EMPLOYMENT TRIBUNALS

Claimant: **Oluseyi Awosika**

Respondent: **Care Outlook Limited**

HELD AT: **London South (hybrid)** **ON: 27 March 2023 and 19 May 2023**

BEFORE: **Employment Judge Hart**

REPRESENTATION:

Claimant: **In person**

Respondent: **Miss Kennedy (Litigant consultant)**

JUDGMENT

The Judgment of the Tribunal is that:

1. The claims for unlawful deduction of wages in relation to the specific visits on 3, 10 and 14 March 2021 and one of the visits on 12 October 2021 succeeds, and the respondent is to pay the claimant the total sum of **£27.50**.

2. The claims for unlawful deduction of wages in relation to discrepancies in the recording of log in / log out times, for a flat rate payment for visits and all other claims relating to specific visits do not succeed, and are dismissed.

3. The claim for 8 days carried over annual leave from the 2019/20 leave year under regulation 30(a) of the Working Time Regulations 1998 does not succeed, and is dismissed.

REASONS

INTRODUCTION

1. This is the judgment in relation to the claimant's claims for unlawful deduction of wages and carried over holiday pay from the leave year 2019/20. The claimant is still employed by the respondent.

THE HEARING

2. The claimant attended in person along with the Judge; the respondent's representative and witnesses attended by CVP. They are all thanked for their assistance and representation during the hearing. The hearing took place over two days: 27 March and 19 May 2023. Prior to this hearing there had been three case management hearings: 9 August 2022, 12 September 2022 and 6 January 2023.

3. It was confirmed at the outset of this hearing that no reasonable adjustments were required by either party. However the claimant was a litigant in person and did require more time during the hearing and assistance in questioning.

4. I was provided with an initial agreed hearing bundle of 369 pages; due to further documents being added during the hearing the final bundle came to 463 pages. I was also provided with two witness statements from the claimant dated 22 December 2022 and 16 March 2023, and a witness statement from Ms Lynes dated 12 December 2022.

5. The claimant gave evidence on her own behalf, and Ms Lynes gave evidence on behalf of the respondent.

6. The respondent's representative had provided a helpful Schedule of Deductions (Schedule) (pg 89-120), cross referencing the claimant's unlawful deduction of wages claims as set out in her handwritten lists at pages 121-163 and the respondent's response with reference to the automated CM2000 timesheet records at pages 234 – 318. At the hearing on the 6 January 2023 the claimant was asked if she agreed the Schedule. The claimant indicated that there were some discrepancies but could not identify which ones. The claimant was ordered to identify those entries that she disagreed with in her witness statement and explain the discrepancy with reference to her handwritten lists. The claimant's statement dated 16 March 2023 did comment on the entries in the Schedule, but did not identify that there were missing entries.

7. During her evidence the claimant stated that there were a number of missing entries. Following an adjournment for the claimant to go through her notes, she identified 27 missing entries (these are at pages 382-385). The respondent objected to these being admitted pointing out that the claimant had first been provided with the Schedule on 25 August 2022 and this was the first time the claimant had identified these entries. Following an adjournment to consider the matter I accepted that the claimant should have identified these missing entries

before the hearing but also accepted that she had provided with respondent with the relevant documentation to enable these inaccuracies to be identified. Having considered the documentation and taking a proportionate approach, I proposed to admit those entries that were supported by the claimant's contemporaneous handwritten notes (6 in total). The claimant and the respondent confirmed that they had no objection to this approach. The hearing was then adjourned for a short period to allow the respondent to take instructions. The claimant's evidence was concluded by the end of day 1. The parties were given the option of staying late to conclude Ms Lynes' evidence or adjourning to another date, and they both chose the latter.

8. Following the completion of the claimant's evidence the respondent was ordered to update the Schedule and recalculate it. This was duly provided and was included in the bundle at pages 386-451. The claimant provided comments by email dated15 May 2023 which is at pages 452-453.

9. During Ms Lynes' evidence the respondent applied to admit the following documents as late evidence: holiday pay print out for 2022/2023, Wages Adjustment Forms for October 2021, and emails from Mr Ouazene dated 10 March 2023 and Ms Quigley dated 10 March 2021 (pg 454-463). Since these documents were clearly relevant to the issues to be determined and were limited to 9 pages I permitted them to be admitted; the claimant was provided with an adjournment in order to consider the documents.

10. On completion of the evidence the respondent made written and / oral submissions (written submissions having been provided to the claimant in advance of the hearing); the claimant made oral submission. Judgment was reserved due to lack of time to deliver an oral judgment.

11. During submissions it became apparent that the claimant disputed the interpretation of one of the late documents adduced by the respondent: the email from Mr Ouazene dated 10 March 2023 (pg 460). The respondent claimed that it was evidence that the claimant had now been paid the outstanding holiday entitlement, the claimant claimed that it related to payment for days in lieu not holiday. Mindful that the claimant had only limited time to consider this document I proposed that the parties could address me further in writing in relation to their interpretation. The respondent objected stating that the claimant had changed her case, and that this was the reason for the late disclosure of this document. I did not accept that the claimant had changed her case, the claimant had stated at the hearing on the 9 August 2022 that the holiday claim related to 8 days carried over leave. However in the light of the respondent's objection and in order to provide closure I decided that I would reach a decision based on my judicial interpretation of the incomplete evidence before me.

