# EMPLOYMENT TRIBUNALS

**Claimant**: Mr S Ikie

**Respondent:** West London YMCA

**Heard at**: Watford (by CVP) **On**: 26 March 2021
**Before:** Employment Judge Cotton

**Appearances**
**For the Claimant:** Mr S Ikie (in person)
**For the Respondent:** Mr Wilson (Counsel)

This has been a remote video hearing which was not objected to by the parties. A face to face hearing was not practicable, and all issues could be determined at a remote hearing.

## RESERVED JUDGMENT

1. The claimant's claim that the respondent made an unauthorised deduction from his wages contrary to section 13 of the Employment Rights Act 1996 is dismissed.

2. The claimant's claim that the respondent refused to permit him to take rest breaks contrary to the Working Time Regulations 1998 is dismissed.

## REASONS

### Introduction

1. The respondent is a charity. It runs a number of hostels in London.

2. The claimant is employed by the respondent as a Weekend Housing Officer at the respondent's Greenford site in West London. At all relevant times he worked every Saturday and every Sunday on an afternoon shift. He was paid by the hour until around the middle of 2019 when he was moved to an annual salary.

3. By a claim presented on 29 July 2020 the claimant complains that, in the period up to 13 June 2020, the respondent made a series of unauthorised deductions from his wages, deducting one hour's pay for each day he worked.

4. He also complains that the respondent has, for the duration of his employment, refused to permit him to take rest breaks during his working day. As a result, he has suffered distress, including a detrimental impact on his health.

5. The claimant seeks sums of money by way of compensation and a declaration that his right to take rest beaks has been refused.

**Preliminary matters**

6. At the start of the hearing Mr Wilson on behalf of the respondent applied for the admission of seven short witness statements written by current or former members of staff. The (already extended) deadline for the exchange of witness statements was 11 March 2021. These statements were received by the claimant on 24 March – two days before the hearing.

7. The claimant submitted that these statements should not be admitted. They were too late. They were damaging to his case. He was representing himself and it would not be fair to admit them.

8. The respondent submitted that the statements were relevant to the issue of rest breaks, directly addressing points raised by the claimant's witnesses. They were short. They raised no fresh matters. The claimant had read and understood them. In the interests of proportionality only one witness, Ms George, was present to give her evidence and be challenged on it by the claimant.

9. I decided that it was in the interests of a fair trial to permit Ms George to give her evidence and to admit all of the written statements. However, I made it clear that statements written by witnesses who were not present to be challenged by the claimant could not be given the same weight as the evidence of witnesses attending the hearing.

10. I also clarified that since the claimant continues in employment with the respondent I was unable to consider any claim for breach of contract which the claimant may have wished to make.

**Law and Issues**

11. There are two parts to this claim:-
    a. a claim of unlawful deduction from wages contrary to section 13 of the Employment Rights Act 1996 ('the 1996 Act').
    b. a claim under Regulation 30 of the Working Time Regulations 1988 that the respondent has refused to permit the claimant to exercise his right to rest breaks to which he is entitled by virtue of Regulation

12(1).

12. The issues between the parties which potentially fall to be determined by the Tribunal were identified at the start of the hearing.

*Unlawful deduction from wages claim*

13. Section 13 of the 1996 Act says that workers have the right not to suffer a deduction from their wages by their employer which is not an authorised deduction. Failing to pay a worker for hours that he or she has worked may amount to an unauthorised deduction from his wages.

14. Regulation 35 of the Working Time Regulations 1998 says, so far as may be relevant in this case, that any provision in an agreement (whether a contract of employment or not) is void insofar as it purports to exclude or limit the operation of any provision of the Regulations save insofar as the Regulations provide for an agreement to have that effect.

15. The issues identified were as follows:-
    a. Did the respondent, in relation to each day worked by the claimant during the period up to 13 June 2020, pay the claimant for only seven hours work in circumstances in which he was entitled to be paid for eight hours work.
    b. If so was it an unauthorised deduction, that is, a deduction which the respondent was not entitled to make.
    c. If so, what was the sum deducted, when was it deducted and how much is the claimant owed.

16. The claimant limits his claim to the two year period preceding 13 June 2020. The respondent did not seek to argue that any part of the claim for unlawful deduction from wages was out of time.

*Refusal to permit rest breaks*

17. So far as relevant to this case, regulation 30 of the Working Time Regulations 1998 ('the Regulations') provides that a worker may complain to the tribunal where the employer has refused to permit him to exercise his right to rest breaks as set out in Regulation 12. Regulation 12 says that subject to the provision of any applicable collective agreement or workforce agreement (which did not apply in this case) a worker is entitled to a rest break of an uninterrupted period of not less than 20 minutes in any six hour working period, and is entitled to spend it away from his workstation if he has one. The Regulations do not require that the rest breaks are paid, although an employer may agree to pay for such breaks.

