system to record her contact hours.

51. At this meeting, the claimant and Mr Boers also discussed arrangements regarding the car. The claimant did not have her own car. She knew that she would need a car to work for the respondent, so that she could travel between assignments. Until this point the claimant had understood that she would be provided with a company car which would be owned, maintained and paid for by the respondent but which would be available for her to use to travel from home to her first assignment, between assignments and then to return home at the end of the day.

52. The claimant's understanding was reasonable because the contract of employment signed by her referred to 'using a company car'. Mr Boers has accepted that the terminology caused confusion and he has since amended the contracts and scheme wording to 'Employee car ownership scheme' rather than company car scheme.

53. The position regarding the car scheme was clarified to the claimant by Mr Boers at the meeting on 28 April 2017. The claimant was told by Mr Boers that she would be given a loan of £600 to purchase a car from the respondent. The loan was interest free and would be paid back to the respondent at the rate of £20 every four weeks which would be deducted from the claimant's pay.

54. The claimant and Mr Boers signed a car loan agreement document which set this out (page 306). The registration certificate for the car was transferred into the claimant's name. The claimant was also required to set up payments for business insurance and road tax for the car, both of which were in her name.

55. The claimant did not want to buy the car but felt pressured to sign the agreement. After she had signed the agreement the claimant and Mr Boers went to the car park and Mr Boers gave the claimant the car.

56. The respondent reimbursed the claimant for the amounts she paid in road tax and car insurance. These were paid to the claimant as allowances through the payroll and were recorded on her payslips. The claimant's road tax allowance was paid every four weeks from 2 June 2017 (page 454). There was a delay setting up the claimant's insurance allowance; this was not paid until 28 July 2017, and then a back payment for the earlier period was made (page 455).

57. When the claimant's car required repairs in August 2017, the respondent paid for the repairs. The payment was then put through payroll as a payment to the claimant. As the payment had actually been made by the respondent to the garage direct rather than to the claimant, the amount paid was included as a payment on the claimant's payslip ('Car Maintenance') and then as a deduction ('Advance').

58. The respondent deducted tax and national insurance payments from the road tax and insurance allowances paid to the claimant, and from the car maintenance payment.

59. The respondent also had a one page document headed 'Company Car scheme' which explained the car loan, the insurance and road tax allowances and the car maintenance arrangements (page 483). The claimant said that the respondent had manufactured this document specifically for the tribunal proceedings and that she had not been given a copy at the time.

60. We find that it is more likely that the document was in existence at the time the claimant joined the respondent. This is because it has a similar heading to the pay rates document on page 482 which the claimant accepts she received while in employment. Also, the car scheme document is headed 'Company Car Scheme'. Mr Boers has accepted that this terminology caused confusion and he has since amended the contracts and scheme wording to 'Employee car ownership scheme'. If the document had been created specifically for the tribunal proceedings, it could have omitted the reference to 'company car scheme' to put the respondent in a better light.

61. However, we accept the claimant's evidence that she did not receive this document at the time. It is clear that she was confused by the car scheme and the payments she would receive under it, and she may have been clearer if she had received the document at page 483.

62. The claimant made a number of complaints to the respondent about the car scheme during her employment. The respondent made it clear to her that she could leave the scheme and make other arrangements if she wished: for example on 27 July 2017 the claimant was told that she could buy her own car (page 120), and on 30 November 2017 the respondent's HR manager set out a number of options for the claimant including leaving the company car scheme arrangement (page 146). The claimant did not take any of these up."

8. In respect of the wages claim in relation to the training, the Tribunal concluded:

"113. The claimant claims one week's pay for five days training in April 2017 at the start of her employment.

114. Some training time is included in hours worked for national minimum wage purposes. Regulation 33 provides that training time is treated as hours of time work when it is time spent training and when the worker would otherwise be doing time work.

115. We have found that the claimant was not employed by the respondent until after she had completed her initial training. The training was compulsory and the claimant could not be employed by the respondent until she had completed it.

116. During the period from 10-13 April 2017 when the claimant was attending the initial training, if she had not been attending that training, she would not have otherwise been doing time work. This is because she did not work for the respondent at that time, and would not have been able to do time work.

117. The time spent by the claimant on the initial training during 10-13 April 2017 does not therefore fall within regulation 33, and for this reason we have concluded that the time spent by the claimant at initial training does not count as time worked for national minimum wage purposes.

118. We have also considered whether the claimant was entitled to be paid for the time at initial training at contractual rates of pay. We have concluded that she was not. The terms of her contract provided that she would only be paid for contact time, ie time with clients. The claimant was aware that her attendance at training would be unpaid.

119. We have concluded therefore that there was no unauthorised deduction from the claimant's wages in respect of the failure to pay her for the initial training period."

9. In respect of the complaint regarding deductions for tax and NI, in relation to car payments, the Tribunal's conclusions were as follows:

"122. There was an understandable degree of confusion on the part of the claimant about the arrangements the respondent was going to make to provide her with a car. The arrangements were clarified by Mr Boers on 28 April 2017, although the claimant was not happy about the basis on which she was provided with a car by the respondent.

123. The payments that the respondent made to the claimant in respect of car insurance, road tax, and car maintenance were benefits in kind. As such the respondent was required to deduct tax and national insurance from these payments and pay the deductions to HMRC under the statutory PAYE scheme.

