EMPLOYMENT TRIBUNALS

Claimant: **Mrs Inger Jones**

Respondent: **Healthcare Assistants Limited**

Heard at: **Cardiff**

Before: **Employment Judge RL Brace**

Representation:
Claimant: In person
Respondent: Did not attend

JUDGMENT

1. The respondent has not paid to the claimant the wages to which she is entitled under the National Minimum Wage Regulations. The respondent shall pay to the claimant the sum of **£5,073.74**.

2. In breach of Section 13(1) of the Employment Rights Act 1996, the respondent deducted from the claimant's wages, without her authorisation, 9 weeks' pay for the period from 1 May 2018 to 4 July 2018 i.e. 36 shifts x 15 hours per shift x £7.83 per hour (NMW). The respondent is ordered to pay the claimant the sum of **£4,228.20** in this regard.

3. In breach of Regulation 14(2) of the Working Time Regulations 1998, the respondent failed to pay the claimant a sum in lieu of 5.6 weeks' holiday (based on a weekly pay of £469.80) that she had accrued but not taken by the date on which her employment terminated. The respondent is ordered to pay the claimant the sum of **£2,630.88** in this regard.

4. In breach of contract, the respondent has failed to pay the claimant in respect of notice a sum in respect of one week's pay. The respondent is ordered to pay the claimant the sum of **£469.80** in this regard.

5. In respect of failure to provide a written statement of particulars of employment, it is ordered that the respondent pay the claimant a further two weeks' gross pay i.e. **£939.60** in accordance with section 38(3) Employment Act 2002.

6. The total amount the respondent must pay to the claimant is therefore **£13,342.22**. The claimant is responsible for any income tax or employee national insurance contributions that may be due on the sums awarded at paragraphs 2, 3 and 4 above.

Written Reasons

Background

1. This matter had already come before the tribunal on a number of occasions, in particular

    a. on 30 November 2018, when Willowmere Home Care Agency Limited was added as a respondent to the claim brought against Healthcare Assistants Limited;

    b. on 15 May 2019:

        i. when the claim against Willowmere Home Care Agency Limited was dismissed on withdrawal by the claimant; and
        ii. judgment in default against Healthcare Assistants Limited in respect of liability was given; and

    c. on 20 November 2019 when a remedy hearing was listed for one hour, heard at the same time as the remedy hearing for Mrs D Irwin (Case number 1601078/2018).

2. Whilst a judgment was given for Mrs Irwin on 20 November 2019, no judgment on remedy was given for the claimant as:

    a. she had no papers at all to support her schedule of loss:
    b. the claimant, unlike Mrs Irwin, was making a claim for failure to pay her the National Minimum Wage (NMW); and
    c. the claimant's working hours were complicated.

3. Regarding working hours, the claimant was claiming that unlike Mrs Irwin, she worked for extended periods where she worked shifts lasting 24 hours 'back-to-back' sometimes over periods of a week or more: shifts which included on call over-night work.

4. The claimant considered that the copy of the diary entries and her bank statements (which she did not bring with her) were supporting of her claim for financial losses of £22,491.68.

5. The case management order from the hearing on 20 November 2019 reflects the claimant's concerns regarding the paperwork which she told me that she had left at the tribunal at the hearing in November 2019 and I don't propose to repeat them again here.

6. At the 20 November 2019 hearing, I took verbal evidence from the claimant and Mrs Inger. There was no attendance with the respondent, the respondent having stopped trading in around June 2018.

7. As the claimant's evidence was that she worked back to back shifts of 24 hours which included time sleeping in the individual's home, and was paid a flat £100 in respect of each shift, I drew her attention to:

    a. Regulation 32 National Minimum Wage Regulations 2015; and the cases of:

    b. **British Nursing Association v Inland Revenue 2003 ICR 19 CA**; and **Royal Mencap Society v Tomlinson-Blake and another 2019 ICR 241 CA**

8. As the claimant was a litigant in person and as these cases were unfamiliar to her, as the case management order from the 20 November 2019 reflects, I wanted to give the claimant the opportunity to consider this further, and gave her the further opportunity to send in documentation to support her claim and any representations she wished to make in writing for me to consider before I made my decision on her claims for compensation.

