EMPLOYMENT TRIBUNALS

Claimant: **GILLIAN GILROY**
Respondent: **PARTNERSHIPS IN CARE LIMITED**

Heard at: **Watford** **On: 21 November 2022 and in chambers on 22 November 2022**

Before: **EJ Isaacson**

Representation
Claimant: **Mr R O'Keeffe, counsel**
Respondent: **Mr A MacMillan, counsel**

RESERVED JUDGMENT

The judgment of the Tribunal is:

1. It was an implied term of the claimant's contract of employment, through custom and practice that was reasonable, notorious and certain, that she was entitled to be paid an allowance for all sleep-in shifts. As a lead case this decision will be binding in respect of those related claims brought by claimants in the relevant period (February 2015 to January 2017).

2. There was an unauthorised deduction from the claimant's wages for the gross sum of £3978.70 for unpaid sleep-in shift allowances for the period February 2015 to January 2017. The sum should be paid by the respondent to the claimant and the sum should be taxed and the tax paid by the employer to HMRC.

3. Holiday pay should be calculated based on the claimant's basic pay, plus the sleep-in shift allowance, plus her overtime pay but that the daily rate needs to be recalculated based on a 365-calendar day. As a lead case this decision will be binding in respect of those related claims brought by claimants in the relevant period (February 2015 to January 2017).

4. For this claimant the parties are to agree the recalculated figure which should be based on the information provided by the claimant in her updated schedule of loss regarding the shifts worked by her. The figure should be paid by the respondent to the claimant gross and any tax payable should be paid by the employer to HMRC.

5. The claimant's claim under the National Minimum Wage Regulations is dismissed upon withdrawal, and that decision will be binding in respect of

those related claims brought by claimants who were in the relevant period (February 2015 to January 2017) Senior Support Workers and paid the same salary as the claimant.

REASONS

Evidence before the Tribunal

1. The Tribunal was presented with a joint bundle, written witness statements from Ms Gilroy and Ms Waghorne and written submissions. Both witnesses gave oral evidence and both counsel gave oral submissions. The claimant provided an updated schedule of loss and the respondent sent in a written response to the claimant's updated schedule of loss and the claimant sent in a response to the respondent's submissions on remedy.

2. The following cases were referred to or considered:
Devonald v Rosser & Sons [1906} 2 KB 728 (Devonald)
Sagar v H Ridehalgh and Son Ltd [1931] 1 Ch 310 (Sagar)
Arthur H Wilton Ltd v Peebles and ors [1994] EAT 835/93 (Peebles)
British Nursing Association v Inland revenue[2003] ICR 19 (British Nursing)
Royal Mencap Society v Tomlinson-Blake [2021] ICR 758 (Mencap)
Lock v British Gas Trading Ltd [2014] ICR 813
Abellio East Midlands v Thomas [2022] ICR 802 (Abellio)
Delaney v Staples [1992] IRLR 191 (Delaney)
Coors Brewers v Adcock [2007] EWCA Civ 19 (Adcock)
Akthar v Brd Retail Ltd t/a Burton Kia case No. 1901747/11 (unreported) (Akthar)
Garratt v Mirror Group Newspapers Ltd [2011] ICR 880 (Garratt)
Park Cakes LTD v Shumba & ors [2013] EWCA Civ 974 (Park Cakes)
Dukes v GEC Reliance System Limited EAT [1982]. ICR 149; HL [1988]1 ALL ER 626 (Duke)
The Moorcock(1889) 14 PD 64 (Moorcock)
Dudley MBC v Willetts [2018] ICR 31 (Dudley)
Bear Scotland Limited &ors v Fulton [2015] ICR 221 (Bear Scotland)
Hartley and ors v King Edward VI College [2017] UKSC 39 (Hartley)
Revenue and Customs Comrs v Stringer [2009] UKHL 31(Stringer).
British Airways plc v Williams [2011] IRLR 948 (Williams)
Thames Water utilities v Reynolds [1996] IRLR 186 (Thames Water)
Leisure Leagues UK v Maconnachie [2002] IRLR 600 (Maconnachie)

Background and application to amend

3. The claimant presented her claim form on 31 October 2017. There are a number of cases, which have not been formally joined, who all claim against the same employer an entitlement to a sleep-in allowance for time spent by them for sleep- ins at their workplaces. These claims fall under three case numbers: Ms Oxborrow under case number 3300169/2017; Ms K Culley, Ms PA Campbell, Ms J Sacharczuk, Ms A Krenc, Mr Pugsley and Ms J

Smith under case number 3327345/2017; and Ms E Keeble under case number 3328446/2017. Mr Pugsley has since withdrawn his claim.

4. At a case management preliminary hearing (CMPH) before EJ Hyams on 16 August 2022 it was agreed that Ms Oxborrow would be a lead case for all claimants. Since then Ms Oxborrow changed her name to Ms Gilroy. The Tribunal's record has been amended accordingly.

5. After the CMPH EJ Hyams made an order in which he set out his concerns regarding the draft list of issues provided by the claimant's representative at the time.

6. At the start of the full merits hearing claimant's counsel confirmed that the claimant, as a Senior Support Worker could only be a lead case in relation to those claimants who were also Senior Support Workers. This was agreed. Claimant's counsel then confirmed that the claimant was not pursuing a claim founded on her rights under the National Minimum Wage regulations 2015 (NMWR). It was agreed that the claimant's claim under the NMWR was dismissed upon withdrawal, and that decision would be binding only in respect of those related claims brought by claimants who were in the relevant period (February 2015 to January 2017) Senior Support Workers and paid the same salary as the claimant.