124. Accordingly, we conclude that the deductions from the car insurance, road tax, and car maintenance allowances are permissible exceptions which can be deducted from wages under section 14 of the Employment Rights Act.

125. We appreciate that this meant that the claimant was out of pocket in relation to car expenses, because she had to pay tax on them but the deduction of tax and national insurance from these payments by the respondent was not unlawful. On the contrary, the respondent was obliged to make these deductions under the statutory tax scheme."

Grounds of Appeal

10. At a Rule 3(10) hearing, at which the Claimant was represented by an ELAAS representative, three amended grounds of appeal were permitted to proceed, as follows:

"Ground 1: Unauthorised Deduction from Wages: Induction Training

The Tribunal erred in law, in paragraph 118 of the Reasons, in failing to conclude that there was a binding contract in place between the Appellant and the Respondent, as set out in the terms of the letter dated 10 March 2017, the terms of which included the following: (a) that the Claimant was required to attend an induction training course; (b) that she would be paid at the rate of £8.30 per hour; and (c) that failure to attend the induction training course, once arranged, would

result in the Claimant being invoiced for the cancellation cost, such that the Claimant was contractually entitled to be paid at the contractual rate of £8.30 per hour for hours spent on the induction training course.

Ground 2: Unauthorised Deduction from Wages: Induction Training

In the alternative the Tribunal erred in law, in paragraph 117 of the Reasons, in concluding that the hours spent by the Appellant on the compulsory induction training course did not amount to "*time work*" as defined in Regulation 33 of the National Minimum Wage Regulations 2015. Specifically:

(a) The Tribunal erred in law in concluding that the Appellant did not 'work for' the Respondent at the time of attendance at the induction training course, given that she was under the direction and control of the Respondent when attending the said course;
(b) The Tribunal's decision was contrary to the guidance provided by ACAS in the *Guidance for those New to Work* under the heading *The National Minimum Wage: Training* (*"When you're new to a role, your employer may send you on training courses to gain skills or qualifications. You have the right to be paid for this kind of training as though it were normal working time ... If your employer sends you on a compulsory training course, you have the right to be paid for the time spent on the course."*);
(c) The Tribunal also erred in law in concluding that the Appellant would not "*otherwise be doing time work*" for the purposes of Regulation 33 had she not been attending the compulsory training under the direction and control of the Respondent and at risk of a financial penalty in the event of non-attendance.

Ground 3: Unauthorised Deductions from Wages: Tax Payments

The Tribunal erred in law in concluding that the Respondent was permitted to deduct tax and National Insurance from the payments made to the Claimant to reimburse her for amounts that she had expended on purchasing business insurance and road tax on the vehicle used to undertake her duties and in respect of the cost of maintenance of the vehicle.

Specifically:

(a) The Tribunal erred in law in concluding that the business insurance, road tax and maintenance constituted "*benefits in kind*" (paragraph 123 of the Reasons);
(b) Alternatively, the Tribunal erred in law in failing to explain its reasons for concluding that the payments amounted to benefits in kind;
(c) The Tribunal err in law in failing to consider and apply the provisions of sections 327, 334 and 336 of the Income Tax (Earnings and Pensions) Act 2003, and failed to conclude that the payments made to the Claimant fell within the terms of sections 334 and 336, such that tax and National Insurance should not have been deducted;
(d) Alternatively, the Tribunal erred in law in failing to explain its reasons for concluding that the reimbursement of sums expended were subject to deduction of tax and National Insurance."

11. The Respondent's Answer relied on the Tribunal's decision as correct, and also asserted that it relied on the alternative contention that the car payments were "money's worth" transactions as described in section 62 **Income Tax (Earnings and Pension) Act 2003**.

12. At this hearing today, the Claimant was represented by a pupil-barrister, Mr Browne. Mr Boers appeared for the Respondent as a litigant in person. I had skeleton arguments and full heard oral arguments from them both. I had a main bundle, including some documents which were before the Tribunal. The Claimant also wished to rely upon some further documents which were *not* before the Tribunal, to which, as I will describe, Mr Boers objected.

Grounds 1 and 2 – Arguments, Law, Conclusions

13. The first two grounds of appeal relate to the induction training. The Tribunal found that the Claimant attended induction training from 10 to 13 April 2017 and was not paid for doing so. At the time, the hourly rate for the National Minimum Wage was £7.50 and the hourly rate provided for in her contract was £8.50. The claims that she should have been paid one or other of these amounts both failed. These grounds contend that the Tribunal erred by not concluding that she was at least entitled to the National Minimum Wage in respect of her attendance at this training (ground 2); and, over and above that, that she was entitled to her ordinary contractual hourly rate, in that respect (ground 1). Alternatively, it is said that the Tribunal has failed sufficiently to explain its reasons for rejecting these particular complaints.

