Appeal No: EA-2019-000725-RN
(Previously UKEAT/0193/20/RN)

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 3 September 2021

Before :

THE HONOURABLE MR JUSTICE CHOUDHURY (PRESIDENT)

- -

Between :

MRS J FRUDD & MR I FRUDD	**Appellants**
- and -	
THE PARTINGTON GROUP LIMITED	**Respondent**

- -
- -

Mathew Purchase QC (instructed by **Advocate**) for the **Appellants**
Assunta del Priore (instructed by **Napthen Solicitors**) for the **Respondent**

Hearing date: 20 April 2021

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JUDGMENT

SUMMARY

NATIONAL MINIMUM WAGE

The Claimants worked as receptionist and warden at a caravan site operated by the Respondent. As well as having regular working hours, they were required to be "on call" on certain days from the evening until 8am the next day. Whilst their contracts provided for emergency call-out payments during the period from 10pm to 7am, no such provision was made for the period from 7am to 8am ("the morning hour"). The issue before the ET was whether the Claimants were doing time work during the morning hour within the meaning of Regulation 30 of the **National Minimum Wage Regulations 1999** ("the 1999 Regulations"). The ET concluded that they were not. The Claimants contend that in so doing, the ET erred in law and had failed to apply the statutory presumption under s.28(2) of the National Minimum Wage Act 1998 the worker was paid less than the NMW unless it is established otherwise.

Held, dismissing the appeal, that the ET had not required the Claimants to prove their case on NMW. In the circumstances of this case, where factual determinations had been made at a previous hearing and the parties had agreed not to adduce any further evidence, the ET had not erred in reviewing the position in order to determine whether the claim was made out. Such an approach did not, in the circumstances, amount to a failure to apply the statutory presumption. In deciding that the Claimants were not doing work during the morning hour, the ET did not treat any single factor as determinative. On the contrary, on a fair reading of the judgment, the ET took account of all relevant factors and reached a conclusion that was open to it on the evidence.

The Hon. Mr Justice Choudhury:

Introduction

1. Mrs J Frudd and Mr I Frudd (to whom I shall refer as "the Claimants" as they were below) worked as receptionist and warden respectively at a caravan site operated by the Respondent. As well as having regular working hours, they were required to be "on call" on certain days from the evening until 8am the next day. Whilst their contracts provided for emergency call-out payments during the period from 10pm to 7am, no such provision was made for the period from 7am to 8am. The issue before Employment Judge Horne ("the Judge") sitting in the Manchester Employment Tribunal ("the ET") was whether during that hour, referred to here as the "morning hour", the Claimants were doing time work within the meaning of Regulation 30 of the **National Minimum Wage Regulations 1999** ("the 1999 Regulations"). The ET concluded that they were not. The Claimants contend that in so doing, the ET erred in law. I begin by setting out the factual and procedural background, the latter of which is somewhat lengthy.

Factual Background

2. From June 2008 until their retirement in 2015, the Claimants were jointly employed as a 'receptionist/warden team' at the Respondent's Broadwater Caravan Park ("the Park"). Their written contract of employment required them to reside on the premises, for which purpose they were provided with a caravan. They were one of three such couples residing on site.

3. The calendar for the Park is divided into two seasons: the open season, which runs from 1 March to a date in the winter months; and the closed season, which

runs from that date to March. Clause 10 of the contract provided for normal working hours in shifts during the open and closed seasons, and, at Clauses 10.4 and 10.5, provides:

> "10.4 You will also be required to enter your name on a rota for the purpose of being on call to deal with customers (sic) enquiries or requests for assistance after completion of your shift whether the shift in question finishes at 4:30pm, 5.00pm or 8.00pm. You will be on call until 8am next day.
>
> 10.5 Whilst on call you will also be required to cover the Alarm Pager and attend the relevant caravan. You will be paid for Emergency Call Outs in the Open Season from 10pm until 7am and in the Closed Season from 5pm until 8am at the rate of £7.50 per person per call out"

4. It can be seen from those provisions that during the open season, when the Claimants were on call, they would remain on call during the morning hour even though the entitlement to emergency callout payments ceased at 7am.

5. During most of the period to which the claim relates, that is to say in respect of the six-year period leading up to their retirement, the Claimants were on call on two nights per week and on one further night every other week.

Procedural background

6. On 29 June 2015, the Claimants presented claims alleging that the Respondent had failed to pay the national minimum wage ("NMW"). A key question for the ET was whether they were doing "time work" within the meaning of the 1999 Regulations when they were "on call".