7. Claimant's counsel also confirmed that the claimant was no longer pursuing her previous primary argument that there was an express term that she would receive a sleep-in allowance in relation to all sleep-in shifts undertaken in excess of 4 per month. It was not clarified at the hearing whether this argument would still be pursued by the other claimants who are not Senior Support Workers. I am not making any assumption that the other claimants are also withdrawing the argument that there was an express term that they would receive a sleep-in allowance in relation to all sleep-in shifts undertaken in excess of 4 per month. This is a matter that will need to be clarified.

8. The claimant continues to argue that there was an implied term based on custom and practice that she would be paid an allowance in relation to every sleep-in shift undertaken. She also contends for underpayments of holiday pay as a result of the respondent's failure to take into account these allowances in calculating her holiday pay.

9. The claimant then applied to amend the claim to add a claim for breach of contract in relation to the sleep-in allowance in case the Tribunal finds that the sleep-in allowance is not wages.

10. I heard submissions from both parties on the claimant's application to amend and allowed it. I referred to the EAT case of Vaughan v Modality Partnership [2021] IRLR 97 in which HH Judge Taylor points out that the core test in considering an application to amend is the balance of injustice and hardship to each party in either allowing or refusing the application. What will be the real practical consequences of allowing or refusing the amendment? I did not accept that the application was just a relabeling as it was a new cause of action. Although the application was very late the prejudice to the respondent was minimum as the amendment did not result in any further gathering of documents or witness statements and I would

ensure that the respondent had time to prepare and take instructions in relation to the new claim. The injustice of not allowing the amendment would have been greater to the claimant.

11. I took account of the fact that the claim was out of time but noted that the claimant was in time to bring a claim for breach of contract in the County Court. Taking into account the Tribunal's overriding objectives I decided it would not be in either party's best interests to have further proceedings in another jurisdiction. I also considered the fact that this case was a lead case. On balance it was right to allow the amendment, even considering the fact that the claim was out of time. After the hearing I considered the fact that I was not told whether the other claimants who are Senior Support Workers had also left their employment. Only those employees who have left their employment with the respondent have jurisdiction to bring a breach of contract claim.

List of issues

12. The following list of issues was agreed at the start of the hearing, after the application to amend:

1. *The claimant's claim under the National Minimum Wage Regulations is dismissed upon withdrawal, and that decision will be binding in respect of those related claims brought by claimants who were in the relevant period (February 2015 to January 2017) Senior Support Workers and paid the same salary as the claimant.*

2. *Was it an implied term of the claimant's contract of employment that she was entitled to be paid an allowance for all sleep-in shifts, reflecting the work she was expected to undertake and / or her inconvenience? The claimant contends that this custom was "reasonable, notorious and certain" per Devonald v Rosser & Sons [1906] 2 KB 728.*

    a. *Was the practice of agreeing an allowance for all sleep-in shifts notorious in the care sector from the time of the claimant's employment in 1998, and / or in the relevant period (February 2015 – January 2017)?*

    b. *Is the term contended for reasonable?*

    c. *Is the term contended for sufficiently certain?*

3. *If the implied term is found, was the sum of £21.50 properly payable in relation to each sleep-in shift worked in the relevant period, so that where it was not paid that was an unauthorised deduction from wages within the meaning of s.13 ERA 1996?*

4. *If not, is the claimant entitled to advance a claim for damages for breach of contract in this forum, and if so, was the respondent in breach of the implied term? What losses resulted and are these recoverable under the Employment Tribunal Extension of Jurisdiction Order 1996?*

Findings of fact

13. Both witnesses were honest and reliable. Very little evidence was disputed. I make the following findings of fact.

14. The Claimant has been employed since 5 October 1998 as a Senior Support Worker in care homes for persons with learning disabilities and transferred into the respondent's employment from 24 January 2000. Her contract specified she was entitled to an annual salary of, at that time, £12,195 per annum.

15. The term as to working hours specified (p80):
"Your hours of work will normally be 37.5 hours per week (1950 per annum) exclusive of meal breaks, full time working a shift rota including evenings, weekends and sleep-ins. Overtime will only be payable when authorised by a Senior Member of Staff. You will be required to work a rota or shift system which at GHG's discretion may be varied from time to time."

16. There is no express clause in the contract regarding sleep-ins. Both parties agreed that the above clause is silent regarding sleep-ins.

17. There were three types of shifts, as described by the claimant:

"If I worked a shift rostered as '9' this meant that I was required to work 15 hours which is two 7.5 hours shift. If I was rostered to work 9:00-4:30, I would work a single 7.5 hours shift. If I was rostered to work as '9S' this meant that I would work 15 hours and then a 9 hour sleep-in."

18. The claimant worked a regular rota on a 3 weeks rolling basis and did approximately 7 sleep-ins in a 3 week period. In a normal month the claimant worked around 9 to 11 sleep-ins. The claimant's shift and roster system is further explained by the Claimant at p125.

19. The claimant was not paid for the sleep-ins which were part of her rostered pattern. Some sleep-in shifts were remunerated separately from the claimant's annual salary in the form of a "night allowance", but these were for overtime sleep -in shifts.

20. The claimant did not know of any other company in the care sector that did not pay a sleep-in allowance and had spoken to others in the care industry who all were paid an allowance for sleep-ins.

21. The claimant had no reason to believe that pay for sleep-ins wasn't in her salary, but it became clear she wasn't being paid for sleep-ins. The claimant looked at her pay slips and did a calculation of her weekly pay based on her normal hours of 37.5 hours per week (hourly rate £8.75 x 37.5 x 52 divided by 12) and realised that she was not receiving any pay for her rostered sleep-in shifts and was only being paid her basic salary for 37.5 hours. When she took account of the hours she did in sleep-ins she worked out she was being paid less then support staff. She felt it wasn't right that she was working sleep in shifts for nothing 9 -11 times a month.