14. It is convenient first to consider ground 2. The relevant provisions of the **National Minimum Wage Act 1998** ("the **1998 Act**") are as follows:

> **"1 Workers to be paid at least the national minimum wage.**
> **(1) A person who qualifies for the national minimum wage shall be remunerated by his employer in respect of his work in any pay reference period at a rate which is not less than the national minimum wage.**
> **(2) A person qualifies for the national minimum wage if he is an individual who—**
> **(a) is a worker;**
> **(b) is working, or ordinarily works, in the United Kingdom under his contract; and**
> **(c) has ceased to be of compulsory school age.**
> **(3) The national minimum wage shall be such single hourly rate as the Secretary of State may from time to time prescribe.**
> **(4) For the purposes of this Act a "pay reference period" is such period as the Secretary of State may prescribe for the purpose.**

(5) Subsections (1) to (4) above are subject to the following provisions of this Act.
…

54 Meaning of "worker", "employee" etc.
…
(3) In this Act "worker" (except in the phrases "agency worker" and "home worker") means an individual who has entered into or works under (or, where the employment has ceased, worked under)—
(a) a contract of employment; or
(b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual;
and any reference to a worker's contract shall be construed accordingly.
…

28 Reversal of burden of proof
(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.
…

17 Non-compliance: worker entitled to additional remuneration.
(1) If a worker who qualifies for the national minimum wage is remunerated for any pay reference period by his employer at a rate which is less than the national minimum wage, the worker shall at any time ("the time of determination") be taken to be entitled under his contract to be paid, as additional remuneration in respect of that period, whichever is the higher of—
(a) the amount described in subsection (2) below, and
(b) the amount described in subsection (4) below.
(2) The amount referred to in subsection (1)(a) above is the difference between—
(a) the relevant remuneration received by the worker for the pay reference period; and
(b) the relevant remuneration which the worker would have received for that period had he been remunerated by the employer at a rate equal to the national minimum wage.
(3) In subsection (2) above, "relevant remuneration" means remuneration which falls to be brought into account for the purposes of regulations under section 2 above.

(4)The amount referred to in subsection (1)(b) above is the amount determined by the formula—

$$\frac{A}{R1} \times R2$$

where—
A is the amount described in subsection (2) above,
R1 is the rate of national minimum wage which was payable in respect of the worker during the pay reference period, and
R2 is the rate of national minimum wage which would have been payable in respect of the worker during that period had the rate payable in respect of him during that period been determined by reference to regulations under section 1 and 3 above in force at the time of determination.
(5) Subsection (1) above ceases to apply to a worker in relation to any pay reference period when he is at any time paid the additional remuneration for that period to which he is at that time entitled under that subsection.
(6) Where any additional remuneration is paid to the worker under this section in relation to the pay reference period but subsection (1) above has not ceased to apply in relation to him, the amounts described in subsections (2) and (4) above shall be regarded as reduced by the amount of that remuneration."

15. Certain regulations contained in **The National Minimum Wage Regulations 2015** ("the 2015 Regulations") are also relevant. Regulation 7 provides:

"7. A worker is to be treated as remunerated by the employer in a pay reference period at the hourly rate determined by the calculation—

R/H

where—
"R" is the remuneration in the pay reference period determined in accordance with Part 4;
"H" is the hours of work in the pay reference period determined in accordance with Part 5."

16. Part 5 concerns hours worked for the purposes of the National Minimum Wage. Chapter 1 is headed "Determining the Hours of Work". Within that chapter, Regs. 17 and 19 provide:

"17. 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."
…

19.—(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."

17. Chapter 3 concerns "Time work". Within that chapter, Reg. 33 provides:

"33. The hours a worker spends training, when the worker would otherwise be doing time work, are treated as hours of time work."

18. Mr Browne submitted that the Tribunal erred, first, because it considered only whether the Claimant had begun working for the Respondent at the time of training, in the sense of whether she had begun carrying out caring duties. But, he submitted, it should first have considered whether she was, by the time she started the training, an individual who "has entered into" a contract under which she was a worker within the scope of s54 of the **1998 Act**. Had the Tribunal addressed itself to that question, he submitted, it would have been bound to conclude that she *had* entered into such a contract by that time

19. The Tribunal found as a fact that, on 10 March 2017, the Claimant was sent a letter, a copy of which was in the Tribunal's bundle. It was headed "Offer of employment as a carer". It began with the words:

"Further to your recent interview we are pleased to offer you employment with the Company as a Carer on the following terms detailed below."

It set out a number of basic terms. It included the following paragraphs:

"Upon signing this acceptance the company's induction process will begin. Training and support will be provided and you will be expected to undertake all relevant training in order for you to carry out the duties and responsibilities of this post. Updating your training is compulsory whilst the office is arranging for you to attend a Training Course and you accept this invitation, failure to attend will result in you being invoiced for the cancellation cost.

If you wish to accept this offer of employment, please sign the attached duplicate copy of this letter and return.

Full details of all your terms and conditions of employment are contained within your contract of employment, which will be issued to you within 8 weeks of you signing this letter."

There was then a box in which the following words appeared:

> **"I accept the offer of employment on the terms set out in this conditional offer of employment appointment letter dated 10th March 2017.**
>
> **I understand that this offer is null and void should the company not obtain satisfactory recruitment checks."**

There was a space for the Claimant to insert her name, sign and date a copy.

20. Mr Browne relied also on the fact, as found by the Tribunal, that the Claimant did attend and complete the training and was provided with a certificate to that effect on 30 April 2017.