CLAIMS / ISSUES

12. The claims and issues were agreed by the parties at the beginning of the hearing. They were as set out in the Case Management Order dated 12 September 2022, with the following amendments:
    12.1 Deletion of original issue 2.1.1, which was struck out at the hearing on 6 January 2023 due to being out of time;
    12.2 Deletion of issue 2.2(d) in relation to a visit on 25 February 2021 prior to submissions, the respondent conceding that this was not a separate issue, but in fact an example of issue 2.2(b).

    The remaining claims and issues to be determined by the tribunal were therefore as follows:

1. Time limits

1.1 Given the date the claim form was presented and the dates of early conciliation, any complaint about something that happened before 18 February 2021 may not have been brought in time.

1.2 Was the claim for unauthorised deductions made in time? The Tribunal will decide:
- 1.1.1 Was the claim made to the Tribunal within three months (plus early conciliation extension) of the date of payment of the wages from which the deduction was made?
- 1.1.2 If not, was there a series of deductions and was the claim made to the Tribunal within three months (plus early conciliation extension) of the last one?
- 1.1.3 If not, was it reasonably practicable for the claim to be made to the Tribunal within the time limit?
- 1.1.4 If it was not reasonably practicable for the claim to be made to the Tribunal within the time limit, was it made within a reasonable period?

1.2 Was the claim for holiday under the Working Time Regulations 1998 made in time?

2. Unauthorised deductions

2.1 Were the wages paid to the claimant less than the wages she should have been paid:
- 2.1 On 1 January 2021 in relation to the cancellation of a visit on that day?
- 2.2 From 5 January 2021 as set out in the Schedule of Disputed Payments? The parties agreed that each of the disputed payments fall into one the following categories of reasons for dispute:
  - (a) differences between the log in and/or log out times recorded by respondent's system and the log in/log out times recorded by the claimant herself ('log in / log out claims');
  - (b) visits where the claimant did not stay the full length of the booked visit by the Local Authority and was paid only for the minutes she stayed ('flat rate claims').
  - (c) visits where the claimant and respondent's records differ as to whether the visit occurred at the date and time claimed ('specific visits claims').

  The following six entries were added to the Schedule of Disputed Payments during the hearing: 10 May 2021, 26 May 2021, 10 October 2021, 12 October 2021,1 December 2021 first visit, 1 December 2021 second visit.

2.2 Was any deduction required or authorised by statute?

2.3 Was any deduction required or authorised by a written term of the contract?

2.4 Did the claimant have a copy of the contract or written notice of the contract term authorising the deduction before the deduction was made?

2.5 Did the claimant agree in writing to the deduction before it was made?

2.6 How much is the claimant owed?

3. Holiday Pay (Working Time Regulations 1998)

3.1 The parties accept that the leave year ran from 1 April to 31 March.

3.2 Did the respondent (Mr Amin Ouazene) verbally agree to allow the claimant to carry 8 unused days of holiday over from the 1 April 2019 to 31 March 2020 leave year to the 1 April 2020 to 31 March 2021 leave year prior to 31 March 2020or at any time thereafter?

3.3 If so, did the respondent refuse to permit the claimant to take that holiday leave in the leave year to the 1 April 2020 to 31 March 2021?

3.4 If not, was it not reasonably practicable for the claimant to take the 8 days holiday leave as a result of the effects of the coronavirus pandemic?

3.5 In the leave year 1 April 2020 to 31 March 2021 did the claimant have 8 days untaken holiday leave at the end of the leave year?

3.6 If so, was it not reasonably practicable for the claimant to take that holiday leave as a result of the effects of the coronavirus pandemic?

3.7 Has the respondent refused to permit the claimant to carry over any holiday that it was not practicable for the claimant to take as a result of the effects of the coronavirus pandemic into the subsequent two leave years?

3.8 What if any award of compensation should be paid by the respondent to the claimant? The tribunal may award such compensation as it considers just and equitable taking into account:

3.8.1 respondent's default in refusing to permit the claimant to exercise her rights to carry over annual leave, and

3.8.2 Any loss sustained by the claimant which is attributable to the matters complained of.

FACTUAL FINDINGS

13. I have only made findings of fact in relation to those matters relevant to the issues to be determined. Where there are facts in dispute I have made findings on the balance of probabilities.

14. The respondent, Care Outlook Ltd, is a provider of care services to local authorities. It has 12 branches and employs approximately 900 persons across London and further afield.

15. From 18 August 2013 the claimant, Mrs Awosika, worked as a care worker for the respondent, providing home care to residents of Hounslow Local Authority (Hounslow LA).

16. The claimant signed a contract of employment (pg 37-41) which provided that:

16.1 Payment of wages was based on ECM login data and / or submission of signed timesheets. [I note that there were no signed timesheets and therefore payment was based on the ECM log in data. 'ECM' stands for 'electronic call monitoring'].

16.2 Payment was paid fortnightly, two weeks in arrears.

16.3 Holiday entitlement was 28 days, with the holiday running from first April to 31st March.

16.4 Work on a bank holiday was paid at a rate of 1.25 x the basic rate with a day in lieu.

The claimant was also provided with a staff handbook (extracts at pg 43-49).