22. At the start of her employment she had been told that the allowances would be part of her salary. After about 6 months she raised the issue with her line manager and continued to do so on many occasions as it was clear to her that there was no payment for her sleep-in shifts within her normal pay. She raised it at all her reviews and at supervision meetings. No one would give her any explanation despite her constantly raising the issue other than being told that payment for sleep-in hours was included in her monthly salary.

23. I find there was no ascertainable express term governing payment for sleep-in shifts prior to 2017. I find that the claimant was clear that she expected to be paid a sleep-in allowance and was astounded that the respondent was not paying her anything for the sleep-ins.

24. Occasionally mistakes were made on her pay slips but generally it was clear to the claimant that she did receive a sleep-in allowance for overtime shifts but not for her normal rostered shifts.

25. On 27 January 2017 the respondent wrote a letter to the claimant that stated that from 01 February 2017 the claimant would be paid £21.50 for every sleep-in shift in excess of 4 shifts per month ("shifts completed as overtime"). 4 sleep-in shifts per month was said to be the number of sleep-in shifts she was contracted to undertake in consideration of her annual salary. Payment for sleep-in shifts completed as overtime would continue to be paid at a rate of £21.50 per shift (p179). It is not clear why the sleep-in allowance was only going to be paid for shifts in excess to 4 shifts per month. This seems to be an arbitrary decision and there was no evidence before me to explain it.

26. From February 2017 the claimant was paid a sleep-in allowance of £21.50 for sleep-in shifts done in excess to 4 sleep-in shifts per month and also received a sleep-in shift allowance for sleep-in shifts done on overtime.

27. When the Priory took over the respondent paid the claimant an allowance for every sleep-in shift and the allowance increased to eventually £30 per sleep-in shift.

28. A formal grievance was made after the claimant presented her claim form and proceedings were stayed pending the outcome of the internal grievance and then stayed pending the decision in the Mencap case. I do not criticise the claimant for not raising a formal grievance earlier. She constantly raised the issue with her manager who should have referred her to the formal grievance procedure.

29. From 1998 Ms Waghorne worked for 15 years in a number of roles from support worker, senior support worker, deputy manager and manger for Caretech Community services. On 3 December 2013 she commenced employment for the respondent as Peripatetic manager and later Operations manager.

30. Ms Waghorne confirmed that the Priory pay an allowance for every sleep-in shift. Ms Waghorne confirmed that during her time in the various different roles at Caretech she was always paid an allowance over her basic contractual hours for sleep-ins.

31. The claimant was made redundant in May 2019.

32. The claimant produced an updated schedule of loss. The shifts worked by the claimant set out in the schedule are not disputed and are accepted. It is not disputed that the claimant's holiday pay was calculated based only on the claimant's basic salary and did not include overtime or a sleep-in allowance in the relevant period.

33. The Low Pay Commission (LPC) is statutory and was established under s 8 NMWA 1998 and has an authoritative and influential role in setting of the NMW. Its membership is drawn from both sides of the industry and those with relevant knowledge and experience. The reports of the LPC disclose the depth of investigation and consultation which it undertakes in discharging its statutory responsibilities. The LPC confirms in their reports that most workers who are required to do a sleepover are paid an allowance for the inconvenience - "*an allowance is usual practice".*

Submissions

Claimant

34. When summarising submissions I have taken into account submissions set out in the pleadings which remain relevant, questions asked in cross examination, oral and written submissions.

35. In summary, claimant's counsel argued that as evidenced by the claimant and confirmed by Ms Waghorne she had not heard of any employer in the respondent's industry that did not pay an allowance for sleep-ins. It is an implied term by reference to custom and practice that the claimant is entitled to a sleep-in allowance for the work she was reasonably expected to have to do during those shifts. In the present case that allowance was paid in respect of some non-contractual shifts, in the sum of £21.50, but the respondent was obliged to apply that to all sleep-in shifts. She also contends for underpayments of holiday pay as a result of the respondent's failure to take into account these allowances.

36. He argued it is established law that there are implied terms in law such as to give reasonable notice, a duty to take reasonable care and the implied term of mutual trust and confidence. In this case the claimant is referring to a different variety of implied term by custom and practice which needs to be reasonable, notorious and certain – LJ Farrell in Devonald p743. If a term is regularly adopted in a particular trade or industry or in a particular area, then it may be that the term has become customary and falls to be implied into every contract in that trade or industry or area, on the basis that the parties must be taken to have agreed upon the obvious.

37. It is clearly fair and reasonable that workers required or volunteering to undertake sleep-in shifts should be paid some allowance to reflect the work they are expected from time to time to do, and for their inconvenience. The term that the claimant, and others in the residential care sector, should receive an allowance reflecting the work they are reasonably expected to undertake during a sleep-in shift (that being identified by agreement between the parties as £21.50 in the present case) is no less certain than the term found in Devonald.

38. Claimant's counsel argued that in the Sagar case LJ Lawrence draws a distinction between an implied term by reference to conduct and an implied term by custom and practice in a particular sector. He argues that LJ Lawrence looked at other cases to see how common place it was to make deductions in the weaving trade. In this case we should look at the evidence referred to in the Mencap case. Once a practice is established there can be some contracting out but once custom and practice becomes the exception rather than the rule it is no longer a custom. 85% was said to prevail in Sagar (p339).