9. The claimant provided this information on or around 6 December 2019. I have therefore since the hearing had the opportunity to consider:

    a. the claimant's witness statement;
    b. Schedule of Loss (Document A);
    c. Extracts from the diary that was kept which the claimant indicated showed the shifts she completed (Document B);
    d. Bank Statements (Document C).

Findings

10. The claimant worked for the respondent, Healthcare Assistants Ltd from 1 July 2017 until 4 July 2018 as a domiciliary care worker or carer. Healthcare had in place a contract with the Vale of Glamorgan local authority to provide a package of domiciliary care for certain residents in the Vale of Glamorgan who had a care requirement usually identified by a social worker from within the local authority clients

11. Throughout her employment with Healthcare, the claimant was engaged by the respondent in providing 1:1 domiciliary care to one particular client, an individual with a brain injury who required 24-hour care (the "Client").

12. No written statement of terms of employment was provided to the claimant by the respondent.

Hours worked each shift

13. It was agreed between Healthcare and the claimant that she would work 24-hour shifts and would be paid a flat rate of £100 per shift. The claimant would sleep in and a bedroom was provided for her in the Client's home.

14. The claimant's shift started and ended at 8am. From around 8.00am each morning the claimant would assist the Client to get them out of bed and prepare them for the day ahead. The claimant would then provide 1:1 care to the individual throughout the day would ensure that the Client retired to bed. The claimant was unable to be specific as to the exact time that the Client would go to sleep but in live evidence confirmed that this would have been from around 10.00-11.00pm each night.

15. The claimant would then go to bed and sleep, unless awoken by the Client at around 8am each morning, when either she would go home or would start a further 24-hour shift i.e. a back-to-back shift.

16. The claimant gave evidence that the Client would wake sometimes once or twice each night and she would then awaken too and would have to attend to the Client's needs and deal with them, ensuring that they were again settled to sleep. She also gave evidence that she would therefore be awake between 15-20 minutes on each sleep interruption. She was unable to give any clear evidence of exactly when each shift the Client had gone to sleep or how often the Client had awoken as she need copies of the diary entries which she had completed whilst working with the Client; a diary which was retained in the Client's home (the "Diary").

17. A copy of the Diary entries had according to the claimant been provided by her at the November 2018 hearing and had, the claimant tells me, been left at the tribunal. It was this documentation that the claimant relied upon.

18. The claimant provided further copies of what she considered to be the relevant Diary entries (Document B). I found that from the entries in the Diary that the Client would retire to bed at variable times between 9.45pm to 11.30pm. Some Diary entries did not record the time that the Client had gone to sleep but I found that more times than not, the Client had gone to sleep at 10.30pm and that the Client had woken up to use the toilet facilities at least once during the period from 10.00pm and 8.00am each night. The Diary entries rarely recorded how long the Client was awake on each period of interrupted sleep when the carer was assisting them.

19. I found that a carer looking after this Client, including the claimant, would have been working between 8.00am to 10.30pm and would have then slept until 8.00am save for around 30 minutes during the period from 10.30pm to 8.00am when they too would have been awake assisting the Client.

Shifts worked each month

20. The Diary entries showed only shifts certain days (variable) for the following months:

Month	**No of Diary Entries**	**Total**
December 2017	17 shifts	
January 2018	22 shifts	
February 2018	23 shifts	
March 2018	25 shifts	
April 2018	21 shifts	
May 2018	20 shifts	
		128 shifts
Average no of shifts between December 2017 – May 2018		**21.33 shifts**

21. No Diary entries for the period up to and including November 2017 have been provided and no Diary entries from 23 June 2017 onward have been provided. The June 2018 Diary entries, for 11 shifts only were provided and ended on 22 June 2019.