17. The claimant was paid by the minute. She received a minimum of 30 minutes pay per visit, but otherwise her pay was determined by the times logged by ECM log in system. She was not paid for travel time or the time entering and exiting a client's premises.

18. The claimant's hourly rate of pay was £11 per hour for a weekday visit; £11.70 for a weekend visit and £13.75 for a bank holiday visit (pg 258).

The log in / log out claims

19. The ECM system used by the respondent was called CM2000. The carer was required to use the client's landline to log in when they arrived at the client's home and log out when they left. They would dial a log in number and replace the telephone, the system would then call them back and the carer would answer; it was at this point that the time of the visit would be logged. This created an automated timesheet, recording the name of the carer, name of the client, time and length of the visit and rate of pay. The fortnightly payslips were then generated based on the totals provided by the CM2000 timesheet.

20. Prior to September 2020 carers made handwritten notes of the visit and placed them in a physical file retained by the client at their home. In September 2020 the respondent moved to a software package called 'People Planner', a digital system for recording the care notes of each visit. This required the carer to log in and log out using the works mobile phone to scan the QR code on the patient's file. On the 26 August 2020 the claimant attended a meeting with other carers during which the respondent explained the People Planner system. At this meeting she was informed that the CM2000 log in / log off system using client's landlines would continue to be used to record the times of visits for payment purposes (pg 54).

21. The claimant claims that following the introduction of People Planner, CM2000 regularly under recorded the time of her visits by 1 minute, when compared to her handwritten record that she had made of the times when she logged in and logged out (pg 164-224). These occasions are set out in the Schedule at page 89-120 (log in / log out claims). The claimant denied that she recorded the time when the call to CM2000 was made, stating that she always recorded the time when she was phoned back. She stated she used the clock on her mobile phone to record the time. The claimant accepted in her evidence that she would log into CM2000 using the client's telephone before logging into People Planner.

22. On the 16 November 2021, the claimant attended a meeting with Ms Terri Lynes (Operation Manager) and Ms Deborah Trani (Branch Manager) who took minutes (pg 80). The claimant raised the log in / log off discrepancies claiming that the introduction of People Planner and the requirement to use two phones was the cause of the discrepancies and resulted in a reduction in her pay. Ms Lynes informed the claimant that she was paid in accordance with the CM2000 logs and not her hand written records.

The flat rate claims

23. The respondent was contracted by Hounslow LA to provide scheduled visits of 30, 45 or 60 minutes. The claimant claims that the respondent received a flat rate in accordance with the scheduled times of the visit and that carers should have been paid this flat rate rather than by the minute. She alleged that if a visit went short the respondent would financially benefit. Ms Lynes denied this and stated that the contract with Hounslow LA was that carers would be paid a minimum of 30 minutes for each visit; thereafter they were to be paid by the minute.

24. In support of her claim the claimant relied on an undated email from the respondent to her team stating that following a meeting with Hounslow LA the respondent had agreed a minimum visit length in order to ensure that tasks were completed effectively (pg 55). Carers would be required to attend a minimum of:
    - 23 minutes for a scheduled 30-minute visit;
    - 39 minutes for a scheduled 45-minute visit; and
    - 54 minutes for a scheduled 60-minute visit.

    The email does not refer to the rate the respondent were paid by Hounslow LA for the visits, nor does it make any reference to the amount that carers would be paid. I therefore do not find that this is evidence that the respondent were paid a flat rate for these visits, nor that it formed an agreement between the respondent and the claimant as to her rate of pay.

25. The claimant also sought to rely on the payment for short notice cancellations, which she claimed was in accordance with the scheduled time of the visit. The respondent denied this stating that the payment for a short notice cancellation visit was 30 minutes only. I accept the claimant's evidence which is supported by the cancellations recorded in the CM2000 timesheets, for example at page 248 it is recorded that the pay rate for a cancelled 45-minute scheduled visit was at 0.75 hours (£8.25) and pay rate for a cancelled 60-minute scheduled visit was at 1 hour (£11). However, I do not find that this is evidence that the respondent was paid a flat rate in relation to non-cancelled visits, and accept Ms Lynes' evidence as to the terms of the contract between the respondent and Hounslow LA.

The specific visit claims

1 January 2021 visit

26. On 1 January 2021 the claimant visited a client for a 1 hour scheduled visit, to be informed by his son that he had been taken to hospital. The claimant sent a text to Ms Trani informing her of what she had been told by the son. Ms Trani responded stating 'you have had a hectic morning' and then a further text stating

'do not go [to the client] until further notice, I have cancelled lunch too' (pg 62). The lunch time visit was scheduled for 30 minutes. The claimant stated that she was not paid for either visit. My Lynes stated that the claimant was paid for both visits; that initially she had only been paid for the cancelled lunch visit; this was then corrected and she was subsequently paid for the breakfast visit.

27. On 9 March 2021 the claimant sent a text to Ms Jacqui Quigley (Finance Administrator) regarding the failure to pay her for the morning and lunch visits (pg 60). On 10 March 2021, Ms Quigley responded stating that she had spoken to Head Office 'with regards to the calls on the 1st January' and informing her that 'these' would be paid in the 'next payroll not this one coming' (pg 462). The payroll 'coming' was 12 March 2021 and the 'next payroll' was 26 March 2021 (pg 343). The payslip for 26 March 2021 records that a 'pay adjustment' was made of £25. The payslips did not identify what this payment related to, but in the light of Ms Quigley's email I find that this sum included the payment for the 1 January visits, which at the bank holiday rate would have been £13.75 for the cancelled morning visit of 1 hour and £6.87 for the cancelled lunch time visit of 30 minutes.