39. Claimant's counsel then turned to the Low Pay Commission (LPC) first and second reports referred to in the Mencap case, to demonstrate that the sleep-in shift allowance is notorious. The LPC is statutory and was established under s 8 NMWA 1998. "*It has an authoritative and influential role in setting of the NMW. Its membership is drawn from both sides of the industry and those with relevant knowledge and experience. The reports of the LPC disclose the depth of investigation and consultation which it undertakes in discharging its statutory responsibilities" (para9).*

40. At paragraphs 12 to 14 Lady Arden sets out the specific recommendation relevant to sleep-in shifts: *"For hours when workers are paid to sleep on the premises, we recommend that workers and employers should agree their allowance, as they do now. But workers should be entitled to the national minimum wage for all times when they are awake and required to be available for work"; para4.3.4.* At para 48 the LPC confirms that their recommendation was based on evidence that **most** workers who are required to do a sleepover are paid an allowance for the inconvenience. At para 49 LPC states "*an allowance is usual practice".*

41. Claimant's counsel emphasised that the LPC confirmed that employers and employees should agree allowances "***as they do now*****".** He argued this was evidence of a common practice to pay an agreed allowance for sleep-ins and at para 14 Lady Arden stated: "*Employers should continue to agree an allowance with them for such work".*

42. In Mencap the facts of the case were that Ms Tomlinson-Blake as a care support worker was paid an allowance of £22.35 for sleep ins and Mr Shanon was paid a payment of £50 per week which rose to £90 pw. These figures are similar to the allowance paid to the claimant from 2017.

43. Claimant's counsel relied on Peebles as authority that you can have an implied term as to a mechanism for setting any pay or remuneration or element of remuneration. He argued in this case there was an agreed sum for an allowance, which was paid in 2017.

44. Claimant's counsel referred to Abellio for the test of wages and damages. The test for whether something qualifies for wages is whether there is consideration for work done or to be done. You need a sum which is properly payable and capable of qualification on a particular occasion. He argues in this case the sleep-in allowance is capable of qualification and was for work expected to do or an estimate for the loss/ inconvenience being away from home. On a balance of probability the allowance would be

£21.50. The evidence supports the fact that it was a recognised practice and custom across the industry to pay a sleep-in allowance.

45. Claimant's counsel argued that the principles set out in Garratt and Park Cakes are not relevant to this case. The claim is that there was an implied term by custom and practice across the care sector. It is rare but this case is an example of it.

46. Claimant's counsel confirmed that the claimant has not contended for underpayments of holiday pay in connection with her additional leave and so there is no issue about whether sleep-in allowances were part of her *"remuneration for employment in normal working hours"* within the meaning of s.221 ERA 1996.

47. The issue is whether overtime payments and sleep- in shift allowances were intrinsically linked to the tasks the claimant was required to carry out under her contract. Plainly the sleep-in allowance, implied into the contract, is intrinsically linked to her employment under her contract.

48. In addition, the Tribunal is required to *"ensure that workers benefit from remuneration comparable to that paid in respect of periods of work; or, to put it another way, do not suffer any financial disadvantage as a result of taking annual leave"* – see *Dudley.* It was a "*normal"* part of her pay.

49. A week's pay should be based on his or her average pay over an appropriate reference period.

50. The calculation of holiday pay should be based on a week's leave which is a working week rather than a calendar week.

51. There was no ascertainable express term governing payment for sleep-in shifts prior to 2017, and that night allowance payments appear to have been made on an *"arbitrary"* basis as the respondent argued. The Tribunal is asked to find that in the absence of any express term governing the same, the parties should be taken to have intended that an allowance would be agreed, because it was a notorious, reasonable and certain industry wide practice.

52. The Tribunal is required to ascertain the parties' intentions construed objectively. The claimant confirmed she considered it was so obvious that sleep-ins would be paid because it was notorious in the sector.

Respondent

53. Respondent's counsel argues the claimant's pay slips demonstrate that there was an arbitrary receipt of sleep-in allowances and it was not clear to the claimant what allowance she was receiving. Therefore you cannot point to a clear term to be implied into the contract as the situation was informal and confused. There is no consistent practice, and the claimant points to inconsistencies and unfairness.

54. The Mencap case cannot be relied upon as authority of a custom and practice as the case decided that for the purposes of NMW claim sleep-in time is not wages.

55. The LPC only recommends for an agreement to be made. In this case an agreement was only reached in January 2017.

56. There needs to be an existence of a legal obligation to find it to be a properly payable allowance and for it to be a contractual term it needs to be certain. An implied term cannot contradict an express term.

57. It may be reasonable and decent to pay an allowance for sleep-ins but reasonableness is not part of the test. To show a term is implied you need to show that it was necessary to give business efficacy, was the normal custom and practice, or the term demonstrated the way the contract was to be performed or otherwise was obvious.

58. Respondent's counsel argued that the claimant cannot rely on Devonald as the Court of Appeal held that the custom of making deductions from pay for bad workmanship was an implied term in the contract of a Lancashire weaver: those deductions had been made regularly and uniformly for over 30 years at the mill in question, and the custom was followed in at least 85 per cent of Lancashire cotton mills and was well known to Lancashire weavers. A claim for deductions, put on the basis that the weaver did not know the term, failed based on this finding. The dictum from Sagar is that in order for a term to be implied, the custom in question must be reasonable, notorious, and certain. The scenario the claimant describes is plainly one of inconsistent practice and considerable uncertainty – the reliance on Devonald-implication seems misguided in the circumstances.

59. In Duke the EAT was asked whether a policy in regard to a retiring age had been communicated to employees or whether there was evidence of any universal practice to that effect. Browne-Wilkinson J said: *'[T]here was no evidence that the employers' policy of retirement for women at the age of 60 had been communicated to such employees in 1978 nor was there any evidence of any universal practice to that effect. A policy adopted by management unilaterally cannot become a term of the employee's contracts on the grounds that it is an established custom and practice unless it is shown that the policy has been drawn to the attention of the employees or has been followed without exception for a substantial period.'* Respondent's counsel argued that in this case there was an absence of evidence any policy relating to a sleep-in allowance.

