



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Mrs K Taylor
Ms P Walton

Lotus Care Home Ltd

v

Heard at: Leeds by CVP

On: 5 May, 12 September, and 6 November 2023

Before: Employment Judge O'Neill

Appearance:

For the Claimant: Mrs Shillito (Commercial non legal representative)

For the Respondent: Mr H Singh Operations Manager

RESERVED JUDGMENT

1. The following claims are dismissed on withdrawal by the claimant
 - 1.1 Compensation for breach of the national minimum wage regulations and / or unauthorised deduction from wages in respect of the travel period between home and the first assignment and from the last assignment to home.
 - 1.2 Compensation for breach of contract by failing to reimburse the claimants for the costs of uniform, dbs checks, and training.(the claimants acknowledge that this has been paid).
 - 1.3 Compensation for breach of contract by failing to pay the Pandemic Bonus (the claimants acknowledge that this has been paid).
2. The following claims fail and are dismissed
 - 2.1 Compensation for the respondents failure to pay wages at the appropriate rate under the National Minimum Wage Regulations
 - 2.2 Compensation for an unauthorised deduction from wages under Part11 of the Employment Rights Act 1996 in respect of the sums deducted for tax from the travel payment

- 2.3 Compensation for holiday accrued but not taken in the holiday year beginning 1 January 2022 under the Working Time Regulations 1998.
- 2.4 Compensation for having been denied statutory holiday in holiday years before 1 January 2022 - Working Time Regulations 1998.

REASONS

Background

1. The claimants are care workers visiting clients in the clients homes. They make claims for unauthorised deduction of wages failure to pay at national minimum wage rate, failure to afford them their full holiday entitlement, failure to pay accrued holiday pay at termination of employment and unlawful deduction of wages in respect of the deduction for tax from the travel payment.

Evidence

2. There was an agreed bundle of documents of over 1200 pages. The claimants and Mr Singh produced written statements which were taken as read and gave oral evidence and were cross examined.

Law

3. National Minimum Wage Regulations 2015 SI 2015/162 (NMW)
4. Working Time Regulations 1998 (as amended) SI 1998/ 1833(WTR)
5. Employment Rights Act 1996 – Part II (ERA)

Claims

6. The following claims were withdrawn by the claimant and are dismissed
 - 6.1 The claim for breach of the NMW regulations and or unauthorised deduction from wages in respect of travel time between home and the first assignment and between the last assignment and home.
 - 6.2 The claim that in breach of contract the respondent failed to reimburse the claimant for uniform, DBS checks and training.
 - 6.3 The claim that the respondent had failed to pay the claimants a pandemic bonus of £500.
7. The following claims remain namely
 - 7.1 Underpayment of NMW As a consequence of the payment method for time spent between assignments. The claimants alleged that the aggregate payments received from their hourly paid work on assignment and the travel payments divided by the hours spent on assignment and the time spent in travel produces an average hourly rate which is less than the NMW.

7.2 Compensation for unlawful deduction of wages. The claimants say the respondent makes deductions for tax on the travel payments and that the respondents are not entitled to do so and this constitutes an unauthorised deduction.

7.3 Compensation for holiday pay accrued but not taken at the effective date of termination IE 28th of October 2022.

7.4 Compensation for holidays accrued but not taken in the holiday years before the first of January 2022 because of a requirement to work on the 25th and 26th of December.