18. Regulation 21 says (so far as may potentially be relevant in this case) that the right to rest breaks does not apply where the worker is engaged in security and surveillance activities requiring a permanent presence in order to protect property and persons, or where the worker's activities involve the need for continuity of service as may be the case in relation to,

amongst other things, services related to residential institutions. In such cases – and by virtue of Regulation 24 – the employer is required, wherever possible, to allow the worker to take an equivalent period of compensatory rest and, where this is not possible for objective reasons the employer shall afford the worker such protection as may be appropriate to safeguard the worker's health and safety.

19. The issues identified were as follows:-
    a. What rest break was the claimant entitled to under the Regulations.
    b. Did the respondent refuse to permit the claimant to take, during his working day, the rest break to which he was entitled.
    c. If the claimant did not expressly request, and the respondent did not expressly refuse to permit, rest breaks, did the respondent put in place a system that failed to allow such breaks.
    d. If so, what compensation would be just and equitable having regard to employer's default and loss suffered by the claimant.

**Evidence**

20. I was provided with a bundle of documents, 225 pages long, which was agreed except that it omitted a contract referred to in the statement of the claimant's witness Ms Enwelim as being attached to that statement. This document was emailed to the Tribunal during the course of the hearing.

21. I was provided with witness statements from the claimant's witnesses Ms Idowu, Mr McStanhope and Ms Enwelim, all of whom attended and gave evidence.

22. For the respondent I was provided with witness statements from Ms Burl, HR Business Partner, and Mr McKeown, Head of Housing, Care and Support, each of whom attended and gave evidence. I was also provided with statements the following members or former members of staff: Ms George, Ms Milaweera, Ms Rehman, Mr Duaale, Ms Thomas, Mr Bignell and Ms Dhillon. Of these, only Ms George attended and gave evidence.

*Unlawful deduction from wages*

23. It was common ground that the claimant was employed by the respondent as a Weekend Housing Officer from 20 March 2004. His job was to provide support services to residents and to be responsible for security at the Greenford site in West London at weekends. He was a 'lone worker' which meant that during his shift he did not have anyone working with him. At all relevant times his regular shift was an afternoon shift which, and the claimant arrived at 3pm and left at 10pm; and it was common ground that he worked for 7 hours on a Saturday and 7 hours on a Sunday.

24. The claimant's initial contract ("the 2004 contact") says that the claimant's employment began on 20 March 2004. It says that his hours of work are '16 per weekend' and he is to be paid by the hour. The claimant said that, at that time, in practice he worked for 8 hours on a Saturday and 8 hours on a Sunday.

25. The claimant said that in around 2011 the respondent started to provide a 24 hour service, and this prevented him from leaving the building in order to take a break. He said his then-manager, Mr Masters, asked him to come in an hour later instead of taking a break. This arrangement was not written down and there was no documentary evidence of it. However, the claimant said that from that point, he turned up to work at 3pm and left at 10pm in the belief that he would be, and in practice was, paid from 2pm – ie for 8 hours a day rather than for the 7 hours actually worked.

26. It was common ground that in May 2019 the respondent sought to vary the claimant's contract.

27. The respondent's evidence was that this was to reflect a new HR system which included online rather than paper time sheets. It was decided that, since the claimant had for at least 10 years, worked the same hours – 14 per week end - it would be more efficient for the claimant to be paid a salary rather than being paid by the hour. A letter from HR to the claimant dated 10 May 2019 says 'Salary will be calculated on an annual basis. You are contracted to work 14 hours per week at the rate of £12.42 per hour…..'

28. The claimant said that this is what alerted him to the fact that the respondent did not share his understanding that his contractual hours were 16 per weekend, rather than 14, reflecting the fact that he in effect took an hour's paid rest break *before* starting work. He said that since his pay was not identical each week he had not previously realised that for many years he had been paid for 14 hours rather than 16. The evidence showed that he had made it very clear to the respondent that he did not agree to a contract which said that his hours of work were 14 rather than 16.