22. The claimant verbally agreed with the respondent that she would work a minimum of 16 shifts per month.

23. The claimant told me in live evidence that she did, from time to time, work more than 16 shifts per month. I had also heard from Mrs Inger, who supported the claimant's own evidence that she worked a considerable number of back-to-back 24 hour shifts, and confirmed that the claimant would

undertake shifts where no one else was available or no one else would provide cover for, to ensure that this vulnerable adult had the care that she needed.

24. The claimant would, in many weeks during her employment with the respondent, stay at the Client's home for days at a time, sometimes up to a week, providing the 1:1 care that this Client needed. This meant that the claimant worked for extended periods at the Client's home and did not leave the Client's home to go to her own home in this period, ensuring that the Client was looked after.

25. From August 2017 to December 2017 the claimant worked 16 x 24-hour shifts per month.

26. On reviewing the diary entries provided, it was not clear to me which dates had been completed by the claimant and which dates had been completed by other carers, and the claimant had not identified this.

27. Accepting that the majority of the Diary entries were those completed by the claimant, I found on balance of probabilities that the claimant had worked the number of shifts claimed in her Schedule of Loss from January 2018 through to June 2018 (inclusive).

28. The amount of shifts worked / work completed by the claimant from August 2017 through to June 2018 inclusive was as set out in the claimant's Schedule of Loss i.e. 184 shifts.

Pay received

29. Bank statements were provided by the claimant for October 2017 through April 2018 and I took evidence from the claimant that she had received payments from the claimant, net of tax, from the commencement of her employment up to October 2017 on an estimated basis of £1,350 per month (net of tax) for 16 shifts per month.

30. On 19 June 2019 the Vale of Glamorgan local authority were advised by the respondent that they would be unable to provide further care to the Client (in addition to two other clients from whom they had contracts with the authority). Despite this the claimant agreed to remain with the Client to ensure that she had the necessary 1:1 care until 20 June 2018. The claimant received no remuneration for this.

31. The claimant was not given paid leave during her employment with the respondent and was provided with no notice to terminate when her employment ended on 20 June 2018.

32. Whilst there was originally an issue as to whether the claimant's employment transferred by operation of the Transfer of Undertakings (Protection of Employment) Regulations 2006 but this is no longer an issue before me and I decline to make any findings that there was a TUPE transfer, by reason of either a business transfer or service provision change as I have insufficient evidence before me to make any such finding.

Conclusions

33. I concluded that the claimant was to be regarded as working when she was 'on call' i.e. when she was available at or near a place of work for the purpose of doing work and was required to be available for such work (Regulation 27(1)(b) and Reg 32(1) Working Time Regulations 2015 (WTR)).

34. Following the CA in ***Royal Mencap Society v Tomlinson-Blake*** 2019 ICR 241 CA, I concluded that as the claimant was a care worker, who was required to sleep at her workplace and be available to provide assistance if required, she was 'available for work' within the meaning of regulation 32 WTR rather than working.

35. Accordingly, she was not entitled to be paid the National Minimum Wage (NMW) for the whole of the 24-hour sleep-in shift, but only for the time when she was required to be awake for the purpose of working.

36. On that basis I further concluded that for each 24-hour shift worked by the claimant, she was working 15 hours i.e.

    a. 14 hours 30 minutes (from 8.00am to 10.30pm); and
    b. 30 minutes for the hours each night (she would have been awake for the purposes of working).

37. The claimant was paid a flat £100 per shift. This amounted to an hourly rate of £6.67 per hour (i.e. £100 divided by 15 hours).

38. In paying the claimant £100 for each 24-hour shift, the respondent was in breach of the National Minimum Wage (prevailing from April 2018 to March 2019 of £7.83 per hour) by an amount of £17.45 per shift or £1.16 per hour.

Week's pay

39. A week's pay for the claimant, who had no normal working hours, was to be calculated by reference to average weekly remuneration over a 12-week period pursuant to s.224 Employment Rights Act 1996.

