Case No: 2305217/2019

EMPLOYMENT TRIBUNALS

Claimant: **L Lloyd**

Respondent: **Elmhurst School Limited**

Held at: London South Employment Tribunals by CVP

On: 4 and 5 October 2021

Before: **Employment Judge L Burge**
J Cook
S Gooden

Representation
Claimant: In person, assisted by her husband Mr S Lloyd
Respondent: Mr J Wynne, Counsel

JUDGMENT having been sent to the parties on **12 October 2021** and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. The Claimant, Linda Lloyd, gave evidence on her own behalf. Anthony Padfield (Headteacher of the Respondent) and Steven Wade (Group Education Director of Bellevue Education International Limited) gave evidence on behalf of the Respondent.

2. The Claimant brought a claim that she was not paid in accordance with the National Minimum Wage.

3. The issues to be decided by the Tribunal were:

    a. What is the pay reference period?
    b. What is the Claimant's total gross pay
    c. What is the working time that should be counted during the pay reference period?

4. The Tribunal were referred to a bundle of 178 pages. The Respondent provided written submissions and both parties gave oral closing

submissions.

Findings of fact

5. The Respondent is a private school for boys in South Croydon. In September 2009 the Claimant was recruited as a Learning Support Assistant ("LSA", also known as a Teaching Assistant). There was no job advert, she heard about the job through a friend. She was interviewed by Charles South, CEO and Bursar. She would be working 2 days per week and would be paid £311.74 per month. Her main responsibilities were helping students on a one to one basis and in small groups. In evidence to the Tribunal the Claimant said that her understanding of her working arrangements when she was recruited was that she worked term time only.

6. The Claimant signed a contract with the Respondent. There was no clause in the contract that dealt with hours of work. However, clause 3(b) stated that:

> *"during term time these duties must be personally attended to during such hours, including out of school hours, as the CEO and/or Head Teacher may reasonably direct. In addition the Teaching Assistant may be required to work for varying short period after the end and before the beginning of any term*."

7. Subject to this clause 3(b), in clause 4 the Claimant was "entitled to the usual school holidays as holidays with pay". Not only did the contract not specify what rate of pay the school holidays would be paid at, there was no clause saying what her salary would be.

8. In 2010 the Claimant's days increased to 3 days (21 hours).

9. In October 2013 the Respondent became part of Bellevue Education International Limited.

10. The Claimant is a valued member of staff. Over the course of her employment she undertook training for forest school outside of school hours, and occasionally represented the school. She also undertook a course on mental health approximately two years ago which she received extra pay for. In cross examination the Claimant accepted that as a proportion of her working time these extra activities were "hardly noticeable". The Tribunal finds as a fact that none of these extra activities meant that she had to work during school holidays and that the Claimant worked term times only.

11. The Claimant received her pay monthly in equal installments over 12 months. The Claimant's gross pay is currently £8568 (0.6 equivalent of £14,280).

12. Mr Padfield gave evidence, that is accepted by the Tribunal, that the Claimant's pay was calculated on the basis of 40 weeks - she worked 36 weeks during term time while the school was open to students and that she

was also entitled to 4 weeks' annual leave in accordance with her statutory entitlement.

13. In November 2017, the Claimant raised with the Respondent that she did not think that she was being paid in accordance with the National Minimum Wage legislation. On 7 December 2017 the Claimant contacted HMRC who investigated the Respondent's employees' pay and hours, including the Claimant's. HMRC interviewed the Claimant and had a copy of her 2009 contract. In December 2018 HMRC concluded that the Respondent's employees in question were paid for a 40 week period and were paid at least at the National Minimum Wage. There was one exception (not the Claimant) who had been paid over a 38 week period and so he alone was erroneously being paid under the National Minimum Wage.

14. During the HMRC investigation the Respondent realised that many of its staff did not have employment contracts on their personnel files and so sent out new contracts. The Claimant declined to sign this new contract.

15. When the pandemic hit the Claimant and all the Respondent's employees were furloughed for 3 weeks in April 2020 (except those providing office support). While there was initially some confusion, LSAs were withdrawn from being furloughed over the summer holiday because they worked term time only. The Claimant and nearly all employees of the Respondent were furloughed from 12 December 2020 - 4 January 2021.