29. The respondent submitted that it was highly unlikely that the claimant had ever been told that he could work between 3pm and 10pm while being paid as though he had worked for 8 hours. The 2004 contract, which stipulated 16 hours, had in any event been varied by agreement in 2009 when the claimant was at risk from redundancy and had agreed to reduce his hours to 8 hours per weekend. I was directed to a letter from HR to the claimant dated 7 April 2009 saying 'We are delighted to confirm that as a result of the conversations we were able to have over the weekend your post is no longer at risk of redundancy; instead it has been secured by accepting a change to your terms and conditions of employment.' This letter attached a new contract dated 2 May 2009, which was however unsigned. This contract said 'The basic hours of work are 8 per week…' I was further directed to a letter from HR to the claimant dated 28 February

2012 which says ‘As you will recall, in 2009 your working hours for your permanent post of Weekend Housing Support Officer at Greenford were reduced from 16 per week to 8 per week. As part of the agreement to vary your contractual hours it was agreed that you would be offered the opportunity to work additional hours on a casual basis.’ The letter goes on to discuss whether the claimant is still available for casual work.

30. The claimant says that this contract was not agreed by him and that he had never agreed to a reduction to 8 hours and had never worked only 8 hours.

31. The respondent’s witnesses said that, whatever might have been the arrangement in 2004 and 2009, in practice the claimant had for many years worked for 7 hours and been paid for 7 hours, and had not challenged his working arrangements or his pay. He had, by his conduct over years, accepted this position. The respondent submitted that it was not credible that the claimant had failed to challenge the arrangement because he had believed for all this time that he was being paid for 16 hours while working 14. Prior to mid-2019 he was paid by the hour, submitted his own time sheets and was provided with payslips. Mr McKeown said that the respondent’s position had always been that they would be content for the claimant to work 16 hours instead of 14, in fact he had been asked multiple times to do so, but in that case he would need to work for 16 hours.

**Conclusions**

32. I find that the respondent did not make any unauthorised deductions from the claimant’s wages. It was accepted by the claimant that for years he had worked for 14 hours each weekend, and that he was paid for the same at the correct hourly rate. This is what happened in practice; both parties conducted themselves according to this arrangement; the claimant by his conduct accepted it. Up until he was transferred to a new pay system, he submitted time sheets recording the hours he had worked and received pay slips reflecting the arrangement. I find that this was the agreement between the parties at all relevant times.

33. I am not persuaded that the claimant had any legal entitlement to be paid for 16 hours while working only for 14 hours, on the basis that in practice, and pursuant to an agreement made with David Masters, he may have refrained from taking rest breaks during his shift.

34. Agreements to ‘contract out’ of the Working Time Regulations are in any event void except in specific circumstances. Neither party sought to argue that these applied.

35. I note that the claimant argues on the one hand that his agreement with the respondent was that he should effectively take an hour’s paid rest break before starting work and, on the other, that the respondent had refused to permit him to take a rest break during work.

*Rest breaks*

36. The claimant's evidence was that throughout his employment – or at least since 2011 when the respondent started to provide a 24 hour support service - he has been required to work 7 hour shifts without taking any rest breaks.

37. As far as the claimant's contractual entitlement to rest breaks is concerned, the position is not entirely clear. The 2004 contract fails to mention any right to rest breaks. The 2009 contract, which the claimant says he was not aware of, refers to a 25 minute break for every 3 hours worked. My attention was drawn to an unsigned draft contract drafted for the claimant and referring to a start date of 13 June 2020 which says 'you are entitled to one paid hour during each shift that you work ensuring adequate cover but this must not be at the beginning or end of a shift.'

38. As noted, the Regulations – in summary, and so far as relevant to this case – say that where a worker's daily working time is more than six hours he is entitled to a 20 minute uninterrupted rest break, away from his workstation if he has one. An exception applies, though, where the worker is engaged in security and surveillance activities requiring a permanent presence, or where the worker's activities involve the need for continuity of service as may be the case in relation to services relating to residential institutions. In such cases, the employer's obligation is to wherever possible allow the worker to take an equivalent period of compensatory rest and, where this is not possible, to afford the worker such protection as is appropriate to safeguard his health and safety.

39. The nature of the claimant's work for the respondent has been described above. He worked at weekends in a residential institution and part of his job was security-related. Therefore, while this was not argued by the respondent, I find that, based on such evidence as was presented about the nature of the claimant's job, at least to some extent he was involved in activities covered by the exception.

40. On the issue of whether the claimant expressly requested permission to take a rest break during his working day, aside from the fact of his having brought this claim, I was directed to an email from the claimant to his manager dated 6 August 2019. In this letter, amongst other questions, the claimant asks his manger to confirm how much time he is permitted for breaks and how was he to take uninterrupted breaks. The claimant said that this had not been clarified. The claimant also raised a grievance which was heard on 30 April 2020. This was mainly about his working hours (whether they were 14 or 16) but the note of the meeting records that the issue of breaks was also raised.