5 January 2021 visit

28. During evidence it became apparent that this visit had been wrongly classified in the Schedule and was a log in / log off claim not a specific visit claim.

26 February 2021 visit

29. There was no dispute between the parties that the times of the visit on the 26 February 2021 was 13:04-13:49. The claimant confirmed in her evidence that she had in fact been paid £8.07 not £7.77 as claimed. It was not disputed that this sum reflected the minutes that she attended. The claimant claimed that she should have been paid for the scheduled 45 minutes, therefore this was a flat rate claim not a specific visit claim.

3 March 2021 visit

30. This claim was in relation to a visit on the 3 March 2021 between 11:45 and 12:45. The claimant stated that this visit was supposed to be a double up visit with another carer who did not attend. She informed the office who said that they would make enquiries and get back to her but they never did. Her evidence was that she was on the premises for 60 minutes but was only paid for 30 minutes. My Lynes stated that this was a visit cancelled at short notice and that the claimant was paid for 30 minutes because this was what was paid for short notice cancellations.

31. I accept the claimant's evidence that this was an actual visit not a short notice cancellation. She gave clear evidence as to what occurred during the visit and her evidence is supported by the CM2000 timesheet which records the visit under the section on 'visit details' and not under the section on 'cancellations'. It also records that the visit was for 1 hour, but that the claimant was only paid for 30 minutes (pg 245).

10 March 2021 visit

32. The respondent admitted that the claimant had not been paid at the time for this visit, and that it owed £5.50. I accept Ms Lynes' evidence that the reason that the claimant had not been paid was because she had dialled in on a different care worker's number when logging in / logging out of the CM2000 system.

14 March 2021 visit

33. This claim was in relation to two visits to the same client: an early morning visit at 06:44 and a later morning visit at 11:44. The claimant stated that the first visit was 60 minutes and the second was 30 minutes. Ms Lynes accepted the later morning visit was 30 minutes but stated that the early morning visit was 26 minutes. The respondent's CM2000 timesheet records the time of the visit as 06:44-12:14, and I find that this was because the claimant had not correctly logged off at the end of her first visit.

34. Ms Lynes stated that although the times on the timesheet were incorrect the claimant was correctly paid. I note that the CM2000 record allocated 0.5 hours to the visit to be paid the rate of £5.85, and that it calculated a total hourly rate for the pay period 1 March to 14 March 2021 as £1077.47 (pg 244); this was the same as that on the payslip dated 26 March 2021 (pg 343). I find from this that the rate of £5.85 related to the later morning visit of 30 minutes and that the early morning visit was not paid, since the payslip contained no adjustment to the sum calculated by the CM2000 system.

35. I accept the claimant's evidence that the early morning visit was 60 minutes not 26 minutes as stated by the respondent, there being no evidence before me that the visit was for a lesser period. I note that other early morning visits to this client were 60 minutes (for example 4 March 2021 at 6:30), and therefore find that this was a visit scheduled for the same length of time. I consider it unlikely that the claimant would only have visited for 26 minutes when a visit had been for a scheduled 60 minutes since this would be contrary to the minimum visit requirement of 54 minutes for a scheduled 60-minute visit (pg 55).

26 March 2021 visit

36. The respondent accepted that this was an error on the Schedule and that the claimant had not claimed in relation to a visit on this date.

10 May 2021 visit

37. This claim was in relation to a visit on 10 May 2021 between 18:40-19:21. The claimant stated that she should have been paid 1 hour for this visit. This is because she had been booked for 30-minute visit with another carer who did not turn up. Ms Lynes stated that ordinarily the respondent 'would not pay for two visits to one carer'. I accept the evidence of Ms Lynes, there being no evidence that carers were paid double when another carer did not attend as scheduled.

26 May 2021 visit

38. This claim was added to the Schedule as a missing entry. There was no dispute in relation to the recorded times and the visit had lasted 40 minutes. The

claimant's claim for £8.25 was the payment that she would have received for a 45-minute visit. I therefore consider that this was a flat rate claim.

10, 12 and 13 October 2021 visits

39. The claimant stated that she was not paid in relation to visits to a particular client on 10 October (1 visit), 12 October (3 visits) and 13 October 2021 (3 visits). The respondent accepted that these visits took place and that initially the claimant was not paid because she had been logged in under another carer's number. Apparently this can occur when a carer presses redial instead of entering their log in number. The respondent stated that once these errors had come to light the claimant was paid.

40. In relation to the 10 October 2021 visit, this was raised by the claimant in an email to Ms Quigley on 17 October 2021 (pg 64). Initially Ms Quigley responded that the claimant had received payment, but on further investigation accepted that the claimant had not been paid for this visit and the claimant was notified of this by email on 22 October 2022 (pg 73). The Wage Adjustment Form dated 22 October recorded an underpayment of £5.50 (pg 457); this sum is the same as an 'adjustment' recorded in the 5 November 2021 payslip (pg 359). I therefore find that the claimant was paid for this visit.