7. On 1 December 2015, the ET, Employment Judge Sherrat presiding, dismissed the claims. That was the first of several judgments promulgated by the ET in this dispute ("the First ET Judgment"). The Claimant appealed to the

Employment Appeal Tribunal ("the EAT"). That appeal was heard with two other appeals, one of which, **Royal Mencap Society v Tomlinson-Blake**, was in due course appealed to the Supreme Court. The EAT, Simler P (as she then was) presiding, allowed the appeal and remitted it to a differently constituted ET: see **Focus Care Agency v Roberts** [2017] ICR 1186 ("the First EAT Judgment").

8. Upon remittal, the matter came before the Judge. In a judgment dated 1 February 2018 ("the Second ET Judgment"), the Judge found that the Claimants were employed on time work during some of the time whilst on call. In respect of the open season, their hours of time work during time on call were those between 5pm and 10pm where there was no security guard working at the Park, and between 5pm and 8pm where there was a security guard working.. The Judge had not specifically been asked to address the morning hour.

9. The Claimants appealed against the Second ET Judgment. The second appeal came before HHJ Richardson in February 2019 ("the second EAT judgment"). He concluded that the Judge had not expressly addressed the morning hour in the judgment and that some reasoning was required to deal with that period. Accordingly the matter was remitted to the same tribunal to deal with that narrow issue.

10. On remittal for the second time, the Judge dealt with the matter without any further evidence being advanced by either party. In the course of a clear and thorough judgment ("the Judgment"), the Judge decided that time on call in the morning hour was not "time work" for the purposes of calculating the NMW. Instead, the Claimants were only working for the purposes of the NMW

calculation during times when they were actually called out to work. The Judge's conclusions were set out as follows in paragraph 29 onwards:

> 29. Having taken into account all factors, I cannot infer that the claimants were doing any significant amounts of work during the morning hour. Indeed, I am able to find positively that for the vast majority of the time they were not doing any work and the occasions on which they were called upon to work must have been rare. This is in stark contrast to the evenings, where the claimants were routinely kept busy doing the various tasks I have listed.
>
> 30. The very clear difference in workload between the morning hour and the evening does, in my view, provide a logical basis for distinguishing between those two periods, even if the contract treated them in the same way.
>
> 31. I now take a step back and ask myself the question specifically remitted to me. During the morning hour, were the claimants working, within the ordinary meaning of that word? I do not think that they were, except on rare occasions when called out to a specific task. In reality, during the morning hour, the claimants were available for work, and on the Park together, but they were not working.
>
> 32. I have considered whether or not the time that the claimant actually spent working on tasks would be of significance in determining whether the claimants were paid the National Minimum Wage or not. In my view, the occasions were, in all likelihood, so rare that they would not make any significant difference.
>
> 33. In my view, there is no reason to vary the consent judgement sent to the parties on 5 September 2018 and that judgement is affirmed. No further sums to the claimants."

11. It is against the Judgment that the Claimants now appeal.

Legal Background.

12. Section 1(1) of the **National Minimum Wage Act 1998** (the 1998 Act), provides:

> "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."

13. Under section 17 (1) of the 1998 act, a worker who is paid less than the NMW is entitled to "additional remuneration" to make up the shortfall.

14. Section 28 of the 1998 Act, so far as relevant, provides:

> "28.— Reversal of burden of proof.
>
> …
>
> (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) …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.
>
> …"

15. There is, therefore, a statutory presumption that the worker was paid less than the NMW, and the burden is on the employer to establish otherwise.

16. By section 2(3) of the 1998 Act, regulations may make provision as to the circumstances in which, times at which or the time for which a person is to be treated as, or as not, "working" for these purposes. During the relevant period the applicable regulations were the 1999 Regulations and latterly the **National Minimum Wage Regulations 2015** ("the 2015 Regulations"). There are some differences in the wording between the two sets of regulations. However, neither

party contends that the differences are material for present purposes. I shall therefore focus on the 2015 Regulations.

17. Regulation 17 of the 2015 Regulations makes provision for calculating the hours of work by reference to other provisions. The relevant one for present purposes is regulation 30, which defines 'time work' as follows:

> "30. The meaning of time work
>
> Time work is work, other than salaried hours work, in respect of which a worker is entitled under their contract to be paid—
>
> (a) by reference to the time worked by the worker;…"

18. Neither the 1998 Act nor the 2015 Regulations provide any definition for that which would constitute "work" for these purposes.

19. Regulation 32 is a deeming provision dealing with periods when a worker is available for work at or near a place of work. It provides:

> "32.— Time work where worker is available at or near a place of work
>
> (1) Time work includes hours when a worker is available, and required to be available, at or near a place of work for the purposes of working unless the worker is at home.
>
> (2) In paragraph (1), hours when a worker is *"available"* only includes hours when the worker is awake for the purposes of working, even if a worker by arrangement sleeps at or near a place of work and the employer provides suitable facilities for sleeping."