The Law

16. Section 13(1) Employment Rights Act provides that an employer shall not make a deduction from wages of a worker employed by them unless the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract or the worker has previously signified in writing his agreement or consent to the making of the deduction. An employee has a right to complain to an Employment Tribunal of an unauthorised deduction from wages pursuant to s.23 ERA.

17. The basic effect of the National Minimum Wage Act 1998 and associated Regulations is to amend workers' contracts of employment to provide a minimum rate per hour below which they should not be paid.

18. Under s.2 of the of the National Minimum Wage Act 1998 "Determination of Hourly Rate of Remuneration" it is provided:

"*2(3)(a). The regulations may make provision with respect to –*

(a) circumstances in which, times at which, or the time for which, a person is to be treated as, or as not, working, and the extent to which a person is to be so treated."

19. It is therefore the Minimum Wage Regulations (not for example the Working Time Regulations) that determines what is "work" for the purposes of the Act. The relevant parts of the National Minimum Wage Regulations 2015 SI 2015/621 (the "NMW Regulations") are as follows:

a. Regulation 6 of the NMW Regulations states that the pay reference period is a month (or if the worker is paid by reference to a period shorter than a month, that shorter period).

b. Regulation 7 (calculation to determine whether the national minimum wage has been paid), the hours of work in the pay reference period are the hours worked or treated as worked by the worker in the pay reference period as determined—

    i. for salaried hours work, in accordance with Chapter 2…;

c. In Chapter 2, Regulation 21 provides:

    21.—(1) "Salaried hours work" is work which is done under a worker's contract and which meets the conditions in paragraphs (2) to (5) of this regulation.
    (2) The first condition is that the worker is entitled under their contract to be paid an annual salary or an annual salary and performance bonus.
    (3) The second condition is that the worker is entitled under their contract to be paid that salary … in respect of a number of hours in a year, whether those hours are specified in or ***ascertained in accordance*** *with their contract ("the basic hours").*
    (4) The third condition is that the worker is not entitled under their contract to a payment in respect of the basic hours other than an annual salary or an annual salary and performance bonus.
    (5) The fourth condition is that the worker is entitled under their contract to be paid, where practicable and regardless of the number of hours actually worked in a particular week or month—
    (a) in equal weekly or monthly instalments…"

    [Tribunal's emphasis]

d. Regulation 22 "Determining hours of salaried hours work in a pay reference period" provides:
    22.—(1) The hours of salaried hours work in a pay reference period are to be calculated in accordance with the following paragraphs:
    …(3) Where the pay reference period is a month, the hours of salaried hours work in that period are the basic hours divided by 12.

20. Regulation 23 "Absences from work to be reduced from the salaried hours work in a pay reference period":
    "23.—(1) The hours a worker is absent from work are to be subtracted from the hours of salaried hours work in a pay reference period if all of the following conditions are met—
    (a)the employer is entitled under the worker's contract to reduce the annual salary due to the absence;
    (b)the employer pays the worker less than the normal proportion of annual salary in the pay reference period as a result of the absence…"

21. Determining the basic hours in the calculation year:

25.—(1) In this Chapter, the basic hours in a calculation year are determined in accordance with the following paragraphs.
(2) The basic hours in the calculation year are the ***basic hours ascertained in accordance with the contract*** *at the start of the calculation year, unless there is a variation to the basic hours which takes effect in the calculation year.*

[Tribunal's emphasis]

22. 'The BEIS guide' is admissible in employment tribunals as an aid to construction of the NMW legislation, but tribunals are not obliged to follow it.

23. The burden is on the Respondent to show that by applying the correct calculation in the NMW Regulations it paid the Claimant at a rate no less than the minimum wage (s.28(2) NMW Act 1998).

Conclusions

24. To work out whether an individual is being paid the National Minimum Wage ("NMW"), it is necessary to work calculate their hourly rate of pay. The total pay received in the relevant pay reference period (one month) needs to be divided by the total number of basic hours worked during that period. Basic hours need to be "ascertained in accordance with the contract".