41. In relation to the 12 October 2021 visits this was discussed at the meeting with Ms Lynes on 16 November 2021 (pg 80). The notes of this meeting record that the respondent identified that the claimant had dialled in a different carer's number, because she had used redial. I accept the respondent's case that this was the reason for the non-payment. The Wage Adjustment Form dated 16 November recorded an underpayment of £8.25 for the first visit and £5.50 for the second visit (pg 458) providing a total of £13.75; this sum is the same as an 'adjustment' recorded in the 19 November 2021 payslip (pg 360). In relation to the second visit the Wage Adjustment Form recorded that this took place at 13:10 for 13 minutes, but the pay column for this visit was blank, and there is no corresponding entry on the 19 November 2021 payslip. I therefore find that the claimant was paid for the first and third visits but not the second.

42. In relation to the 13 October visit, this was also discussed at the meeting with Ms Lynes on the 16 November 2021 (pg 80). The Wage Adjustment Form dated 24 November recorded an underpayment of £5.50 for the first visit; £8.25 for the second visit and £5.25 for the third visit (pg 459) providing a total of £19.25; this sum is the same as the 'adjustment' recorded in the 17 December 2021 payslip (pg 362). I therefore find that the claimant was paid for these visits.

1 December 2021 visits

43. These two visits were late additions identified as missing entries. In relation to the first visit on the 1 December 2021 the claimant recorded that the visit was 7:57-8:42 and stated that she should have been paid £8.48 instead of £8.29 (the claim was for 19p). In relation to the second visit the claimant recorded that the visit was 9:03-9:48 and again claimed 19 pence. According to the claimant's

records the length of the visit for both of these claims was 45 minutes. She did not raise any specific issue in relation to these visits in her evidence and I was not able to compare the claimant's records with the CM2000 timesheet since these only ran up to October 2021. From the evidence before me I find that these two claims were log in / log out claims; the amount of 19p corresponds with 1 minute of pay, and the log in / log out claims all relate to a discrepancy of 1 minute.

The holiday claim

44. The claimant stated that she spoke to Mr Amin Ouazene (Payroll Officer) prior to the end of the 2019/20 leave year who informed her that she had 11 days leave left, she took 3 days and asked to carry over the remaining 8 days due to the death of her father. This was orally agreed. COVID then happened and she was unable to take this leave because everything was closed.

45. The respondent accepted that the claimant was permitted to carry over leave from the 2019/20 leave year but claimed that the amount was 5 days not 8 days. The respondent did not dispute that the claimant was then unable to take her full leave entitlement in the 2020/21 leave year due to COVID and that 6 days leave had been carried over to the subsequent leave years. The respondent relied on a printout provided by payroll called 'Payment Type History' (holiday printout). This recorded the dates that the claimant receive holiday pay along with the number of days paid. I note that the dates are not the dates that the holiday was taken but the date of payment.

46. For the leave year 2019/20 the holiday printout records that the claimant was paid for 23 days holiday; since the claimant was entitled to 28 days holiday per year this supports the respondent's evidence that 5 days were carried over (pg 227). The holiday printout also records that the claimant received holiday pay for 3 days on 22 June 2019, 13 days on 17 August 2019, 4 days on 31 August 2019 and 3 days on 28 March 2020. The March 2020 entry supports the claimant's case that the last holiday she took that year was 3 days, however it does not support her case that she was informed prior to this that she had 11 days remaining. Indeed from the end of August 2019 the records show that the claimant had only 8 days remaining; once she had taken 3 days in March 202 this would leave 5 days.

47. There was a discrepancy that emerged during the hearing, which called into question the accuracy of the payslips relied upon by the respondent. The payslip dated 20 April 2021 provided by the respondent included payment for unused annual leave (pg 344) whereas the payslip provided to the claimant of the same date made no reference to unused annual leave (pg 381). The respondent was unable to explain this discrepancy, but in any event I find that this did not call into question the accuracy of the holiday printout provided by payroll, since this corresponded with the claimant's payslip not the respondent's. The claimant did not claim that her payslip was incorrect.

48. Therefore, I consider that the holiday printout accurately recorded the number of days holiday taken and when payment was made, and that this is likely to be more accurate than the claimant's recollection of her oral conversation with Mr Ouazene sometime towards the end of the 2019/2020 leave year. There is nothing in writing confirming what was agreed and no other supporting evidence. I also take into account that the claimant was vague in her evidence as to what holiday she had taken and when, and that she had not kept her own records. I therefore find that the agreement was that the claimant could carry over 5 days from the 2019/20 leave year, not 8 days.

49. The claimant was unable to give any positive evidence as to what holiday she had taken in subsequent years. I therefore accept the information provided by the holiday printout which records:
    49.1 that in the leave year 2020/21 she took and was paid for 27 days and carried over a further 1 day (pg 229);
    49.2 that in the 2021/22 leave year she took and was paid for 29 days and therefore used up 1 day of her carried over holiday (pg 231); and
    49.3 that in the 2022/23 leave year she took and was paid for 28 days (pg 455).

50. Ms Lynes' statement signed on the 22 December 2022 stated that the claimant took October and November 2022 off as leave 'which far outweighs the 22 days of annual leave she has left between now and the end of the financial year' and stated that the claimant would be paid what was left of her leave entitlement for the 2022/23 leave year and what has been accrued from previous years before the end of the year.