60. In Park Cakes and Garratt, cases regarding custom and practice around enhanced redundancy pay, respondent's counsel argued that ordinary contractual principles still apply- by conduct has the employer evinced to the relevant employees an intention that they should enjoy the benefit as of right? He argues this must also apply to a claim of an implied term through custom and practice. The claimant had difficulty in understanding her rights under the contract.

61. Respondent's counsel argued that the LPC could not be relied upon as evidence of an implied term. A passing reference in a case is a bridge too far. The Tribunal needs to look at the particular circumstances of the case and consider it objectively.

62. The Mencap case is authority that sleep-in allowances are not wages and therefore is not properly payable as wages. Abellio is authority that the sleep-in allowance cannot be "wages".

63. For a term to be included in holiday pay calculations it must be intrinsically linked to the performance of tasks under the contract of employment (Bear Scotland). For example, a standby or call -out payment, if their services were required of sufficient regularity, could be included as normal remuneration for the purposes of Art 7(1) of the Working Time Directive (WTD) and the minimum of 4 weeks' annual paid leave it prescribes.

64. The approach under ss221-224 ERA which refers to a calculation on the basis of '*normal working hours'* is different to the WTD. Overtime is disregarded unless guaranteed and obligated by the employer. Discretionary allowances do not count where they are not payable under contract. Therefore the respondent argues that the ERA does not allow for the inclusion of a sleep-in allowance.

65. A different avenue by way of a contractual damages claim may still lie open If this were held to be money due under an implied term, as has been argued.

66. Any calculation should be done by reference to a 52-week period and holiday pay calculated based on a fraction of a 7-day week. A calendar day rather than a working day.

67. Any sleep-in allowance owed should be calculated on the basis that 4 sleep-ins per month were to be included within the terms of the contract. Damages should be quantified based on those hours in excess of 4 per month only.

The law

Implied term

68. The general rule is that a term will be implied into a contract if it is so obvious that both parties would have regarded it as a term even though they had not expressly stated it as a term or if it is necessary to imply the term to give the contract business efficacy. For example, the implied term of mutual trust and confidence.

69. Terms may also be implied if they are customary in the trade or calling, or form the usual practice of the particular employer, if it is sufficiently well known. Such a custom or practice must be "reasonable, certain and notorious". Reasonable, in the sense of fair; notorious, in the sense of well known, although not necessarily universal, but at least the general rule rather than the exception; certain, in the sense of precise.

70. The court will not lightly find a custom. The existence or otherwise of a custom or practice is a question of fact and evidence.

Claiming a sleep-in allowance and holiday pay

71. There are three potential remedies for an employee who is not paid for a period of annual leave; a claim under WTR 30 based on contravention of the primary obligation to pay under reg 16(1), a claim in respect of an

unlawful deduction from wages under ERA Part II and a breach of contract claim.

Unauthorised deduction from wages

72. S27(1) of the Employments Right Act 1996 (ERA) states that wages in relation to a worker, means any sums payable to the worker in connection with his employment, including, any fee, bonus, commission, holiday pay or other emolument referable to his employment, whether payable under his contract or otherwise. Section 27(2) sets out payments which are excluded.

73. S 13(3) defines a deduction and s13(1) and (2) sets out what amounts to an authorised deduction. S 14 sets out excepted deductions.

74. If a claimant succeeds under s13 then the Tribunal makes a declaration that there has been a deduction and awards an appropriate amount for the deduction including an appropriate amount for financial loss attributable to the non-payment.

75. The Deductions from Wages (Limitation) Regulations 2014 impose a two-year limit on back pay for wages claims presented on or after 1 July 2015.

76. In *Delaney v Staples*, Lord Browne-Wilkinson emphasised the need to keep the 'normal meaning' of wages in mind when considering the definition. He stated:

"… the essential characteristic of wages is that they are consideration for work done or to be done under a contract of employment. If a payment is not referable to an obligation on the employee under a subsisting contract of employment to render his services it does not in my judgment fall within the ordinary meaning of the word "wages."

77. Payments that have been held to fall within s27(1)(a) include overtime pay, shift payments, an attendance allowance and an allowance for overnight stays.

78. The definition of wages under s27 ERA includes contractual holiday pay but also payments in respect of annual leave due under regs 14(2) and 16 of the Working Time regulations 1998 (WTR).

79. In Stringer the HL categorised payment due for a period of statutory annual leave as wages for the purposes of ERA.

80. The principle that the NMW is concerned with standard or basic pay is reflected in the NMWR. Certain payments, often referred to as allowances, do not count towards the calculation of the NMW pay.

81. In the Mencap case Lady Arden concluded that the meaning of the sleep-in provisions in the NMW 1999 regulations and 2015 regulations is that, if the worker is permitted to sleep during the shift and is only required to respond to emergencies, the hours in question are not included in the NMW calculation for time work or salaried hours work unless the worker is awake for the purpose of working. In ascertaining the meaning of the regulations

Ms Arden gave weight to the recommendations of the LPC that sleep-in workers should receive an allowance and not the NMW unless they are awake for the purposes of working. She said her conclusion was reinforced by an extract from the second LPC report dated February 2000:

"In our first report we said that 'for hours when workers are paid to sleep on the premises, we recommend that workers should agree their allowance, as they do now. But workers should be entitled to the national minimum wage for all times when they are awake and required to be available for work'. We based our original recommendation on evidence that most workers required to do a 'sleepover' are paid an allowance for the inconvenience (similar to an on-call allowance). These allowances cannot count towards the national minimum wage calculation. If workers are contractually required to sleep on the employer's premises, as opposed to choosing to do so, then that, including any payment made as compensation, is a matter for both parties to the employment contract."