20. These provisions (which were contained in regulation 15 of the 1999 Regulations) have been the subject of much legal authority in recent years. Their meaning was definitively determined by the Supreme Court very recently - in fact after permission to appeal was granted in this matter – in **Royal Mencap**

Society v Tomlinson-Blake [2021] UKSC 8, which dealt with the position of workers at a care home who were required to sleep-in as part of their duties to attend to emergencies that may occur overnight. In doing so, the Supreme Court overruled the earlier decision of the Court of Appeal in **British Nursing Association v Inland Revenue** [2003] ICR 19, CA. Lady Arden, giving the lead judgment of the Court, explained the error that the Court of Appeal had fallen into in **British Nursing Association**:

> "57… As it seems to me, neither the EAT nor the Court of Appeal [in British Nursing Association] recognised that the 1999 Regulations drew a basic distinction between working and being available for work. The latter is the subject of regulation 15 and it is in this sense, I suggest, that the parties agreed that regulation 15 was the governing provision. If the worker was only available for work, his activity was distinct from working. I agree. The two concepts are clear and do not overlap, though they may not always admit of easy application on the facts.… The arrangements covered by regulation 15 [regulation 30 of the 2015 Regulations] are only those where the principal purpose and objective of the arrangement is that the employee will sleep at or near the place of work, and responding to any disturbance during the time allocated for sleep must be subsidiary to that purpose or objective. I agree with the points made by Underhill LJ [in **Royal Mencap, CA**] at paras 40 and 56 of his judgment that not every worker who is permitted to take a nap between tasks is a sleep-in worker and that the person may, depending on the facts, be working, as opposed to being merely available for work, even if his work is only intermittent. These points may have particular resonance during a situation such as may arise in a pandemic, when employees are required to work at home when they can."

21. The Supreme Court makes clear therefore that there is a critical distinction drawn by the regulations between working and being available for work: a worker cannot be doing both at the same time. It is also relevant to note what Underhill LJ said in **Royal Mencap** in the Court of Appeal in relation to that distinction:

> "79… I quite accept that the distinctions are subtle, but they are in my view sufficient to justify a difference in outcome: it must be borne in mind that the decision which side of the line dividing "actual work" from availability for work" a given case falls is factual in character, and in marginal cases different tribunals might well assess very similar facts differently"

22. This highlights the fact-sensitivity of conclusions that a tribunal may have to make in relation to whether an employee is doing time work or is merely available for such work during any given period.

The Grounds of Appeal

23. Permission was granted to the Claimants to appeal the Judgment on four grounds. Mr Purchase QC, who appears for the claimants in the appeal (but who did not appear below) puts those grounds as follows:

i) Ground 1- the ET erred in placing the burden of proof on the Claimants to prove that they were engaged in work during the relevant periods, instead of applying the reverse burden of proof and the presumption that the work done did qualify for NMW as provided for by s.28 of the 1998 Act.

ii) Ground 2 - the ET erred in treating the number of tasks or activities carried out during the morning hour as determinative of the question whether the Claimants were working in that period.

iii) Ground 3 - the ET's conclusion that the Claimants were not at work during the morning hour was not one that was open to it and was perverse;

iv) Ground 4 – in any event, the ET erred in failing to order compensation for the time that the Claimants were working.

24. I shall deal with each ground of appeal in turn

Ground 1 – Error as to Burden of Proof

Submissions

25. Mr Purchase submits that although the ET referred to s.28(2) of the 1998 Act, there are various indications from the Judgment that it in fact proceeded as if the burden were on the Claimants and treated the absence of any evidence from the Claimants as to the activities they carried out during the morning hour as decisive. Mr Purchase drew my attention to the following parts of the Judgment, amongst others, to make good his point:

i) At paras 8 to 12 of the Judgment, the ET treated the question as being whether the Claimants had "made out their case" that they were employed during the morning hour and whether there were facts from which the Judge could draw an inference that they were regularly doing work at that time.

ii) The ET refers at paragraph 24 and elsewhere to the lack of positive evidence of activities being carried out, but fails to refer to the absence of any evidence adduced by the Respondent.

iii) Although the ET states that it is able to make a positive finding that for the vast majority of the time the Claimants were not doing any work, this is undermined by the thrust of the Judgment as a whole.

iv) The ET failed to take account of Respondent's failure to comply with the statutory duty to keep records of time worked.