21. In the run-up to this appeal hearing, a dispute emerged as to whether, as well as *receiving* the 10 March 2017 letter, the Claimant had also signed and *returned* a copy. She thereupon applied for documents to be introduced which, she contended, showed that she had done so. Taken at face value, these were: a copy of that letter bearing her signature, and print-outs of e-mail exchanges between her and the agency, and of a letter. These documents between them indicated that she had sent the agency, and they had received, a signed copy during March 2017. Mr Browne told me that his instructions were that the signed copy sent to the EAT was not a copy of the one the Claimant actually sent the agency. Rather, it was a further copy which she had signed in March 2017, and retained for her own records. Mr Browne said that these documents were only being made available now, as it had only become apparent in the run-up to this hearing that whether the Claimant had signed and returned a copy of the 10 March 2017 letter to the agency at the time was a contentious matter.

22. I interpose here that Mr Boers did not accept the authenticity of these documents; and he in any event maintained that the Claimant should not be permitted to rely upon them at this stage as part of her appeal, as these were documents which he said could and should have been before the Tribunal had she wished to rely upon them.

23. As to that, Mr Browne submitted that, applying the test in **Ladd v Marshall** [1954] 1 WLR 1489, the documents should be admitted. He said that notwithstanding that Mr Boers did not accept their authenticity, they were apparently credible. They were of probative value as, on their face, they showed that the Claimant *had* accepted the offer in the 10 March 2017 letter. That, he submitted, was the case, even though the signed copy sent to the EAT was not a copy of the signed one that the Claimant said she had actually sent to the agency, given that there was also an e-mail to the agency acknowledging receipt of the signed copy from her.

24. As to whether this evidence could not have been obtained with reasonable diligence for use at the Tribunal Hearing, Mr Browne accepted that the evidence *existed* at the time, but said that the issue of whether the Claimant *had* signed and returned a copy of this letter at the time was simply never raised at the Tribunal hearing, whether by the Claimant, the Respondent's representative, or the Tribunal itself. Bearing that in mind, the burden of proof, and that the Claimant had been representing herself in the Tribunal litigation, this should be treated as sufficient for this evidence to be admitted.

25. But in any event, argued Mr Browne, even without this documentation before it, the Tribunal should have considered on the evidence that it *did* have, whether a contract within the scope of s54 had been formed. Had it properly addressed itself to that question, it should have answered it in the affirmative. That was having regard, in particular, to the fact that acceptance was required for the induction process to begin, and the induction process *did* begin in the Claimant's case. So the Tribunal could or should have inferred from the mere fact of her attendance at the induction training, following receipt of the letter, that a contract had been formed, even if she had not returned a signed copy of that letter.

26. Mr Browne also submitted that the effect of the offer letter was that, if the Claimant took up the offer of induction training, but then left the course, she would be invoiced for the cancellation cost. This was a further indication that a contractual relationship had been formed.

27. Mr Browne submitted that the Tribunal's conclusion that, had the Claimant, on the days in question, not been attending induction, she would not have been working on those days, and hence that the effect of Reg. 33 of the **2015 Regulations** was that this was *not* to be treated as working time, was also in error. This was because attendance at the training was a compulsory requirement. If she did not attend it, then she would not be permitted to undertake caring work. A purposive interpretation was required. This fell to be treated as work, where it was a compulsory gateway to doing the caring work for which she was hired. Otherwise employers would be able to impose compulsory training on an employee, as a condition of their receiving further paid work, but without having to pay them for attending that training. As I have noted, the grounds of appeal suggest that this was at odds with the ACAS Guidance.

28. He also relies upon Reg. 19, providing that, owing to the fact that workers hours may vary, if it is uncertain that they would be working at a particular time if not attending training, then the training fell to be treated as work for the purposes of the National Minimum Wage calculation. Mr Browne also put into my bundle a copy of **Whittlestone v BJP Home Support Limited** [2014] ICR 275 but he did not make any detailed submissions in relation to it, as he said that he relied on it only by way of analogy.

29. As to ground 1 concerning the contractual position, in his written skeleton argument, Mr Browne relied on the fact that the 10 March 2017 letter referred to the fact that the Claimant would be paid £8.50 per hour, and to the training being compulsory. It did not state that the training would be unpaid. That statement only appeared in the full contract of employment,

which she only received and signed on 13 April 2017, once the training was complete. Accordingly, the Tribunal should have concluded that she had a contractual right to be paid her hourly rate for attending the training, and that not to do so was an unlawful deduction.

30. In oral submissions, however, whilst not abandoning ground 1, Mr Browne did not devote any time to developing it. This was because he referred me to Reg. 17(4), the effect of which was, he said, that if she succeeded on ground 2, then the award of a National Minimum Wage payment made now would have to be made at the presently prevailing rate, which is £8.91 per hour, which would exceed what was her hourly contractual rate at the time. Indeed, he said, in relation to other payments awarded to the Claimant with which this appeal was *not* concerned, the Tribunal itself, in a reconsideration decision, subsequently made an adjustment to its calculations to take account of the effect of Reg. 17(4).