51. At the 19 May 2023 hearing Ms Lynes stated that the claimant had now been paid for the 5 days carried over and relied on an email dated 10 March 2023 from Mr Ouaxene to the claimant stating, ' you did receive your 5 days of holiday today' (pg 460). This was in response to an email form the claimant of the same date enquiring about why her 5 days holiday had not been paid (pg 461). The claimant denied that this related to her holiday stating that this email was in response to her request for payment for 5 days in lieu not holiday. I accept the claimant's evidence that this email was in relation to another matter. The email is ambiguous and does not specify what holiday is being referred to. In particular, I find it unlikely that the claimant would have sent an email requesting payment for 5 days' holiday given that her case was that she was entitled to 8 days' holiday. Further the holiday printout for the leave year 2022/23 (which runs up to 5 April 2023) records that 28 days were paid for and makes no reference to payment of the 5 days carried over (pg 455). I therefore find on the basis of the information before me that the claimant has not yet been paid for the 5 days carried over holiday, but I also find on the basis of Ms Lynes' evidence that it is the respondent's intention to pay her.

52. The claimant entered into ACAS Early Conciliation on the 17 May 2021 and received the ACAS certificate on the 14 June 2021. She submitted her claim form on the 22 June 2021. Her claim is therefore in time.

THE LAW

Unlawful Deduction of Wages

53. Section 13(1) of the Employment Rights Act 1996 (ERA 1996) provides that an employer shall not make a deduction from wages of a worker employed by him unless the deduction is "authorised" by statute, a written term of the contract or by agreement.

54. An employee only entitled to claim unlawful deduction in relation to what is payable under her contract of employment. Therefore if there is no contractual entitlement to the wage being claimed then the claim will not succeed.

55. A worker has a right to complain to an employment tribunal of an unauthorised deduction from wages under section 23 of the ERA 1996.

Holiday Claim

56. There are three types of claims that can be brought in relation to non-payment of holiday pay. The first is for breach of contract, however an employee can only bring that claim in an employment tribunal where their contract has ended. The second is for unlawful deduction of wages, if holiday has been taken but not paid. The third claim is under the Working Time Regulations 1998 (WTR 1998), in relation to the statutory entitlement of 28 days. The claimant has brought her claim under the WTR 1998, since she is still employed by the respondent and has not alleged that she ahs taken holiday for which she was not paid.

57. Under the WTR 1998 there are two types of statutory holiday leave. Basic leave of 4 weeks under regulation 13 and additional leave of 1.6 weeks under regulation 13A, amounting to a total of 5.6 weeks (28 days) including bank holidays. The reason for these two separate periods of annual leave is because the 4-week basic leave entitlement is derived from EU law and the 1.6 week additional leave entitlement is derived from UK law. This means that the two provisions must be interpreted separately.

58. Under the WTR 1998 the general rule is that untaken leave cannot be carried over from one leave year to the next, and that if it is not taken then it is lost. The reason is that it is a health and safety measure designed to give workers a break from work. For this reason it cannot be replaced by payment in lieu, except where the worker's employment is terminated (see regulations 13(9) and 13A(6)).

59. There are some exceptions to this general rule. European caselaw has established that the 4 weeks' basic leave may be carried over in a situation where the worker was unable to take the leave during the leave year. These exceptions include being on sick leave or maternity leave (**Stringer & Oth v Revenue and Customs Commissioners** [2009] ICR 932 (ECJ); **NHS Leeds v Larner** [2012]

ICR 1389 (CA); **Merino Gomez v Continental Industrias del Caucho SA** [2004] IRLR 407 (ECJ)), being prevented from taking the leave because the entitlement was denied (**King v Sash Window Workshop** [2018] IRLR 142 (ECJ)) or where the employer has not taken sufficient steps to encourage its workers to take their holiday entitlement (**Kreuziger v Land Berlin Case** C-619/16 (ECJ)). The UK courts have accepted that a purposive approach should be adopted when interpreting UK law that implements an EU Directive and that words should be read into the WTR to permit leave to be carried over in situations where a worker was unable to take their full leave entitlement (see eg **Larner** and **Smith v Pimlico Plumbers Ltd** [2022] IRLR 347 (CA)).

60. In addition to the caselaw exceptions, there is also a statutory exception permitting basic leave to be carried over where it was not reasonable practicable for a worker to take this leave due to COVID (regulation 13(10)). The carried forward leave must be taken in the two leave years immediately following the leave year in respect of which it was due (regulation 13(11)).

61. The caselaw and statutory exceptions do not apply to the additional leave under regulation 13A. However, regulation 13A(7) permits the 1.6 weeks of additional leave to be carried forward to the immediate next leave year where there is a 'relevant agreement'. A relevant agreement is defined as a workforce agreement, a collective agreement or 'an agreement in writing which is legally enforceable as between the worker and the employer' (regulation 2).

62. Under the WTR 1998 a worker can bring three claims to an employment tribunal. There are:
    (a) that an employer has 'refused to permit' the worker to take her leave entitlement (regulation 30(1)(a));
    (b) that an employer has failed to pay for leave actually taken under regulation 16(1) (regulation 30(10(b)); and / or
    (c) where there is untaken leave on termination of employment, a worker can claim pay in lieu under regulation 14(2) (regulation 30(1)(c)).