82. In Abellio the EAT found that a quantum meruit action cannot be brought in an Employment Tribunal under Part II of the ERA 1996. It is common law as opposed to a statutory action, and it does not fit the Part II definition of 'wages' which covers payments under the contract. Quantum meruit usually concerns work done outside the confines of the contract or additional to it and would therefore have to be brought separately in a civil court. A claim for a specified amount which was quantifiable would fall within Part II of the ERA whereas damages for loss of a chance could not be brought under Part II.

Working Time Regulations

83. The basic entitlement to holiday pay is given by WTR reg 16. Regulation 16(1) entitles the worker to be paid in respect of any period of annual leave to which he or she is entitled under reg 13, and additional annual leave under reg 13A, at the rate of a week's pay in respect of each week of leave. The rate of a week's pay is to be calculated by reference to ss 221 to 224 of the ERA 1996, subject to modifications contained in reg 16(3), including that the statutory maximum on a week's pay does not apply for these purposes.

Pay

84. The basis for calculating a week's pay is calculated by using a 12-week reference period. With effect from 6 April 2020, the reference period has changed for these purposes from 12 weeks to 52 weeks as a result of the amendment of WTR reg 16(2) by reg 10 of the Employment Rights (Employment Particulars and Paid Annual Leave) (Amendment) Regulations 2018 SI 2018 /1378. The most recent 104 weeks prior to the calculation date are to be taken into account.

85. Section 2 of the Apportionment Act 1870 will apply to apportion salary into equal daily amounts, unless the contract clearly stipulates otherwise or is clearly inconsistent with such an approach being taken.

86. There are a number of conflicting judicial decisions regarding how a day's pay or a week's pay should be calculated for an unauthorised deduction

from wages claim. How that daily amount will be calculated will depend on the particular contract and the type of work involved.

87. In Thames Water the EAT held that a day's holiday pay was to be calculated at the rate of 1/365th of annual salary.

88. In Maconnachie the EAT found that a calculation based on working days should be used.

89. In Hartley, the Supreme Court held that the Apportionment Act 1870 applies unless the contract can be categorised as "*severable*" and apportioned daily salary as 1/365 of annual salary, as opposed to the 1/260 figure contended for by the employer. The claimants were on annual contracts and regularly carried out work outside normal working hours; on evenings, weekends and days of annual leave.

90. Ss221-224 ERA refers to a calculation on the basis of '*normal working hours'* is different to the WTD. Overtime is disregarded unless guaranteed and obligated by the employer. Discretionary allowances do not count where they are not payable under contract.

91. A claim that the employer has not paid the worker for holiday he has actually taken or for holiday which has accrued but is still unpaid on termination (reg 30(1)(*b*)) is 'wages' for the purposes of s 27(1)(*a*) (Stringer).

92. In Williams the ECJ found: *"… that an airline pilot is entitled, during his annual leave, not only to the maintenance of his basic salary, but also, first of all, to all the components intrinsically linked to the performance of the tasks which he is required to carry out under his contract of employment and in respect of which a monetary amount, included in the calculation of his total remuneration, is provided, and, second, to all the elements relating to his personal and professional status as an airline pilot."*

93. In Bear Scotland the EAT found standby and emergency call-out payments were intrinsically linked to the performance of tasks under the contract of employment. For reg 13 leave, the same rate as for normal remuneration should apply. Workers can claim for the balance of "normal" pay but only in respect of the 4 weeks leave which derives from the European Directive. For the additional 1.6 weeks, holiday pay is calculated in accordance with the formula in sections 221-224 ERA for a "week's pay", which will not include amounts for overtime and other payments.

94. In Dudley the EAT concluded that the argument that there was no intrinsic link between the payments and the performance of tasks that the employees were required to carry out under their contracts were misplaced; the correct question was whether the payments were part of the normal pay of each employee. This was a question of fact in each case. In any case, when undertaking the voluntary additional work, the employees were performing duties required under their contracts. What mattered was not whether overtime, or participation in a voluntary standby rota was part of the employees' contractual obligations, but whether they were part of their normal working activities.

Breach of contract

95. The right to bring a breach of contract claim in the Tribunal is provided by the Employment Tribunals Extension of Jurisdiction (England & Wales) Order 1994 (Order 1994). Proceedings may be brought in respect of a claim of an employee for the recovery of damages or any other sum which is outstanding on the termination of the employee's employment. There are excluded categories under Article 5 and a claim for personal injury is excluded. The claim should be presented in time. The Tribunal will consider if there was a breach, whether the claimant has suffered a loss as a result of the breach and what losses are recoverable.

Applying the law to the facts

96. Was the practice of agreeing an allowance for all sleep-in shifts notorious in the care sector from the time of the claimant's employment in 1998, and / or in the relevant period (February 2015 – January 2017)? The claimant told the Tribunal that for all the years she had been working in the care sector she understood that an allowance would be paid for every sleep-in shift worked. Everyone she spoke to in the care sector was paid an allowance for sleep-ins. Ms Waghorne confirmed that she had always been paid an allowance for every sleep-in shift she had worked over her time in the sector since around 1998. She also confirmed that the Priory always paid an allowance for sleep-ins. There was no evidence produced to contradict the witnesses' evidence.

97. I disagree with the respondent's counsel's assertion that the LPC could not be relied upon as evidence of an implied term – *"a passing reference in a case is a bridge too far".* There is far more than just a passing reference to the LPC reports in the Mencap case. As stated by Lady Arden: "*It has an authoritative and influential role in setting of the NMW. Its membership is drawn from both sides of the industry and those with relevant knowledge and experience. The reports of the LPC disclose the depth of investigation and consultation which it undertakes in discharging its statutory responsibilities" (para9).* The LPC is statutory and was established under s 8 NMWA 1998. I find that the LPC has considerable weight and authority and that its recommendations are influential, as did Lady Arden in the Mencap case.