31. Mr Boers' submissions on these two grounds were as follows. Firstly, the Tribunal had correctly concluded that the Claimant was *not* employed by his company at the time the training took place. The contract of employment was only signed on 13 April, after the training was completed. The issue of the offer letter of 10 March 2017 was not sufficient to form a binding contract and, indeed, that offer was conditional. It set out a number of conditions including that the Claimant, for example, had to have a DBS certificate, something which she only obtained on 30 April. The Tribunal had also not erred, in failing to find that the Claimant had signed and returned the letter. As I have indicated, he submitted that she should not be permitted to put before the EAT documents which, had she wished to rely on them, should have been introduced before the Tribunal. In any event, he did not accept that these were authentic, as he pointed to what he considered were a number of troublesome or perplexing features of their appearance.

32. Secondly, Mr Boers said that the Tribunal was right to conclude that the training took place at a time when, had she not been attending it, the Claimant would not otherwise have been working. The Tribunal correctly relied upon that, and on the fact that it was a necessary pre-condition of her doing the work that she first had to have completed the induction training. Mr Boers told me that, though this was not in the Tribunal's decision, this was reflective of a national standard that she was expected by the Care Quality Commission to attain.

33. Thirdly, he did not accept that the Claimant was under the direction or control of the Respondent whilst on the training course and hence that she was a worker. She could have left the course at any time. Indeed, not everyone who attended the course *did* complete it. It was also not correct that the Respondent would or could have claimed back the cost of the induction course. This was a misunderstanding of the relevant paragraphs of the 10 March 2017 letter and of other paragraphs referring to training in the full contract that was issued to the Claimant on 13 April. There were on-going training requirements over and above the induction training, and it was to these that these provisions referred. Indeed, there were no third-party costs associated with the induction training, which was carried out in-house.

34. Finally, the contract which the Claimant did sign on 13 April 2017, expressly provided that her attendance at the induction training was unpaid. She never took issue with this at the time and only did so much later as part of the Tribunal claim. Indeed, her original claim form referred to her "start date" as having been 14 April; and the claim for payment for the training was later introduced by way of amendment.

35. I turn to my conclusions in relation to these grounds. I will take ground 2 first. I agree with Mr Browne that the correct starting point should have been for the Tribunal to determine

whether or not the Claimant, at the start of the course, had a contract with the Respondent under which she was a worker within the meaning of s54 of the 1998 Act. It would have been sufficient to meet that requirement, had such a contract existed, even though she did not start doing care work until some time later. However, nowhere in its decision did the Tribunal cite s1 or s54 of the **1998 Act** or otherwise make reference to these provisions or the statutory definition of a worker for these purposes.

36. I am inclined to think that, when it stated, at para. 115, that the Claimant was "not employed" until after she had completed her initial training and could not be employed until she had done so, the Tribunal was referring to the fact that the full contract of employment document was signed on 13 April and provided for a start-date of 14 April *and* to its conclusion that this reflected the fact that the Claimant would not be permitted by the Respondent to carry out caring duties until she had completed the training or fulfilled certain other requirements. But neither of these findings by the Tribunal was determinative of the question of whether, as a matter of fact and law, a contract within the scope of s54 had been formed by the time the Claimant started the training.

37. The answer to the question whether such a contract had been formed was not necessarily determined by when the Claimant first began performing caring duties, or even by when she could or would first be permitted to do so. There is no reason why the contract itself could not have been formed on an earlier date. Further, the s54 definition of a worker itself applies to someone who has "entered into" a contract of the requisite type. Further, a contract, including that of a worker within s54 may, in a given case, be formed in writing, orally, by conduct, or by some mixture of one of more of these. The fact that the Claimant was not given, and did not

sign, the full written contract of employment until 13 April was therefore not by itself necessarily determinative of what the Tribunal had to decide in order to resolve this claim.

38. It is clear that there were, or are now, a number of other points at issue which may, potentially, have been relevant to the Tribunal's overall assessment of this question, but were not necessarily determinative of it. These include whether, as a matter of fact, the Claimant signed and returned a copy of the 10 March 2017 letter before she started the training; whether the intent or effect of that letter was that there could be some form of cost associated with the induction training if she did not complete it; and the significance or not of the fact that there was a gap between the time she had completed the induction training and when she actually started her first caring assignment. The Tribunal did not make any findings of fact about these matters or what, if any significance was to be attached to them.

39. Insofar as it relied upon the much more limited facts that it did, as supportive of the conclusion that the Claimant was not a worker, and not potentially entitled to the National Minimum Wage by the time she started the training, for the reasons I have given, the Tribunal erred. It failed to consider the relevant statutory provisions and it failed to make the necessary findings of fact in order to determine whether the Claimant was a s54 worker at the time, or if it did consider these aspects, then it erred by not addressing them in its decision at all.

40. This conclusion follows without recourse to s28 regarding the burden of proof but is, I think, reinforced by it. It was certainly the Claimant's case by the time of the full merits hearing, that she was entitled to the National Minimum Wage by the time she started the training course. I do not think that in every case where there is an issue about when the requisite contractual relationship was first formed, the mere assertion by a Claimant that this

happened on a date earlier than is accepted by the Respondent, without any supportive evidence at all, would be enough to cause s28 to be engaged. There has to be *some* evidence put forward in support of the assertion that a contractual relationship was first formed as of a certain date.