25. In this case the Claimant says that the clause in her contract that gives her an entitlement to "the usual school holidays as holidays with pay" mean that the 12 weeks of school holiday should be paid at the same rate as when she is working/on statutory leave and should be included in her basic hours worked calculation. So the Claimant says that her basic hours are 21 hours for 52 weeks of the year.

26. Mr Wynne described the "holiday with pay" clause as "loose wording". It is an ambiguous clause. However, for NMW purposes it does not matter as the Tribunal needs to determine what the Claimant's basic hours are and it is clear that she is not working during the 12 weeks' leave.

27. The Respondent says that the Claimant's basic working hours are 21 hours per week during term times plus her statutory leave entitlement. So the Respondent says that her basic working hours are 21 hours for 40 weeks of the year.

28. The parties agree that if the Claimant's basic hours are for 52 weeks of the year the Claimant is paid under the NMW and the Tribunal will need to go on to consider how much the Claimant was underpaid by. If, however, the Claimant's basic hours are 21 hours for 40 weeks a year, she is paid over the NMW and so the claim fails.

29. It is usual for workers who only work during term time to receive pay over 52 weeks. This ensures that they are not paying too much national insurance over the months they are working and ensures that workers are not without pay for proportions of the year.

30. The Tribunal has found as a fact that the Claimant worked term time only. When the Claimant accepted her job it was on her and the School's understanding that she would work term times only. The contract did not explicitly set this out although this is consistent with clause 3(b) which states:

    "during term time these duties must be personally attended to during such hours, including out of school hours, as the CEO and/or Head Teacher may reasonably direct. In addition the Teaching Assistant may be required to work for varying short period after the end and before the beginning of any term."

31. The Claimant undertook some forest school training, represented the school and did some mental health training in addition to her duties during school hours but these were hardly noticeable in the context of her usual activities.

32. The Tribunal ascertains that, in accordance with her contract, the Claimant's basic working hours are the hours that she works (plus her 4 week pro-rated holiday entitlement). The fact that she has the clause "the usual school holidays as holidays with pay" does not mean that these school hours are deemed to be working hours for the purposes of the NMW legislation. Moreover, this interpretation does not accord with the legislation and the caselaw. In the Regulations there are examples of time that do not count towards NMW calculations such as where a salaried hours worker sleeps at/near a place of work when on call, and is provided with suitable facilities for sleeping - only time when the worker is awake for the purpose of working will be treated as working time. In *Royal Mencap Society v Tomlinson-Blake and another* [2021] ICR 758 the Supreme Court said that the Court of Appeal had failed to recognise that the NMW Regulations draw a basic distinction between working and being available for work. If the worker was only available for work, his or her activity was distinct from working and could not also fall within the meaning of time work or salaried hours work.

33. The same principle can be applied in this case – the fact that the contract entitles the Claimant to "holidays with pay", does not mean that this counts as a working activity. The Claimant is not working during those 12 weeks. The purpose of the National Minimum Wage legislation is to ensure that workers are paid a minimum amount for the work that they do. Basic hours need to be "ascertained in accordance with the contract". The Tribunal concludes that it is not correct that "the usual school holidays as holidays with pay" mean that the 12 weeks of school holiday should be paid at the same rate as when she is working/on statutory leave and should be included in her basic hours worked calculation for NMW purposes.

34. Looking at Regulation 21(3) the Respondent has shown that the Claimant's "basic hours" as ascertained in accordance with her contract (and as understood by both parties when it was entered into) is 21 hours over 40 weeks.

35. The Claimant is right to point out that in the NMW Regulations absences from work should not be discounted from work (as long as they are paid in

full) but this does not arise in this case because the 12 weeks holiday do not form part of her "basic hours".

36. The contract also did not set out what the Claimant's pay was to be. However, she knew that initially she was to be paid £311.74 every month, even though she only worked during the term time. The Claimant has accepted that if her pay is calculated over 40 weeks then she is paid above the NMW.

37. It is the unanimous judgment of the Tribunal that the Claimant's claim for unlawful deductions from wages for failing to pay NMW fails and is hereby dismissed.

Employment Judge **L Burge**

Date: 20 October 2021

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