



# EMPLOYMENT TRIBUNALS

**Claimant:** J Ross

**Respondent:** Optima Care Limited

**Heard at:** London South Employment Tribunal by CVP

**On:** 8 March 2022

**Before:** EJ L Burge

## Representation

Claimant: In person

Respondent: Mr Husain, Solicitor

# RESERVED JUDGMENT

**It is the judgment of the Tribunal that:**

1. the Respondent has made an unauthorised deduction from the Claimant's wages and is ordered to pay the gross sum of £333.06, in respect of the amount unlawfully deducted; and
2. the Respondent has made an unauthorised deduction from the Claimant's wages by not paying her overtime for work on 13 and 14 February 2021, although that amount due has subsequently been paid.

# REASONS

## Introduction

1. The Claimant claimed that she had not been paid overtime and so the Respondent had made unauthorised deductions from her wages.

## The hearing and evidence

2. The hearing took two hours. The Claimant gave evidence on her own behalf. Hema Sivalingam (Finance Director), Laura Fehilly (HR Director)

and Bahij Harb (Finance Manager) gave evidence on behalf of the Respondent. During the hearing I was referred to a bundle of 183 pages. The Claimant appended documents to her witness statement. Both parties gave oral closing submissions.

## **Facts**

3. The Claimant worked from 28 September 2020 until 4 April 2021 as a Service Manager at the Respondent, a company providing residential and supported living services.
4. The Claimant's contract of employment provided:

### ***“Pay***

*Your wage will be paid at the rate of £33,000 rising to £35,000 on successful probation, full occupancy and SIP completion by direct credit transfer into your nominated bank account on or around the 7th day of each month in arrears for the hours worked in the previous calendar month.*

*Where overtime is worked, you will be paid in accordance with those provisions set out under Hours of Work...*

### ***“Hours of Work***

*Your normal hours of work are 40 per week and are variable in accordance with the rota, which will be notified to you on a monthly basis.*

*You are required to work on Monday-Friday as defined by the rota. The minimum amount of hours on any working day will be 8. Working hours on any day will be between the times of 9am and 5pm. You are not required to work on more than 5 days per week.*

*If you are required to work an early shift, the earliest starting time will be 7am.*

*If you are required to work a late shift, the latest finishing time will be 10pm.*

*\*In addition to these hours, you will be required to work a reasonable amount of additional hours when necessary. You are entitled to payment for these additional hours at your normal rate of pay.*

*You are entitled to an unpaid break of 20 minutes if your daily working time is more than 6 hours during your working day...*

5. The staff handbook provided that “All overtime has to be pre-authorised and will only take effect once you have worked the equivalent of full time hours.”

6. While the staff handbook says that overtime has to be preauthorised by management, Ms Sivalingam confirmed that in practice what would happen is that the line manager would send payroll an email to say that hours need to be paid or, more commonly for managers, they would request that the employee be given time off in lieu.
7. The Claimant says she worked overtime of 6 hours on 14 and 15 December 2020, when she returned to work after self-isolating following contracting Covid-19 and that her manager had authorised it. Ms Fehilly had only joined the Respondent after the Claimant had left her employment and gave evidence that she could find no evidence that the Claimant worked these additional hours, or that it had been authorised. However, the outcome to the grievance did not say that the Claimant had not worked those hours but “the overtime you refer to above is considered to be voluntary and therefore unpaid”. The Claimant’s manager left the Respondent before the Claimant did and was not a witness to the Tribunal. On balance, I find that the Claimant did work 6 hours’ overtime on 14 and 15 December 2020 and that her manager authorised it.
8. The Claimant says that she worked 19 hours during the weekend of 13 and 14 February 2021. The Respondent subsequently paid the Claimant for the 19 hours overtime she had worked on 13 and 14 February 2021, although they termed it as a “gesture of goodwill”.
9. The Claimant claimed that she worked 15 hours during the weekend of 27 and 28 February 2021 and that she had been told to do so by Ms Sivalingam. Ms Sivalingam gave evidence that the Claimant had worked during 27 and 28 February but that this was her choice. On balance, I find that the Claimant did work 15 hours over that weekend and had been told to do so, so it was preauthorised, by Ms Sivalingham.
10. The Claimant resigned by letter dated 5 March 2021, she did not work her notice period but continued to be paid until 4 April 2021.
11. On 5 April 2021 the Claimant entered a grievance. The relevant parts for the purposes of this claim are that the Claimant said that she had not been paid for overtime, referred to 14, 15 December 2020, 13, 14, 27 and 28 February 2021 and said that her additional hours amounted to 122 hours which should have been paid at £15.86 per hour.
12. A grievance hearing took place on 19 April 2021 where the issues were discussed.
13. By letter dated 30 April 2021 the Respondent wrote to the Claimant informing her of the outcome of her grievance and included that:
  - a. There was an error in her contract and the reference to shifts/rotas was not applicable and so the overtime she was claiming was considered to be voluntary and therefore unpaid;