26. Ms Del Priore, who appears on behalf of the Respondent, as she has done at each of the previous stages, submits that this is a ground of appeal that is being raised for the first time and that the failure to apply the correct burden of proof did not feature in either of the previous appeals. The basis on which the matter was remitted to the ET following the Second EAT judgment was the narrow one of providing reasoning to address the morning hour. Had the Claimants wished to raise a point on the burden of proof they ought to have done so at an earlier stage and, Ms Del Priore submits, they are precluded from now doing so by the rule in **Henderson v Henderson**. She submits that the point is without merit in any event given that the ET does expressly refer to the correct burden. The points relied upon by Mr Purchase amounted to nothing more than infelicities of language from which one should not infer that the Tribunal failed to apply its own self-direction.

Discussion

27. There is some force in Ms Del Priore's **Henderson v Henderson** point. Although permission was granted to proceed on this ground, it is clear that it is a point that could and ought to have been raised earlier and, at the very latest, by the time of the second appeal to the EAT. There was nothing to prevent the burden of proof point being taken on the earlier appeal when all aspects of the ET's reasoning in the Second ET judgment were challenged. The second EAT appeal succeeded on the very narrow basis that the reasoning dealing with the

morning hour was inadequate, and the Judgment sought to address that deficiency.

28. That said, the Claimants were given permission to proceed with this ground of appeal and it is appropriate that I deal with it, notwithstanding the reservations I have as to the legitimacy of it being raised at this stage in the procedural history.

29. The approach to the evidence was agreed. That is to say, the Claimants agreed with the Respondent's suggestion that the ET should simply review the evidence of the 2018 hearing and determine, in the light of that evidence, whether or not the Claimants had made out their case. No suggestion was made there that this amounted to a reversal of the burden of proof. Not only that, but when the Respondent sought to adduce evidence to show that the Claimants were not doing time work, permission was refused (no doubt in part because of the Claimant's objections to that course). It would be unfair to conclude that the Respondent had failed to discharge the burden of proof by its failure to adduce evidence when that failure was the result of being refused permission to do so.

30. In these circumstances, it is not appropriate or fair to permit the Claimants to argue that the ET erred in its approach to the burden of proof and the evidence. The eventual approach to the evidence was agreed.

31. If I am wrong about that, I consider the substance of the ground. As to that, I agree with Ms Del Priore that the extracts from the Judgment relied upon by the Claimants do not demonstrate that there was any error in the ET's approach to the burden of proof. There was a correct self-direction on the burden of proof as follows:

> "7 … I remind myself that that under the National Minimum Wage Act 1998, section 28(2), tribunals considering complaints of unlawful deduction from wages are required to presume that a worker was not paid the national minimum wage unless the contrary is proved."

32. The effect of such a clear and unambiguously correct self-direction on the burden of proof should not be readily undermined by the occasional use of infelicitously worded passages in dealing with the evidence. The role of the appellate court when faced with an ostensibly correct self-direction was clarified by the Supreme Court (Sir John Dyson) in **MA (Somalia) v Secretary of State for the Home Department** [2010] UKSC 49:

> "46. We turn to the first of the Court of Appeal's criticisms. In our view, the court was wrong to interpret paras 109 and 121 of the determination as if the AIT were saying that they were dismissing the appeal because MA's account was incredible. In the light of the clear and impeccable self-direction set out only a few paragraphs earlier (at para 105), and having regard to the need for restraint to which we have referred, the court should surely have been very slow to reach the conclusion that it did. It should only have interpreted these paragraphs in the way that it did if there was no doubt that this is what they meant. It is often easy enough to find some ambiguity or obscurity in a judgment or determination, particularly in a field as difficult and complex as immigration, where the facts may be difficult to unravel and the law difficult to apply. If, as occurred in this case, a tribunal articulates a self-direction and does so correctly, the reviewing court should be slow to find that it has failed to apply the direction in accordance with its terms. All the more so where the effect of the failure to apply the direction is that the tribunal will be found to have done precisely the opposite of what it said it was going to do. The striking feature of the present case is that the Court of Appeal was of the view that at para 109, the AIT failed to apply the direction that they had set for themselves only four paragraphs earlier."

33. Of course, the mere fact that the law has been correctly stated does not insulate a tribunal against a finding that the law has, nevertheless, been incorrectly applied. As stated by Mummery LJ in **Brent v Fuller** [2011] ICR 806:

> "30. Another teaching of experience is that, as with other tribunals and courts, there are occasions when a correct self-direction of law is stated by the tribunal, but then overlooked or misapplied at the point of decision. The tribunal judgment must be read carefully to see if it has in fact correctly applied the law which it said was applicable. The reading of an employment tribunal decision must not, however, be so fussy that it produces pernickety critiques. Over-analysis of the reasoning process; being hypercritical of the way in which the decision is written; focusing too much on particular passages or turns of phrase to the neglect of the decision read in the round: those are all appellate weaknesses to avoid."