98. The LPC recommended that workers and employers should agree their allowance, as they do now, that most workers are paid an allowance and that an allowance is usual practice. I agree with the claimant's counsel that this is evidence of a common practice to pay an agreed allowance for sleep-ins and this is corroborated by the claimant and Ms Waghorne's evidence. The respondent did not produce any evidence to contradict what is set out in the report or what the claimant or Ms Waghorne told the Tribunal.

99. I do not agree with the respondent's argument that it was not clear to the claimant that she would receive an attendance allowance. I find that the claimant expected from day one of her employment to receive an allowance or some form of remuneration for the sleep-in shifts. She raised the issue a number of times with her employer informally and through a formal grievance procedure and then these proceedings.

100. Although the Mencap case is authority that for the purposes of NMW claim sleep-in time is not wages does not mean that the LPC report cannot be relied upon. The LPC recommends that an agreement be made but also states that allowances are usually paid. The report may not set out a percentage, like in the Sagar case of 85% but the impression given from the quotes from the LPC reports in the Mencap case is that the allowance is the rule rather than the exception.

101. Although there may be some cross over, I agree with claimant's counsel that there is a distinction between an implied term referred to in Devonald and an implied term in Garratt and Park Cakes drawn by reference to conduct. Terms may be implied if they are customary in the trade or calling, or form the usual practice of the particular employer, if it is sufficiently well known. Such a custom or practice must be "reasonable, certain and notorious". This case falls within the Devonald category.

102. I do not accept the respondent's argument that it was not clear to the claimant what allowance she was receiving. She carefully calculated her hours compared to her salary and realised she was receiving no pay for her rostered sleep-in shifts. There was no ascertainable express term governing payment for sleep-in shifts prior to 2017.

103. Some discrepancies on the claimant's pay slips could not be explained by the claimant or Ms Waghorne. The claimant mentioned that on occasion mistakes were made by administration. However the claimant's evidence was clear that until February 2017, she was not paid for the sleep-ins she worked during her rostered shifts and was only paid a sleep-in allowance for overtime sleep-in shifts.

104. I find that the LPC reports are sufficient evidence, because of their authority, to conclude that there is a consistent practice within the care sector to pay a sleep-in allowance. Without the LPC report findings it would not be possible to conclude that a sleep-in allowance is implied into the contract by custom and practice. The custom in question must be reasonable, notorious and certain. The LPC reports confirm that within the care sector a sleep-in allowance is normally paid. It is a consistent practice with considerable certainty. Both witnesses confirmed this.

105. I disagree with respondent's counsel's argument that it follows that because the Mencap case decided that for the purposes of the NMW claim sleep-in time is not wages, that it cannot be relied upon as authority of a custom and practice. What amounts to working time under the NMWR is different to what amounts to an implied term through custom and practice.

106. I find that there was a legal obligation to pay the claimant a sleep-in allowance for sleep-in shifts done during her rostered shifts through an implied term. There is no express term to contradict the implied term. I find that in the absence of any express term governing the same, the parties should be taken to have intended that an allowance would be agreed, because it was a notorious, reasonable and certain industry wide practice.

107. The Tribunal is required to ascertain the parties' intentions construed objectively. The claimant confirmed she considered it was so obvious that

sleep-ins would be paid because it was notorious in the sector. As set out above, looking at the whole picture objectively, based on the authoritative LPC report findings, supported by the evidence of the two witnesses, I find that it was an implied term of the claimant's contract that she would be paid an allowance for all sleep-in shifts. There was an implied term by custom and practice across the care sector that an allowance would be paid for sleep-in shifts. It is rare but this case is an example of how a notorious, reasonable and certain industry wide practice can be implied into a contract of employment.

108. Is the term contended for reasonable? I find that it is fair and reasonable that workers required to work a sleep-in shift should be paid an allowance to reflect the work they are expected to do and for the inconvenience. It is recommended by the LPC to be an appropriate practice and, from the evidence before me, is applied across the sector. The figure of £21.50 for the relevant period seems to be reasonable in the circumstances. In Mencap the facts of the case were that Ms Tomlinson-Blake as a care support worker was paid an allowance of £22.35 for sleep ins and Mr Shanon was paid a payment of £50 per week which rose to £90 pw. These figures are similar to the allowance of £21.50 paid to the claimant from 2017. The figure of £21.50 was agreed between the parties.

109. Is the term contended for sufficiently certain? I find the term is sufficiently certain. It is precise and, as set out above, the amount sought for the allowance is based on actual payments made from 2017 and appears to be in line with allowance payments in the sector at the relevant time. There is no express term to the contrary. Both parties agreed that the contract was silent on sleep-ins. The claimant was clear she was not paid for her sleep-in shifts. The findings in the LPC reports set out above make it sufficiently certain. It may not be 100% across the sector but the evidence is that it is the normal practice- the rule rather than the exception.

110. If the implied term is found, was the sum of £21.50 properly payable in relation to each sleep-in shift worked in the relevant period, so that where it was not paid that was an unauthorised deduction from wages within the meaning of s.13 ERA 1996?

111. The essential characteristic of wages is that there is consideration for work done or to be done under a contract of employment. The claimant was obliged to work her three-week roster, which included sleep-ins. The sleep-in shifts were part of her normal working activities.