41. In this case, although the initial claim form gave a start-date of 14 April, it did refer to the induction training. The Tribunal also refers to the fact that the claim was amended at a Preliminary Hearing in July 2019; and I was told that this was when the wages claim in relation to the training week was introduced. This was clearly, therefore, a live issue in this case at the full merits hearing. The evidence and undisputed facts were, at least, that the Claimant was *issued* with the 10 March 2017 letter, that that letter provided that the training was a compulsory condition of being permitted to carry out caring work, and that the Claimant did, in fact, attend the training. That was, in my judgment, sufficient to cause s28 to be engaged in respect of this issue.

42. I have reached the conclusion that the Tribunal erred in respect of this claim without recourse to the additional documents that the Claimant sought to introduce before the EAT. However, I have noted the impact of s.28 and that the Respondent was, at the Tribunal hearing, represented by Counsel; and, indeed, at that time, had solicitors representing it in the litigation. I consider that this meant that, once the live claim for the National Minimum Wage in respect of the training week was introduced, there was some onus on the Respondent, if it wished to advance a case that the Claimant did *not* sign the 10 March letter, and that it was significant that she had not done so, to indicate that this was in issue. Although the Respondent would thereby have been asserting a negative position, this would have put the Claimant fairly on notice of this being an issue that it regarded as significant, and given her the opportunity, if she wished,

A then to adduce before the Tribunal any documentary evidence she might wish to rely on in respect of this point. But as a matter of fact, it was not raised by anyone at the time.

B 43. The **Ladd v Marshall** criteria must, it seems to me, be considered in the context of the overriding objective. Given that this issue was not raised before the Tribunal; given s28 and that the Respondent was at the time represented; and given that this issue has actually only emerged at the appeal stage, it would not, in my judgment, be fair for either side for this issue to C be resolved without these documents being considered. This would not prevent the Respondent from raising any issues it wishes to about their authenticity and/or their significance. The fair course to both sides would be to allow the documents to go in, and for any points about their D authenticity or significance to be raised and adjudicated.

44. All of that being said, these errors would not be sufficient to get the Claimant home on E ground 2 if the Tribunal was, in any event, correct to conclude that, even if she was a worker, the effect of Reg. 33 was that the Claimant was not entitled to the National Minimum Wage in respect of her attendance at the induction training. However, I conclude that the Tribunal also erred in this respect. That is for the following reasons.

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45. Firstly, nowhere in its decision did the Tribunal cite or consider what the impact of Regs. 17 and 19 of the **2015 Regulations** might be. Reg. 19, in particular, governs references G to training in the whole of Part 5 of the Regulations, and states that they include hours within its scope. Accordingly, the definition of training for the purposes of time working, found in Reg. 33, is not exhaustive.

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46. Secondly, these regulations cater for a case in which it is uncertain whether, if they were not attending the training, the worker would otherwise be working, by resolving such uncertainty in the worker's favour. I appreciate Mr Boers' argument that there was no uncertainty in this case, as the Claimant would not have been permitted to carry out caring duties until she had completed this course. But it seems to me that these provisions are indicative of a broader general approach, which is that, in some situations, attendance at or participation in training, depending on all the circumstances, should be counted *as work itself*, and that this is not necessarily dependent on whether the worker would have been doing something else that amounted to work at that time.

47. More generally, it seems to me that the concept of work, for the purposes of these regulations, is not necessarily or always to be confined to the carrying out of the primary duties for the purpose of which the contract is formed, in this case the provision of caring duties to the Respondent's clients. A worker working for an organisation may be required to do other things by the employer sometimes, apart from carrying out their duties of providing the primary service to clients, whether that be attending training, other staff events, briefings, meetings or taking part in other ancillary activities. There is no reason in principle why such activities, particularly where required by the employer of the worker, could not potentially and in appropriate case count as work. Whether training actually counts as work or not in the given case will be a fact-sensitive question and may depend on a number of factual circumstances, such as whether the training is compulsory, who is providing it, and so forth. Whether this conclusion is reached as a matter or ordinary interpretation of the concept of work or by way of a necessarily purposive interpretation of Regs. 19 and 33, I do not think matters.

48. It follows that where, as in this case, the evidence was that the Claimant was required to attend training, organised and given by the Respondent, as a condition of her being permitted to be assigned caring work, the Tribunal at least needed to consider and make findings of fact, having regard to the provisions of Reg. 19 as well as Reg. 33, before coming to a conclusion as to whether it amounted to work for the purposes of the **2015 Regulations**, and hence whether a claim could be made for the National Minimum Wage. I conclude that, by failing to take the necessary steps to properly reach a conclusion on these questions, the Tribunal erred in this regard as well. Ground 2, therefore, succeeds.

49. Mr Browne urged me that if I upheld ground 2 I should not remit the matter but should substitute my own decision that the Claimant is entitled to receive the National Minimum Wage in respect of whatever time she spent attending these training days. However, I have concluded that I am not able to do that, in particular, because further fact-finding is required; and that is not something that the EAT can undertake on the Tribunal's behalf. The matter will have to be remitted to the Tribunal in order to find further facts, to consider the relevant provisions of the **1998 Act** and the **2015 Regulations** and then draw conclusions afresh in relation to this claim.