41. The claimant also said that because of the nature of his job and the circumstances in which he is required to work it is not possible for him to take breaks. He explained that Greenford is a 13 bed site with vulnerable residents, including teenage mothers. One aspect of his job is to listen out for sounds from a baby monitor in the office, investigating if he hears noises which suggest that a baby or mother is in difficulty. It is not possible to leave this monitor in order to take an uninterrupted break due to the risk of missing an incident for which he would later be held responsible. Further, some residents lose their keys or have their keys disabled, and he is required to be constantly in the office in order to let these residents in and out of the building. Additionally, visitors such as social workers come to the building and need to be let in. His job requires him to be on constant alert to let people in an out of the building, take their ID, sign them in and out of they visitor's book and so on. He acknowledged the existence of a CCTV camera but said it would not be right to rely on this camara to monitor goings-on.

42. The claimant also argued that the provision in the unsigned draft contract of 13 June 2020 about the need to ensure adequate cover demonstrates the respondent's intention to deny him a rest break, since as a 'lone worker' there are no colleagues to cover his break.

43. The claimant said that his inability to take rest breaks has had a negative impact on his health, exacerbating underlying medical conditions.

44. I heard evidence from three of the claimant's colleagues or former colleagues. Ms Idowu said that she has worked at the Greenford site for 6 years. Like the claimant she is a lone worker. She usually works the night shift but has on occasion worked the same shift as the claimant – 3pm to 10pm at the weekend. She was clear that she does not take uninterrupted breaks. She said that she had not been made aware of the possibility of taking such a break and that this would be a challenge given that a 24 hour service is provided and support must be offered when needed. Her evidence was that Greenford can be quite busy and unpredictable. She agreed that it was possible to put a sign on the office door indicating that she was away on her break, and that no one had ever told her she could not do this, but said that in practice she felt she always had to be available and that the residents 'always come first'.

45. Ms Enwelim also works at the Greenford site as a lone worker, generally on the morning shift which ends at 3pm. Her contract says she is entitled to a 20 minute break for every 6 hours worked but it also says she must ensure adequate cover while on her breaks, which is not possible given that she is a lone worker and at week ends it is unusual to have a manager or supervisor on site. She conceded that the Greenford site is not a very hectic 'oil rig style' environment and can be quiet, but was clear that in practice she does not take an uninterrupted break during her shifts. She feels she needs to be on alert at all times. Sometimes the bell does not work; sometimes residents try to sneak in animals or undesirable associates; some residents have mental health problems. Ms Enwelim was clear that 'my focus is only on my work. I am very committed to the

work. I believe in doing what is necessary.' Ms Enwelim said that she was aware that other staff have a practice of putting up a sign saying they were away on their break but she had never used such a sign or discussed a sign system with a manager. She said that when she goes on 'patrol,' which is one of her duties, she will close up the office.

46. Mr McStanhope also works at the Greenford site and is a lone worker. His shift is the night shift – 10pm to 8am. His evidence was that no provision has been made for him to take breaks, he had never discussed breaks with managers and in practice he does not take breaks.

47. Ms Graham's evidence on behalf of the respondent contrasted sharply with the evidence given on behalf of the claimant. She had formerly worked at Greenford site, at weekends, for almost 7 years, up until September 2019. Her manager, Mr Masters, had clearly told her that she could take a break. He had not said that she needed to provide cover – it was not possible for a lone worker to provide cover. She said that Greenford provides low to medium support and it was 'never too busy to take a break'. In fact, sometimes it had been too quiet and she had asked for additional responsibilities. When she took a break she would leave a sticky note on the door saying when she would be back. Ms Graham said that her usual shift was the morning shift and that when she took over from the night workers at 8am she had seen sticky notes left by other members of staff. It was true that sometimes she would need to interrupt her break to let residents in. She had experience of using baby monitors, and said that while every mother and baby had different levels of need it was not necessary to listen to the monitor constantly and it had never stopped her from taking a 20 minute interrupted break. She said 'You use your own initiative. When you don't hear anything, that's when you take a break. The monitor never stopped me from doing anything.' She said she was a smoker and would take her breaks in the garden. She said that she could rely on the CCTV camera to monitor comings and going during her break. Occasionally her break would be interrupted in which case she would take it later. It had never been suggested to her that she could not take breaks and she used her initiative. She said she suffered from sciatica and had been permitted to leave the office and walk around the building as needed to alleviate the symptoms.

48. Ms George said that during her years at Greenford she had had experience of only two residents who had had their keys deactivated and needed to be let in and out of the building.