63. Where it is alleged that there has been a 'refusal to permit' a worker to take their annual leave entitlement under regulation 30(1)(a), it is not necessary for the refusal to be in response to an express request, it is sufficient if there is evidence of any practice or omission by the employer that might potentially deter a worker from taking her full entitlement: **Smith** at para 72, considering **King** [2018] IRLR 142 (ECJ). In a case where the right is disputed and the employer refuses to renumerate it, the burden is on the employer to show that it provided the worker with the opportunity to take that leave, encouraged the worker to take that leave and informed the worker that the right would be lost if he/she did not: **Smith** para 102.

64. If the tribunal finds that a complaint under regulation 30(1)(a) succeeds, it must make a declaration to that effect and may make an award of compensation under regulation 30(3) and (4), of such an amount as it considers just and equitable taking into account:
    64.1 the employer's default in refusing to permit the worker to exercise his or her rights to carry over annual leave, and

64.2 any loss sustained by the worker which is attributable to the matters complained of.

DISCUSSION AND CONCLUSIONS

Unlawful Deduction of Wages

65. In relation to the issues for me to determine, the issue in dispute was whether there has been a deduction of wages in that the claimant had received less than what was 'properly payable' under her contract for employment. This is the only issue in this case, it not being alleged that any deduction was authorised by statute, a written term of the contract or by agreement.

The log in / log out claims

66. The claimant's claim is based on the differences in the time she recorded in her contemporaneous handwritten notes and those logged automatically by the CM2000 system. The claimant confirmed in her evidence that she was not claiming that the discrepancy was caused by the difference between the time recorded by the landline CM2000 system and that recorded by the mobile phone People Planner system. This is because she accepted that she used the CM2000 system first; therefore the introduction of the People Planner system does not explain the discrepancy.

67. I accept that the claimant gave an honest account of what she did and that she genuinely believes that the time recorded in her notes is more accurate than that recorded by the CM2000 system. Therefore I accept her evidence that she was not noting down the time before she made the call as alleged by the respondent, and that rather the time she recorded was when she was called back. However, I note that she was using the clock on her mobile phone rather than the landline clock to record the time in her notes. This could explain the discrepancy if the two clocks were not completely synchronised and it could also account for why the difference was occasional rather than for every visit. Whatever the reason for the discrepancy, I find that the time recorded by the CM2000 system to be the more reliable and accurate source than the time recorded by the claimant. Further her contract specifically provided that payment was based on the ECM log in data, therefore the amount she was paid was in accordance with the terms of the claimant's contract.
68. Since the claimant had not received less than was payable under her contract her claim does not succeed.

The flat rate claims

69. The claimant claims that she should be paid a flat rate based on the scheduled times of the visits not the actual time she attended a client.

70. In support of her claim she argues that the respondent received a flat rate payment from Hounslow LA for these visits, but she has adduced no evidence in support of this contention. As explained under my findings of fact, the minimum visit requirement set out in the email at page 55 is not evidence of any agreement between Hounslow LA and the respondent as to how much would be paid for each visit. Whilst the cancellation fee could suggest a flat rate was paid, it could equally reflect agreement that the flat rate only be paid in relation to visits cancelled at short notice. I consider that Ms Lynes, as the Operations Manager, was in a position to give evidence as to the terms the contract with Hounslow LA, and that she gave clear evidence that payment was a minimum of 30 minutes and then by the minute. I have no reason not to accept her evidence.

71. Further and in any event, even if the respondent was paid a flat rate by Hounslow LA for each visit, that does not mean that the claimant is entitled to that rate. What the claimant is entitled to is set out in her contract with the respondent and this clearly provided that payment was in accordance with the ECM log in data and this is reflected in the CM2000 timesheets and her payslips.

72. The claimant claims that she was paid a flat rate per visit in the past but this changed four years ago. This was denied by Ms Lynes. I have been provided with no evidence in support of the claimant's claim that there was ever any agreement that she be paid a flat rate or that she was in fact paid a flat rate. In the absence of any evidence I do not find that there was any variation to the terms of the claimant's written contract entitling her to a flat fee for each visit.

73. Since the claimant had not received less than was payable under her contract her claim does not succeed.

The specific visits claims:

1 January 2021 visits

74. I have found that the claimant was paid for the morning and lunchtime visits as part of a pay adjustment on 26 March 2021. Therefore there is no unlawful deduction of wages and her claim does not succeed.

3 March 2021 visit

75. I have accepted the claimant's case that this was a visit not a cancellation. The claimant recorded that the visit was for 60 minutes and this is supported by the CM2000 timesheets. The respondent accepted that the claimant was paid 30 minutes for this visit. Therefore she has not been paid for the other 30 minutes. The claimant's contract states that the claimant should be paid for the duration of a visit as recorded by the ECM log in system. I therefore find that she has not been paid for the additional 30 minutes recorded by CM2000.

76. Accordingly her claim for unlawful deduction of wages succeeds and she is entitled to payment of **£5.50**

10 March 2021 visit

77. The respondent has admitted that the claimant was not paid £5.50 for this visit. The claimant's claim for unlawful deduction of wages therefore succeeds.

78. The respondent says that the claimant has now been paid for this, but this is disputed by the claimant. No evidence has been adduced by the respondent in support of their position, and this contrasts with the Wage Adjustment Forms and other evidence that the respondent adduced in relation to other disputed payments. I therefore consider that this sum, whilst admitted, has not yet been paid. The claimant is therefore entitled to payment of **£5.50.**

14 March 2021 visits

79. I have found that the claimant was not paid for the early morning visit, and accepted her evidence that this was for 60 minutes.