50. In relation to ground 1, it appears to me on examination of the wording of Reg. 17(4) that Mr Browne is right that if the National Minimum Wage is now found to be payable in respect of the training days, then the applicable rate will be the rate prevailing when that determination is made. That is the effect, in particular, of the formula set out in Reg. 17(4) when fully analysed. In this case that would be more than the contractual rate. However, I have not determined that the Claimant *is* entitled to the National Minimum Wage in respect of the training. As I have explained, that issue has to be remitted to the Tribunal to consider afresh, and it is not guaranteed that the Tribunal will make such an award on fresh

consideration. In the meantime ground 1 was not abandoned by Mr Powell, and I will therefore also consider it.

51. As I have noted, the 10 March 2017 letter refers to the induction training and refers to the contractual hourly rate; but it is silent on the question of whether it does or does not apply to the induction training. However, the contract that was issued to the Claimant on 13 April states that the induction training is unpaid. Furthermore, the Tribunal made findings at para. 38 and again at para. 118, that the Claimant understood that it would be unpaid and that she was aware that her attendance at training would be unpaid. Although the Tribunal could, perhaps, have been more explicit as to what this meant, the natural reading of these passages is that the Tribunal found that she was aware and understood that this was the position before, or when, she attended the training, given the Tribunal's use of the words "would be".

52. Further, as Mr Boers pointed out, there is no suggestion of the Claimant taking issue at the time, or even after signing the contract of 13 April, with its provision to that effect, and this was a claim that was only made very much later on in the course of the Tribunal litigation. In those circumstances, I do not think I can say that the Tribunal erred in law in concluding that, as a matter of pure contractual provision, she was not entitled to pay in respect of the training. But that, of course, has no bearing on her National Minimum Wage claim in that respect. Ground 1 as such therefore fails.

Ground 3 – Arguments, Law, Conclusions

53. I turn to the question of the tax treatment of the car-related payments raised by ground 3. If these were deductions that the Respondent was permitted or required to make by statute, then s13(1)(a) **Employment Rights Act 1996** would apply to them. Otherwise, they were

unlawful, as the Claimant did not otherwise consent to them. The issue therefore revolved around whether, as a matter of the relevant provisions of the tax legislation, the Respondent was required or permitted to make these deductions. The Tribunal concluded that it was. Mr Browne submitted that the Tribunal erred when reaching that conclusion. He agreed that these payments fell to be treated as earnings for purposes of Part 3, s62 of **The Income Tax (Earnings and Pensions) Act 2003** ("the **2003 Act**"). However, his case is that the Tribunal erred because it failed to consider or correctly apply the provisions of Part 5 concerning deductions allowed by employers for the purposes of calculating employees' income and, in particular, Chapter 2 concerning deductions for employees' expenses.

54. In particular, he referred to the provisions of s336 and s338 of the **2003 Act**:

> **"336 Deductions for expenses: the general rule**
> **(1) The general rule is that a deduction from earnings is allowed for an amount if—**
> **(a) the employee is obliged to incur and pay it as holder of the employment, and**
> **(b) the amount is incurred wholly, exclusively and necessarily in the performance of the duties of the employment.**
> **(2) The following provisions of this Chapter contain additional rules allowing deductions for particular kinds of expenses and rules preventing particular kinds of deductions.**
> **(3) No deduction is allowed under this section for an amount that is deductible under sections 337 to 342 (travel expenses).**
>
> **...**
>
> **338 Travel for necessary attendance**
> **(1) A deduction from earnings is allowed for travel expenses if—**
> **(a) the employee is obliged to incur and pay them as holder of the employment, and**
> **(b) the expenses are attributable to the employee's necessary attendance at any place in the performance of the duties of the employment.**
> **(2) Subsection (1) does not apply to the expenses of ordinary commuting or travel between any two places that is for practical purposes substantially ordinary commuting.**
> **(3) In this section "ordinary commuting" means travel between—**
> **(a) the employee's home and a permanent workplace, or**
> **(b) a place that is not a workplace and a permanent workplace.**
> **(4) Subsection (1) does not apply to the expenses of private travel or travel between any two places that is for practical purposes substantially private travel.**
> **(5) In subsection (4) "private travel" means travel between—**
> **(a) the employee's home and a place that is not a workplace, or**
> **(b) two places neither of which is a workplace.**
> **(6) This section needs to be read with section 359 (disallowance of travel expenses: mileage allowances and reliefs)."**

55. Mr Browne submitted that the Tribunal found that the Claimant got a car because the Respondent required her to have one, one way or another, to do the job, as reflected in the provisions of her contract of employment. So the Tribunal should have concluded that the amounts that the Respondent reimbursed her in respect of tax, insurance and the maintenance costs were incurred wholly, exclusively and necessarily in the course of her duties within the meaning of s336(1)(b). The relevant provisions of s338 also applied. The Tribunal should have properly considered these provisions to be applicable in this case, and therefore concluded that the Respondent was not entitled to make deductions through PAYE in relation to these payments, so that the deductions that it madwere unlawful.