34. In my judgment, this is not one of those occasions where a correct self-direction has been overlooked or misapplied at the point of decision.

35. It is significant that, as well as the clear self direction in the Judgment, the Judge also directed himself as follows in the Second ET Judgment when the bulk of the on call period was considered:

> "5. Mrs Frudd confirmed that the claimants' case rests entirely on the definition of "time work" in regulation 30 MNWR. She does not argue that the claimants fell within the deeming provision in regulation 32. Thus the claimants set the respondent the challenge of proving that the claimants were not actually working during their time on call. If they were merely "waiting to work" as Ms Del Priore pithily put it, they were not employed on time work at those times."

36. As I have said, no complaint was made about the ET's approach to the burden of proof in that case, even though it might be said that the conclusions expressed in that judgment were based more on what the Claimants' evidence established than what the Respondents' evidence did not.

37. The ET (in the Judgment) said that it was "able to find positively that for the vast majority of the time they were not doing any work". That is precisely the kind of finding that can rebut the operative presumption imposed by s.28 of the 1998 Act. Mr Purchase acknowledges these points but highlights the following

passages as being contraindicators as to the correct application of the burden of proof:

i) Mr Purchase submits that at paras 8-12, the ET approached the question as being whether the Claimants "made out their case that they were employed on time work during the morning hour" and whether there were facts from which it could "draw an inference" that they were. It seems to me, however, that far from indicating any error, the ET was merely outlining an agreed approach to the evidence in circumstances where no further evidence was to be adduced. The phrase, "made out their case", was in fact one used by the Respondent in support of its primary case that a review of the evidence would show that the Claimants had not made out their case; it says nothing about the ET's application of the burden of proof (which was correctly stated in the immediately preceding paragraph). Given the absence of any new evidence, the ET's task at the remitted hearing was limited to reviewing the existing evidence and drawing such inferences as it could from that material to reach the necessary conclusions. Doing so does not mean that the ET required the Claimants to prove their case.

ii) Mr Purchase submitted that the ET's refusal to permit the Respondent to adduce further oral evidence was telling in that one could infer from that refusal that the ET thought the burden lay with the Claimant. I do not consider that such an inference can properly be drawn from that refusal. First, the ET's correct statement of the burden of the proof in the immediately preceding paragraph militates strongly against such an

inference, particularly in the absence of any clear or unequivocal indication that the wrong burden was being applied. Second, the reasons for refusing the further evidence are not set out (see para 9). A more natural inference as to the reason for refusal is, as I have said above, that the Claimants had objected to that further evidence. That emerges from the ET's reference to a "dispute" arising once the Respondent attempted to adduce oral evidence that the Claimants were not doing time work. In other words, the refusal is likely to have had little, if anything, to do with how the ET viewed the burden of proof.

iii) Mr Purchase complains of the ET's references to the lack of positive evidence of activities being carried out as being a telling indicator that very little work was going on. It seems to me, however, that the ET was entitled, in the circumstances of this case (where it was agreed that there would be a review of earlier evidence) to make findings based on the absence of any evidence that work was being done during the morning hour. The presumption that the Claimants were doing time work could be rebutted by the absence of any evidence that such work was done, just as much as it could be by positive evidence that no such work was done (e.g. by showing that the Claimants were doing something else). Neither approach necessarily reverses the burden of proof. Rebutting the presumption requires (if there is no positive evidence that the Claimants were otherwise engaged) proving a negative; that can be done by the Respondent pointing to the fact that there is nothing in the evidence being reviewed to show that any work was done during the morning hour.

iv) Mr Purchase makes the point that the Respondent's failure to keep records was a factor that ought to have counted against it. However, this is not a case of an employer failing to keep any records at all, but of an alleged failure to keep records in respect of a period during which the employer legitimately considered no work was being done. The obligation is to keep records "sufficient to establish that the employer is remunerating the worker at a rate at least equal to the national minimum wage": reg. 59, 2015 Regulations. In the circumstances of this case, where the contract expressly described the morning hour as part of the 'on call' period and for which no emergency call out payments would be made, the employer can be said to have kept a sufficient record for the purposes of reg. 59. Insofar as very occasional, ad hoc tasks might be carried out during that period, which is what the ET concluded was the pattern here, the employer cannot be criticised for not keeping records of those. The absence of records is not, therefore, a factor that ought, in the circumstances of this case, to have weighed significantly against the Respondent.