- b. The Respondent was unable to corroborate the hours the Claimant had worked during the 13 and 14 of February 2021, however as a gesture of good will, they would pay her 12 hours you worked in the service; and
  - c. The Claimant had volunteered to attend work on 27 and 28 of February 2021, it was the Respondent's discretion whether to pay for the volunteered overtime, and a decision was taken that this would not be paid.
14. In relation to the Claimant's claim that she had worked an additional 122 hours, Ms Fehilly gave evidence to the Tribunal that she had gone through the Claimant's log in and outs and could see where she had accumulated these hours nor that any overtime was authorised. The Claimant said that the fobs that were used at the Respondent were unreliable.
15. Some time after the Claimant entered her grievance, she provided a list breaking down the 122 hours she said that she had worked in overtime. She did not explain for each one what work she had been doing and how/why it was authorised. She did not provide the Tribunal with documentary evidence showing that she had worked on those hours. On balance, I find that the Claimant did not work approved overtime on those additional hours.
16. The Claimant unsuccessfully appealed the grievance decision.

## **The Law**

17. The Employment Rights Act 1996 ("ERA") provides the right not to suffer unauthorised deductions:

*S.13 (1) An employer shall not make a deduction from wages of a worker employed by him unless—*

- a. 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*
- b. the worker has previously signified in writing his agreement or consent to the making of the deduction.*

18. Section 23 provides:

### **23 Complaints to employment tribunals**

*(1) A worker may present a complaint to an employment tribunal*

*(a) that his employer has made a deduction from his wages in contravention of section 13 (including a deduction made in contravention of that section as it applies by virtue of section 18(2)),*

...

*(2) Subject to subsection (4), an employment tribunal shall not consider a complaint under this section unless it is presented before the end of the period of three months beginning with—*

*(a) in the case of a complaint relating to a deduction by the employer, the date of payment of the wages from which the deduction was made, or*

*(b) in the case of a complaint relating to a payment received by the employer, the date when the payment was received.*

*(3) Where a complaint is brought under this section in respect of—*

*(a) a series of deductions or payments, or*

*(b) a number of payments falling within subsection (1)(d) and made in pursuance of demands for payment subject to the same limit under section 21(1) but received by the employer on different dates,*

*the references in subsection (2) to the deduction or payment are to the last deduction or payment in the series or to the last of the payments so received.*

*(3A) Section 207B (extension of time limits to facilitate conciliation before institution of proceedings) applies for the purposes of subsection (2).]*

*(4) Where the employment tribunal is satisfied that it was not reasonably practicable for a complaint under this section to be presented before the end of the relevant period of three months, the tribunal may consider the complaint if it is presented within such further period as the tribunal considers reasonable.*

19.S.27 ERA defines “wages” as “any sums payable to the worker in connection with his employment”. This includes “any fee, bonus, commission, holiday pay or other emolument referable to the employment”.

## **Conclusions**

20. The Claimant was employed by the Respondent from 28 September 2020 until 4 April 2021. By virtue of her contract, the Claimant was entitled to pay for overtime: “*You are entitled to payment for these additional hours at your normal rate of pay.*” The Respondent said that this clause should not have been in her contract as she was management grade. However, this was the term that had been agreed between the parties and the Claimant was entitled to rely on this clause.

21. In not paying her for the approved overtime, the Respondent made unauthorised deductions from the Claimant’s pay for work carried out on 14, 15 December 2020 and 13, 14, 27 and 28 February 2021.

22. The Claimant produced a breakdown of, what she says, were the additional hours that she worked but she provided no detail of the work

that she had been doing during those hours and why overtime would have been approved and necessary. My conclusion therefore was that she had not proved that she had worked approved overtime and so this part of her claim fails.

23. The Claimant approached ACAS on 12 April 2021 and an early conciliation certificate was presented on 24 May 2021. The Claimant submitted her claim on 1 June 2021. The Respondent argued that the Claimant could not claim for the overtime worked on 14 and 15 December 2020 as she did not bring her claim within 3 months.
24. The first unauthorised deduction for work done on 14 and 15 December 2020 would have taken place in the next payroll on 7 January 2021. The Claimant did not contact ACAS until 12 April 2021 so the time limit for this first deduction was not extended. However, as this deduction was the first in a series of deductions by the Respondent, time runs from the last deduction, 7 March 2021 and so the claim is in time (s.23(3) ERA).
25. The Claimant worked 6 hours over time on 14/15 December 2020 and 15 hours overtime on 27/28 February 2021, totalling 21 hours for which she was not paid. Her gross rate of pay was £15.86 per hour. The Claimant's pay was therefore unlawfully deducted by £333.06 (gross). While the Claimant's pay was also deducted by 19 hours for the overtime she worked on 13/14 February 2021, the Respondent has already paid that amount.

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Employment Judge L Burge

Date 18 March 2022