112. The sleep-in allowance, implied into the contract is a specified amount, capable of quantification on a particular occasion – it is payable for each rostered sleep-in shift for the inconvenience. The evidence supports the fact that it was a recognised practice and custom to pay a sleep-in shift allowance and in this case the evidence is that £21.50 would be payable. Most workers required to do a 'sleepover' are paid an allowance for the inconvenience (similar to an on-call allowance).

113. I agree with claimant's counsel's submission that the issue is whether overtime payments and sleep- in shift allowances were intrinsically linked to the tasks the claimant was required to carry out under her contract (Williams

and Bear Scotland) and whether they were part of normal working activities. I find that the sleep-in allowance, implied into the contract, is intrinsically linked to her employment under her contract and was part of her normal working activies. The claimant was required to do 9 to 11 sleep-in shifts as part of her rota. Therefore the overtime payments and sleep-in shift allowances fall within the definition of wages under s27 ERA.

114. Payments that have been held to fall within s27(1)(a) include overtime pay, shift payments, an attendance allowance and an allowance for overnight stays. I find that the sleep-in allowance falls within this category.

115. The definition of wages under s27 ERA includes contractual holiday pay but also payments in respect of annual leave due under regs 14(2) and 16 of the Working Time regulations 1998 (WTR). In Stringer the HL categorised payment due for a period of statutory annual leave as wages for the purposes of ERA. I find that the claimant's holiday pay should be calculated based on the claimant's basic pay plus the sleep-in shift allowance plus her overtime pay.

116. Claimant's counsel confirmed that the claimant has not contended for underpayments of holiday pay in connection with her additional leave and so there is no issue about whether sleep-in allowances were part of her *"remuneration for employment in normal working hours"* within the meaning of s.221 ERA 1996.

117. I find that an attendance allowance of £21.50 should be paid for each sleep-in shift worked by the claimant during the relevant period of February 2015 to January 2017. The attendance allowance falls within the definition of wages set out under s27 ERA.

118. From February 2017 it is not clear why the sleep-in allowance was only going to be paid for shifts in excess to 4 shifts per month. This seems to be an arbitrary decision and there was no evidence before me to explain it. I cannot see any basis for finding that the attendance allowance should only be paid on the basis that 4 sleep-ins per month were to be included within the terms of the contract. This was an arbitrary decision of the respondent in 2017 which does not reflect the normal practice within the care sector of paying an attendance allowance for each sleep-in shift.

119. I disagree with respondent's counsel's argument that any calculation should be done by reference to a 52-week period. Prior to 6 April 2020 the basis for calculating a week's pay is calculated by using a 12-week reference period. The new regulations for calculating a week's pay using a 52 week reference period only came into effect from 6 April 2020. The claimant's claim was presented on 31 October 2017. I assume the other claimants'' claims were also presented prior to 2020.

120. There are a number of conflicting judicial decisions regarding how a day's pay or a week's pay should be calculated for an unauthorised deduction from wages claim. How that daily amount will be calculated will depend on the particular contract and the type of work involved.

121. In Hartley, the Supreme Court held that the Apportionment Act 1870 applies unless the contract can be categorised as "*severable*" and

apportioned daily salary as 1/365 of annual salary, as opposed to the 1/260 figure contended for by the employer. The claimants were on annual contracts and regularly carried out work outside normal working hours; on evenings, weekends and days of annual leave.

122. The Supreme Court decision is binding and for now should be followed. It may be arguable that the position may well be different where the contract is not annual, or the work is clearly confined to particular dates and times but there has been very limited discussion before me to persuade me that for now I should not follow Hartley.

123. Although sleep-in allowances cannot count towards the national minimum wage calculation, I find that it does not automatically follow that the allowances cannot count towards wages within s27 ERA. I have taken into account that the second LPC report concluded *"If workers are contractually required to sleep on the employer's premises, as opposed to choosing to do so, then that, including any payment made as compensation, is a matter for both parties to the employment contract.".* The attendance allowance is implied into the claimant's contract and falls within s27 ERA.

124. If I am wrong then the claimants, who fall within the claimant's test case category and whose employment has terminated, will be able to recover the overtime payments and sleep-in shift allowances as damages under a breach of contract claim. The payments should be part of the claimant's normal pay. The sleep-in shifts were part of the claimant's normal working activities.

125. The claimant has set out, in her updated schedule of loss, the monies she is owed for the sleep-in shifts worked but under paid. The total amount owed to the claimant for unpaid sleep-in shift allowances is £3978.70. I declare that there has been an unauthorised deduction from wages for the gross sum of £3978.70. The sum should be paid by the respondent to the claimant and the sum should be taxed and the tax paid by the employer to HMRC.

126. The claimant's calculation for holiday pay based on a 13 week period is broadly in line with the 12 week reference period. However, I reluctantly find that the calculation of a daily rate needs to follow the Hartley ruling that a "*day*" in the context of the calculation is a calendar day rather than a working day.

127. The schedule shows the underpayment of overtime paid and sleep-in allowance which should be included in the calculation of holiday pay. I find that the claimant's holiday pay should be calculated based on the claimant's basic pay plus the sleep-in shift allowance plus her overtime pay but that the daily rate needs to be recalculated based on a 365-calendar day. I will leave the parties to agree the recalculated figure. The figure should be paid by the respondent to the claimant gross and any tax payable should be paid by the employer to HMRC.

128. This is a lead case and where relevant will apply to all the claimants.

129. The claimant's claim under the National Minimum Wage Regulations is dismissed upon withdrawal, and that decision will only be binding in respect of those related claims brought by claimants who were in the relevant period (February 2015 to January 2017) Senior Support Workers and paid the same salary as the claimant.

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Employment Judge Isaacson

_____

Date 28 November 2022

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

21 December 2022

FOR EMPLOYMENT TRIBUNALS