38. In the course of his submissions, Mr Purchase referred me to the case of **Ajayi v Abu** [2017] EWHC 3098 (QB), a decision of the High Court dealing with a claim for damages under various heads, including a failure to pay NMW. However, as Mr Purchase acknowledged, that was no more than a case in which it was noted that the employer had, in very different circumstances, failed to keep the requisite records. I derived no assistance from it.

39. For these reasons, Ground 1 of the appeal fails and is dismissed.

Ground 2 – Treating the number of tasks or activities as determinative.

Submissions

40. Mr Purchase submitted that, for the purposes of this ground, the parties were required to apply the law as set out in the First EAT Judgment, notwithstanding the fact that the Court of Appeal in **Royal Mencap** disapproved of the multifactorial approach taken by the EAT in that case to the question of whether sleep-in workers were working. Neither party appealed the First EAT Judgment, and, submits Mr Purchase, each is therefore bound by it. Mr Purchase submits that in any case, the decisions of the Supreme Court and the Court of Appeal in **Royal Mencap** are confined to sleep-in workers, and the multifactorial approach is still relevant in determining whether the Claimants, who were not sleep-in workers, were doing time work within the meaning of reg. 30 of the 2015 Regulations. Applying the multifactorial approach would have led to the conclusion that the Claimants were doing time work during the morning hour and the ET erred in treating the infrequency of activities during that period (as compared to the evening period) as determinative.

41. Ms Del Priore submits that the parties are not bound by the First EAT Judgment because the EAT in that case did not decide the issue of time work, which was the key issue between the parties; instead, that issue was remitted to the ET. In those circumstances, there can be no issue estoppel. I was referred to the judgment of the Court of Appeal in **Foster v Bon Groundwork Ltd** [2012] IRLR 517, in which Elias LJ said as follows:

> 4. Since the relevant legal principles are not in dispute I will set them out briefly. The principle of res judicata can be summarised as follows: where an issue has been litigated before a judicial

> body and determined as between the parties it cannot be reopened. It is binding as between them, and the parties are estopped from reopening it. The issue may be one of fact or of law. However, the parties are only bound by an issue which it was necessary for the court to determine in the earlier claim. In *Arnold v National Westminster Bank plc [1991] 2 AC 93*, *105* Lord Keith of Kinkel observed that the principle applies where
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> "a necessary ingredient in a cause of action has been litigated and decided and in subsequent proceedings between the same parties involving a different cause of action to which the same issue is relevant one of the parties seeks to reopen that issue."
>
> 5. It follows, therefore, that a finding of fact by an earlier court which is not a "necessary ingredient" in the earlier cause of action will not give rise to a "fact estoppel". Moreover, a finding cannot be a necessary ingredient of a cause of action if the earlier court or tribunal did not have jurisdiction to decide the matter at all: see the observations of Sir Nicolas Browne-Wilkinson in *O'Laoire v Jackel International Ltd (No 2) [1991] ICR 718* , 729 when he said: "It is well established that there can be no estoppel arising out of an order or judgment given in excess of jurisdiction."
>
> 6. An exception to this principle is where a court makes an express finding as to jurisdiction which is not appealed. Any such finding is binding on the parties, even if it is subsequently shown to be wrong: see the observations of Lord Hoffmann in *Carter v Ahsan [2008] ICR 82; [2008] 1 AC 696* , para 31.

42. Ms Del Priore submits that the First EAT Judgment did not decide any "necessary ingredient" in the claim so as to give rise to any sort of issue or fact estoppel between the parties. Ms Del Priore further submits that the Supreme Court's decision in **Royal Mencap** is not to be so narrowly applied as the Claimants suggest, and that the distinction between work and being available for work is one that is as relevant to workers who are not sleep-in workers as to those who are. Finally, Ms Del Priore submits that, in any event, the ET was correct to conclude, having considered all the circumstances, that the Claimants were not working during the morning hour.

Discussion

43. In my judgment, the parties in this matter are not bound to apply the legal reasoning of the EAT in the First EAT Judgment, now that that reasoning has been disapproved. Although there may be circumstances where the parties may be bound by a decision of the court, even where that decision has subsequently been held to be wrong in law (see e.g **Watt v Ahsan** [2008] 1 AC 696), that would not be the case where the earlier decision did not decide any necessary ingredient in the cause of action between the parties. Here, the principal issue between the parties (at least initially) was whether the Claimants were doing time work during the period when they were on call (which period included the morning hour). That issue was not determined by the EAT, but instead remitted to the ET. In accordance with the principles summarised by Elias LJ in **Foster v Bon Groundwork**, there is no issue or fact estoppel in respect of that matter.