56. Mr Boers relied principally upon the provisions of s62(2)(b) and submitted that these payments plainly amounted to money or money's worth work and therefore fell to be treated as earnings. The Tribunal was therefore right to view them as what it called benefits in kind and to conclude that the Respondent was obliged to make the tax and NI deductions. Mr Boers referred to e-mail correspondence in my bundle from the Respondent's accountants, referring to s62(2)(b) as having that effect. He submitted that this was plainly the correct analysis. Although the documents in some places referred to the car as a company car, it was plainly *not* a company-owned car. The Claimant bought it from the Respondent, she owned it, and she accordingly insured and taxed it in her own name, as the Tribunal correctly found, and as the documents that were in Tribunal's bundle plainly showed. He added that these payments were, consistently with that approach, treated as part of the Claimant's remuneration when it came to the calculation of her holiday pay.

57. My conclusions in relation to this ground are as follows. Firstly, I observe that it was assumed by both sides that, if these payments *were* taxable payments within the scope of the

relevant provisions of the **2003 Act**, then they were also properly processed through PAYE. The argument before me simply revolves around the question as to whether they were properly considered to be taxable payments under the statutory provisions or not. As I have said, it is not actually disputed that these payments amounted to earnings within the scope of s62 and this is reinforced, it seems to me, by the provisions of s70, s71 and s72 which relate specifically to expenses. I do not need to set them out. The issue relates to the provisions of Part 5 concerning employment income and deductions allowed from earnings. More specifically, it seems to me that, ultimately, the answer to this question revolves around whether these were amounts that fell to be treated as incurred wholly, exclusively and necessarily in the performance of the duties of the employment for the purposes of s336(1)(b).

58. The Tribunal found at paras. 50 to 52 of its decision that the contract issued to the Claimant, which she signed on 13 April 2017, was not clear about the arrangements in relation to a car, and that prior to this she reasonably supposed she would be given the use of a car owned by the Respondent. However, it also found that, at the meeting on 28 April 2017, it was explained that the arrangement that would be made was that she would purchase the car with the assistance of a loan from the Respondent. The Tribunal also found that documentation was signed to that effect and that the vehicle was registered in her name and that she arranged for it to be insured and taxed in her name. It also found that she herself paid these amounts and was then reimbursed by the Respondent through payroll, and that, although the Respondent itself, in the first instance, paid the maintenance cost, this was then processed by payroll so as to treat it as an advance payment of an amount for which she was liable, and in respect of which the Respondent had thereby reimbursed her.

59. The Tribunal also found these arrangements reflected a scheme, set out in a genuine, contemporaneous document produced to it by the Respondent. The Tribunal found at para. 55 that the Claimant felt pressurised to sign the agreement. It also found that, although the scheme document was genuine and contemporaneous, it was not actually given to the Claimant at the time. Nevertheless it made clear findings that the Claimant did buy the car, received a documented loan in respect of the purchase price and, as I have said, that she was then registered as the owner and taxed and insured the vehicle in her own name. The Tribunal did not find that this agreement or arrangement was a sham in any legal sense. It considered the tax treatment of the payments made by the Respondent to her on the basis that the position going forward was, on the face of it, as agreed at, and following, the 28 April 2017 meeting. There is no challenge to those findings of fact as such, and it is not contended as part of this appeal that the Tribunal should have found that this arrangement or the associated documentation was in any legal sense a sham. The appeal has been brought solely on the basis that the Tribunal erred in its conclusion as to whether, given the agreement and arrangements that were put in place on and after 28 April 2017, these payments were taxable.

60. Whilst it is correct that the Claimant's contract required her, if using her own car to go about her assignments, to ensure that it was taxed, insured and roadworthy and, indeed, contained provisions about having a license and being competent to drive it, these provisions are not, by themselves, surprising, or indicative that the Tribunal erred in law in its consideration of the tax treatment of these payments. Given the Tribunal's findings of fact that the Claimant owned this vehicle and she taxed and insured it in her own name, I cannot see that it erred in law in reaching the conclusions that it did. In particular, there was no restriction on her ability to make use of this vehicle, if she so chose, for her own domestic, social or leisure purposes, in addition to using it for work. The vehicle was taxed and it was insured (the

documents were in my bundle) for social, domestic and leisure use as well as business use; and whatever repairs or maintenance were carried out on the vehicle one must assume they ensured that it was roadworthy for all use, whether for business, social, domestic or leisure purposes.

61. The Respondent paid the Claimant in full in respect of the tax, insurance and maintenance costs, and I do not think that in these circumstances it can be said that these amounts were incurred wholly, exclusively and necessarily by her in the performance of the duties of the employment. Nor do I think that the answer to that question could be said to turn on whether in practice the Claimant ever actually did make social, domestic or leisure use of the vehicle at any time; or, if she did, when or how frequently she did so. That she was able to do so, it seems to me, would be sufficient to support the conclusion that s336(1)(b) was not fulfilled, so that these expenses could not be claimed as a deduction by her for tax purposes, and hence the Respondent was right to treat them as taxable.

62. Although the Tribunal did not refer to all of these provisions or this precise analysis in its decision, I conclude that, nevertheless, it came to the right answer, and therefore it did not err in law in dismissing this particular claim. I therefore dismiss ground 3.

Outcome

63. Accordingly, I dismiss ground 1, regarding contractual pay for the training; I dismiss ground 3, regarding the tax treatment of the car-related payments; but I allow ground 2, which relates to whether the Claimant should have received the National Minimum Wage in respect of the training. That claim will go back to the Tribunal for further, fresh consideration, guided by my decision.