80. Under the claimant's contract she should be paid in accordance with the time recorded by CM2000, however this is clearly wrong since the CM2000 timesheets recorded the visit as lasting for 5 hour 30 minutes, but then only allocated 0.5 hours payment. I have found that the claimant's visit was for 60 minutes, therefore her claim for unlawful deduction of wages succeeds and the claimant is entitled to payment of **£11.00**.

10 May 2021 visit

81. It is not disputed that the claimant's visit lasted 30 minutes, and that she was paid for those 30 minutes. Her claim is that she should have received double pay because the other carer did not attend for those 30 minutes. The claimant has adduced no evidence of any contractual entitlement to double pay for this reason. In the absence of any contractual entitlement to such a payment there is no unlawful deduction of her wages and her claim does not succeed.

10-13 October 2021 visits

82. I have found that the claimant was paid for the 10 and 13 October 2021 visits and for two out of the three 12 October 2021 visits. Her claim in relation to these visits does not succeed on the facts.

83. I have found that the claimant was not paid for the second visit on the 12 October 2021. The respondent has not disputed that this visit took place and identified it as an underpayment on the Wage Adjustment Form dated 16 November 2021. No explanation has been provided as to why the claimant was not paid for this visit and it appears to me to be an oversight. The visit was for 13 minutes, which under the claimant's contract would result in a payment for 30 minutes.

84. Accordingly, the claimant's claim for unlawful deduction of wages succeeds in relation to the second visit on 12 October 2021 and the claimant is entitled to payment of **£5.50** for this visit.

Time limits

85. Since the successful unlawful deduction of wages claims were in relation to deductions that occurred after the 18 February 2021, the claims were brought in time.

The Holiday claim

86. The claimant claims that the respondent 'refused to permit' her to take her full statutory holiday entitlement under regulation 30(1)(a) of the WTR 1998.

87. It was not disputed that the claimant was permitted to carry over leave from the 2019/2020 leave year, and I have found that the amount of leave the respondent agreed could be carried over was 5 days, not 8 days as claimed by the claimant. The reason for the claimant being unable to take her annual leave was also not disputed, namely the death of her father.

88. Since the agreement was an oral agreement, and was not a workforce agreement, collective agreement or legally enforceable agreement in writing, it does not fall within the definition of a 'relevant agreement' which would permit the additional leave to be carried over. Therefore her claim can only be brought in relation to basic leave under regulation 13.

89. Basic leave can only be carried over if it falls within one of the caselaw or statutory exceptions. Whether the caselaw exceptions can be expanded to cover bereavement was not identified as an issue in this case and the respondent has not disputed that the claimant was entitled to carry over her leave. Therefore for the purposes of this judgment I am prepared to accept that bereavement is capable of falling within the caselaw exceptions by analogy, and that the interpretation of regulation 13(9) by the UK courts in **Larner** and **Smith** for sick leave should be applied to a worker unable to take their leave due to bereavement. This permits the claimant to carry over her 5 days leave from the 2019/20 year to the 2020/21 leave year. The respondent also did not dispute that the statutory COVID exception applied and that it was not reasonably practicable for the claimant to take her full leave entitlement in the 2020/21 leave year.

90. The sole issue to be determined was therefore whether the respondent 'refused to permit' the claimant to take her carried over leave in the subsequent two years ie the 2021/22 and 2022/23 leave years. On the evidence before me I conclude that the respondent did not refuse to permit the claimant to take her statutory leave entitlement such as to entitle her to compensation. This is because:
    90.1 There is no evidence that the claimant had expressly requested to take her leave and been refused.
    90.2 There is no evidence that the respondent had a practice of discouraging the claimant or other carers from taking their full leave entitlement, either by disputing their entitlement or refusing to pay for it. In fact the holiday printouts record that the claimant not only took and was paid for her full leave entitlement in subsequent years, but also took and was paid for other 'carried over' leave (see e.g. 2021/22 leave year).

90.3 The claimant submitted her claim on 26 June 2021, barely 3 months into the 2021/22 leave year. This is insufficient evidence from which to infer that the respondent would not have permitted the claimant to take the 5 days carried over leave due to COVID from the 2020/21 leave year, within the next 2 years as provided by the statutory COVID exception.

90.4 The claimant did not dispute Ms Lynes' evidence that she had been permitted to take more than her leave entitlement in the 2022/23 leave year. The respondent accepted that the claimant was entitled to be paid for this leave up to her full 28 days leave annual entitlement plus the 5 days carried over leave. Whilst I have found that this leave has not yet been paid, I have found that the respondent intends to pay it, therefore it cannot be inferred from this evidence that respondent would not permit to take her leave or discouraged the claimant from doing so.

Accordingly, I find that the claimant's claim under the WTR 1998 does not succeed.

91. For the avoidance of doubt, this judgment only determines the claim under the WTR 1998 regulation 30(1)(a) (refusal to permit the claimant to take her leave entitlement), and does not determine any claim that the claimant may or may not have under the other provisions of the WTR 1998 or other jurisdictions.

Employment Judge Hart

Date: 23 June 2023