44. Even if I am wrong about that, I do not consider that it makes any material difference to the question of whether the ET erred in its approach. Both parties are agreed that the ET's task was to determine whether the Claimants undertook time work during the morning hour. In determining that issue in the context of a claim for NMW, the ET may well consider whether the worker is working or is merely available for work during the period in question; as Lady Arden stated in **Royal Mencap**, "If the worker was only available for work, his activity was distinct from working and, as Lord Kitchin holds, he could not also be within regulation 3 [of the 1999 Regulations or regulation 30 of the 2015 Regulations]". That question is to be determined, as HHJ Richardson pithily put it in the Second EAT Judgment (at para 31), by "applying the ordinary use

of the English language and a common sense approach". In doing so, a tribunal will necessarily consider all relevant factors, whilst not treating any particular factor as determinative.

45. In my judgment, that is precisely the approach that the ET took. I do not accept Mr Purchase's contention that the ET treated the number of tasks or activities as determinative. Had it done so, it would have focussed on that number to the exclusion of all other factors, or would have based its decision on the number alone irrespective of the way in which the balance was affected by other factors. Instead, the ET considered all factors in considerable detail and then set about weighing those factors that led to an inference or indicated that work was being done against those that pointed away from work (paras 15 to 28). On the basis of that analysis, the ET concluded (at para 29) that the Claimants were not doing any significant work during the morning hour. That was a conclusion that was open to the ET on the evidence. Another reasonable ET might well have concluded otherwise. In such a fact-sensitive area, that possibility is inevitable, but that would not provide any basis for interfering with this ET's conclusions.

46. Mr Purchase points to the ET's conclusion at para 30 as being indicative of treating the number of activities as determinative:

> "30 The very clear difference in workload between the morning hour and the evening does, in my view, provide a logical basis for distinguishing between those two periods, even if the contract treated them in the same way."

47. Mr Purchase accepts that the difference in workload is a relevant consideration but contends that it should not have been determinative. However, this passage must be read in the context of the judgment as a whole; clearly the ET is not eschewing all other factors in favour of the level of workload. The findings were

that whilst some factors were common to both the evening and morning periods (e.g, the contractual treatment of both periods and the Claimants' personal responsibility for dealing with any queries that might arise), many of the tasks which occupied the Claimants in the evenings were simply not done during the morning hour. The ET did not find that the same kinds of work were done during both periods with the only difference between them being quantitative; the differences were clearly qualitative too . However, even if that were not so, that would not preclude the ET from reaching the conclusion, based on the lack of activity during the morning hour, that no work was being done in that period. Whilst the infrequency of tasks or their intermittent nature would not necessarily mean that no work was being done – it being clear that a person might, depending on the circumstances, be working even when not undertaking any particular activity or task - that (i.e. that no work was being done) might be the proper inference to draw when considered alongside other factors.

48. For these reasons, Ground 2 of the appeal fails and is dismissed.

Ground 3 – ET's conclusion was perverse

49. Mr Purchase submits that given the contractual position (which drew no distinction between the evening period and the morning hour), the ET's acceptance that the Claimants were "effectively responsible" for running the Park during the relevant period and during which they could expect disturbances, it was perverse to conclude that they were not doing work during the morning hour. I do not agree. These factors were taken into account by the Tribunal, as were others such as the nature and frequency of tasks actually performed by the Claimants during the morning hour. The conclusions that the

ET reached were open to it on the evidence, and whilst another tribunal might have concluded differently, that is very far from establishing that the decision was one that no reasonable tribunal could have reached on the same material.

50. In support of this ground of appeal, Mr Purchase highlighted some aspects of the ET's findings which he submits were not based on any evidence and/or not ones that were open to it to reach. These are as follows:

51. The ET held that the Park was a "quiet site" and that the caravans were mostly either empty or occupied by owners who were generally self-reliant. It seems to me that this was a view that the ET was entitled to hold. At para 10 of the First ET Judgment, the ET said as follows:

> "10.Within the perimeter of the Park are 309 caravan pitches. About 240 of these are usually occupied by privately owned caravans. Some 15-20 caravans are usually available for hire, although it would be rare for all of those caravans to be fully occupied. The remaining pitches are either empty or occupied by caravans for sale. It is common ground that this is a relatively quiet caravan site. A significant proportion of the privately owned caravans would be vacant at any one time. Long-term residents tend to know their way around and do not need regular assistance."