40. Using the average of 16 x 24-hour shifts per 4 week/month period, and using a 12-week reference period, the week's pay (gross) for the claimant should have been **£469.80** calculated as follows:

$$\frac{\text{48(shifts) x 15(working hours in a 24-hour shift) x £7.83(NMW)}}{\text{12 weeks}} = \frac{\text{£5,637.60}}{\text{12}}$$

NMW

41. Utilising the table provided by the claimant, but reducing the working time for each 24-hour shift down from 24 hours to 15 hours, the claimant worked the following:

Month	**Hours Worked**	**Correct (gross) amount due at £7.83 per hour (NMW)**	**Correct (net) amount payable[1]**	**Amount (net) paid by respondent**	**Shortfall**
Aug 2017	240 (16 x 15)	£1,879.20	£1,700.86	£1350.00	**£350.86**
Sept 2017	240	£1,879.20	£1,700.86	£1350.00	**£350.86**
Oct 2017	240	£1,879.20	£1,700.86	£1350.00	**£350.86**
Nov 2017	240	£1,879.20	£1,700.86	£1350.00	**£350.86**
Dec 2017	240	£1,879.20	£1,700.86	£1,000.00	**£700.86**
Jan 2018	255 (17 x 15)	£1,996.65	£1,818.31	£1,303.00	**£513.31**
Feb 2018	270 (18 x 15)	£2,114.10	£1,935.76	£1,170.60	**£756.16**
Mar 2018	315 (21 x 15)	£2,466.45	£2,288.11	£1,340.00	**£948.11**
Apr 2018	240 (16 x 15)	£1,879.20	£1,700.86	£960.60	**£740.26**
Total	**2,280 hours**	**£17,852.40**	**£16,246.34**	**£11,173.60**	**£5,073.74**

[1] Based on annual gross income of approx. £22,550.40 (i.e. £1,879.20 x 12) less Basic rate tax of 20% of £178.34 per month (£2,140.08 per annum) after accounting for Personal Allowance of £11,850 per annum.

Unlawful deductions for May 2018 and June 2018

42. I concluded that the claimant had not been paid at all for May 2018 and June 2018 but had worked 16 x 24-hour shifts in each of May and June 2018.

43. I therefore concluded that the claim for unlawful deductions from wages in breach of Section 13(1) of the Employment Rights Act 1996, was well-founded.

44. On the basis of my earlier conclusions i.e. that the claimant was entitled to be paid £7.83 (NMW) for the 15 hours worked in respect of each 24-shift, I further concluded that the respondent had deducted from the claimant's wages, without her authorisation, 9 weeks' pay for the period from 1 May 2018 to 4 July 2018 i.e. 36 shifts x £7.83 per hour x 15 hour per shift and order the respondent to pay the claimant the sum of **£4,228.20** in this regard.

Holiday pay

45. I concluded that the claimant had not been paid any accrued annual leave entitlement for the full year that she worked for the respondent and that the respondent was therefore in breach of Regulation 14(2) Working Time Regulations 1998.

46. I concluded that the claim for holiday pay was well-founded and that the respondent had failed to pay the claimant a sum in lieu of 5.6 weeks' holiday (based on a week's pay of £469.80,) that she had accrued but not taken by the date on which her employment terminated and order the respondent to pay the claimant the sum of **£2,630.88** in this regard.

Notice pay

47. The respondent failed to provide the claimant with the minimum period of notice to terminate her employment and I award a week's pay of **£469.80** being one week's statutory notice.

Failure to provide a written statement of terms and conditions of employment

48. The respondent failed to provide a written statement of the terms and conditions of employment as required by s1 Employment Rights Act 1006 and I award two weeks' pay on the basis of £469.80 per week which is an award of **£939.60**.

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Employment Judge R Brace

Dated: 10 February 2020

ORDER SENT TO THE PARTIES ON
……11 February 2020……..

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FOR THE SECRETARY TO EMPLOYMENT TRIBUNALS