49. Ms Burl, HR Business Partner, joined the respondent in July 2017 and said she had had regular contact with the claimant since then in relation to HR issues. Her evidence was that it was 'categorically untrue' that the claimant has been denied his right to take rest breaks; it is the respondent's policy to provide staff with paid rest breaks – taken when they wish - and this has been reflected in the claimant's contracts from 2009. Ms Burl said that there are areas where they can go to take their break, for example the staff room or hostel garden. She said lone worker status does not in any way preclude rest breaks, the only requirements

are that breaks must be taken onsite and staff must keep the emergency phone with them in case a vulnerable young person needs urgent assistance. She confirmed Ms George's evidence that the Greenford site is not a hectic site; in practice there is ample opportunity for staff to take breaks; and managers are encouraged to ask staff to take breaks. She conceded that emergencies may sometimes arise but if so the break can be taken after the emergency is dealt with.

50. Ms Burl said that the claimant had not raised the issue of being refused rest breaks with her, though he had raised many other issues – for example the question of whether he would be paid for 16 hours while working 14, the issue of a special chair he required, and matters relating to his job description. She directed me to an Access to Work report in which the claimant is described as taking 'comfort breaks and refreshments as required.'

51. Mr McKeown has been head of housing, care and support at the respondent since March 2020 and was the person who considered the claimant's appeal in relation to his grievance. Mr McKeown refuted any suggestion that the claimant had not been allowed to take breaks and did not accept that anyone would have agreed to an arrangement whereby he was able to take his break at the start of a shift. In his letter dismissing the claimant's appeal, dated 12 June 2020, Mr McKeown writes that the claimant's manager has 'personally advised you to take breaks. You can take a break in the office or two rooms at the back of the building. There is also a garden at the project which some members of staff access during breaks. You are aware of this.'

52. In his oral evidence, Mr McKeown said that Greenford is a small low risk project with 13 beds in it and lone workers would have an opportunity to take an uninterrupted break during their shift. In relation to the use of portable baby monitors – he said that these were very rarely used, he was only aware of one being used in the past nine months – and staff were not expected to listen constantly for noises on the monitor. Action is only needed if the baby cries for a long time or if shouting is heard in the room. If this were to happen, then the member of staff should respond, but would be able to take a break another time. Lone workers are advised, when they wish to take their uninterrupted break, to leave a note at reception saying that they are on a break. He accepted that interruptions can sometimes happen and if a worker has to respond to such an interruption he or she can take their break at another time.

## Conclusion

53. I find that the evidence does not support the claimant's claim that the respondent 'refused to permit' the claimant to take rest breaks in accordance with his statutory entitlement, whether through an express refusal or by putting in place a system which failed to allow such breaks and which prevented the claimant in particular from taking such breaks. While lone workers are not able to actually leave the site for their break, and while, due to the vulnerable nature of the residents, interruptions can

occur, I find that staff at the Greenford site are permitted to take the rest breaks to which they are entitled during a shift. Insofar as the claimant's activities are covered by the exception in Regulation 21, I find that the respondent permits the claimant to take 'compensatory rest'.

54. The claimant was, I find, aware of his entitlement to rest breaks, since he claimant to have reached an agreement with David Masters about those rights in 2011. The evidence shows that he raised the issue of rest breaks several times, though generally as part of the discussions about his working hours.

55. There is no evidence that the respondent ever expressly refused permission for the claimant to take a break. But case law makes it clear that the absence of an express refusal is not sufficient. The entitlement to rest breaks must be actively respected by employers for the protection of workers' health and safety. Employers have an obligation to afford rest breaks and the entitlement to such breaks will be 'refused' if they put in place working arrangements that fail to allow such breaks. There should be no 'de facto' pressure to deter workers from taking their breaks. However, while workers must be positively enabled to take rest breaks they cannot be forced to do so.

56. Based on the evidence from the respondent's current and former members of staff it seems clear that some of the respondent's workers are not fully aware of the position as to rest breaks at work, and may refrain from taking breaks, either because of this lack of awareness or because of their commitment to their work. However, I accept the evidence of Ms Burl and Mr Mckeown, supported by that of Ms Graham, that in practice rest breaks are encouraged and are in line with the respondent's policy; that the Greenford site is, at least at weekends, generally not so hectic as to prevent breaks from being taken; and that it has areas where workers can go and take their breaks away from their work station. I also accept Ms George's evidence that staff are able to, and in practice do, use a 'sticky note' system to ensure that their breaks were not interrupted, and that it is a question of workers using their initiative to take their breaks at suitable times.

57. The claimant's claim that the respondent has refused to permit him to take the rest breaks to which he is entitled does not succeed.

Employment Judge Cotton

Date: 16 April 2021

Sent to the parties on: .......................

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For the Tribunal Office

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