52. Mr Purchase submits that the ET has gone from concluding (in the Second ET Judgment) that the site was "relatively quiet" with a "significant proportion" of vacant caravans to concluding more recently that it was a "quiet site" where caravans were "mostly" empty or occupied by generally self-reliant owners. I do not agree that these differences are ones of substance or that they demonstrate the absence of an evidential basis for the ET's conclusions. There is nothing inherently wrong in describing "a relatively quiet site" as a "quiet site". The ET was reviewing the evidence in the previous hearing, and the context, namely that of caravan parks, did not need to be restated. I see no distinction in

substance between the ET's initial and later descriptions of the state of ownership and occupancy. The ET heard the evidence at the first ET Hearing, and, upon its review of that evidence, it was entitled to reach further findings (e.g. at para 14.5) and to express similar conclusions using slightly different terminology. None of this supports the Claimants' contention that there was *no* evidence to support the ET's conclusions.

53. Criticism is made of the ET's conclusion at para 20.2 that holidaymakers would not usually be active before 8am, which is said to be a conclusion unsupported by evidence. However, as the ET makes clear at para 14, it made "further findings" based on a review of "all the evidence" given at the second ET hearing. At para 14.6, the ET held:

> "14.6. Holidaymakers (whether visitors or owners) would be unlikely to be active before 8.00am. There is a possible exception, which relates to visitors on their final day. They would be required to vacate their caravan by 10.00am. Some of these visitors would be up and about before 8.00am."

54. That was a view that the ET clearly reached on the evidence and which the EAT cannot disturb. The reference to being inactive before 8am is clearly not a reference to activity per se, but to activity that would be likely to affect the Claimants. The ET's conclusions in this regard are of course supported by its further findings that the Claimants in fact did very little during the morning hour. Whilst the act of using appliances to prepare breakfast before 8am might be relevant to one of the potential activities of the Claimants, namely the resetting of circuit breakers, the ET expressly took that possibility into account at para 27.1 of the Judgment. As it concluded there, those self-reliant occupiers would be unlikely to require assistance from the Claimants to reset circuit

breakers, except on very rare occasions. In these circumstances, it cannot be said that the ET's conclusion was unsupported by evidence. The ET was doing no more than drawing reasonable inferences from the facts.

55. Mr Purchase highlights the fact that the ET wrongly stated that the Park's reception opened at 8am when it in fact opened at 9am. This was something that was taken into account by the ET in its Reconsideration Decision, but was found not to alter the ET's conclusion that the Claimants had very little to do during the morning hour. It was not perverse to conclude that the fact that the reception was closed during the morning hour meant that there would be very few, if any, of the tasks that might occupy the Claimants when it was open. Whilst they might have to attend to the odd emergency before the reception opened, this was, as the ET found, a rare occurrence.

56. Finally, it was submitted that the ETs reference to the busiest time on call being between 5pm and 8pm was not capable of providing any support for the conclusion that the Claimants were not working during the morning hour. However, it seems to me that if the busiest period was not itself that busy, then that does provide some support for the view that the incontrovertibly less busy morning hour involved very little work at all.

57. For these reasons, I reject the submission that the ET's decision was perverse and/or unsupported by evidence; in my judgment, the decision was very far from being either.

Ground 4 – Failure to order compensation for the time that the Claimants were working.

58. The submission here is that as the ET found that the Claimants were working for at least part of the time during the morning hour, albeit rarely, it was incumbent on the ET, applying the statutory presumption set out in s.28 of the 1998 Act, to make an assessment of the number of hours of such work and to order compensation accordingly.

59. Mr Purchase accepted that it was open to the ET to conclude that the amount of work done was *de minimis* so that any sums due would be vanishingly small and so not liable to be paid, but contends that that was not this case.

60. The ET's decision does state, unequivocally, that the occasions when any work was done in the morning hour "were in all likelihood, so rare that they would not have made a significant difference". Whilst not expressed in terms that the amounts involved were *de minimis*, this amounts to much the same: the amounts involved were so small as not to make a significant difference. As such, the ET was entitled, in my judgment, not to proceed to make an order for compensation. It would have been disproportionate in comparison to the small amount recoverable to attempt to calculate the amounts due. There was no pattern to the work done, which arose only on rare occasions, and the ET would have been entering a sea of speculation if it had attempted, on the available material, to quantify the work done as a number of hours during a pay reference period. There was no indication that the parties, who had not adduced any evidence of such work in the course of three ET hearings would now be able to so to support the quantification of these insignificant amounts of work. In these

circumstances, the ET's failure to order compensation did not amount to an error of law.

Conclusion

61. For these reasons, and notwithstanding Mr Purchase's powerful submissions, this appeal fails and is dismissed.