Findings

8. Having considered all of the evidence both oral and documentary I make the following findings of fact on the balance of probability which are relevant to the issue to be determined. Where I heard or read evidence on matters on which I make no finding or do not make a finding to the same level of detail as the evidence presented to me that reflects the extent to which I consider that the particular matter assists me in determining the issues. Some of my findings are also set out also set out in my conclusions below in attempt to avoid unnecessary repetition and some of my conclusions are set out in the findings of fact adjacent to those findings.
9. The respondent operates a domiciliary care business to vulnerable and disabled clients in their homes the claimants are the care workers who provide care to those clients and travel between assignments.
10. Mrs Taylor began her employment on the 7th of November 2018 and ended it on the 28th of October 2022. Acas early consultation began on the 23rd of January 2023 and ended on the 25th of January 2023 ,the ET1 was lodged on the 20th of February 2023.
11. Ms Walton began her employment on the 24 July 2018 and ended it on the 28th of October 2022. Acas early consultation began on the 23rd of January 2023 and ended on the 25th of January 2023, the ET1 was lodged on the 20th of February 2023.
12. Each claimant was paid monthly for the period ending on the 24th of the month. The pay reference is a month ending on the 24th.
13. The claimants had been provided with a contract of employment which among other things makes provision as set out below
 - 13.1 Holidays
 - 13.1.1 Holiday year - 1 January to 31st of December
 - 13.1.2 28 days annual holiday inclusive of bank holiday
 - 13.1.3 No contractual right to carry over

13.2 Pay

13.2.1 The claimants were paid an hourly rate for the work on assignment and required to log their time at the start and finish of each assignment

13.2.2 The rate of pay began at £9 per hour in 2019 but rose each year. In 2022 as from April both claimants were entitled to £11.75 and Mrs Taylor's pay rose again to £12 per hour in August 2022.

13.2.3 The contract also gives a payment calculated initially at 20P per mile for travel time between assignments rising to 27p per mile in June 2022. This payment became known as the Travel Payment and although it was calculated on the basis of mileage was paid to all staff howsoever they travelled between assignments ie those who walked or took the bus were paid the same as those who drove.

13.2.4 The contract contains the following clause ' The employee acknowledges that he / she shall not be paid for travelling time between calls. If payment for travelling time is required by law the employee acknowledges that his /her rate of pay shall be reduced to the national minimum wage as applicable from time to time'

13.3 Breaks

13.3.1 The contract further provides for a daily break of 20 minutes after six hours.

14. NMW Rates

14.1 In each year the claimant's rate of pay whilst on assignment was higher than the national minimum wage but Travel time was not calculated by the hour or paid by an hourly rate but by the fixed rate set out above calculated on Mileage.

14.2 In April 2020 the claimants were paid an hourly rate for assignments of £10.05 and the national minimum wage was £8.72.

In April 2021 the claimants were paid £10. 30 and the NMW was £8.91.

In April 2022 the claimants were paid £11. 75 and the NMW was £9.50.

Holidays 2022

15. The Claimants both left the company on the 28th of October 2022, the holiday year under their contracts began on the first of January 2022, the parties agree that their accrued holiday in that year equates to 23.3 days.

16. The claimants had variable hours but going back over 52 weeks (excluding absences) I accept from the records, pay slips and the schedules produced by the respondent that the respondents calculation of a daily rate for holiday pay purposes of £105.20 for Mrs Taylor and £71.64 for Ms Walton.

17. In making this calculation the Respondent excluded from total pay two extraordinary bonus payments including the Pandemic bonus of £500. The purpose of the statutory holiday is to ensure that people take holiday as a health and safety measure and are not deterred from doing so because their holiday pay is less than their normal pay, I find that the Respondents were entitled to make the calculations in this way as such bonuses would be outside the employees normal expectations.
 18. In the discussions that followed the claimants departure they persuaded the Respondent that they were entitled to more holiday pay for holiday accrued but not taken and additional sums were paid in March 2023 to the claimants by the respondent cover the shortfall.
 19. It was Mr Singh's evidence that during her employment in 2022 Mrs Taylor had received, as shown on the pay slips, holiday pay of £1795.78 and with the additional payments made in March 2023 holiday pay totalled £2451.17 which I accept. If £2451.17 is divided by the daily rate of £105 .20 it produces 23.3 days of holiday pay. In the circumstances I find that Mrs Taylor has already received her full entitlement to accrued holiday pay for holiday year beginning 1 January 2022 and is not entitled to further compensation.
 20. A similar calculation for Ms Walton produces a total amount of holiday pay already paid of £1657 .61 made up of £1471.86 paid through the course of the year as shown on the wage slips plus the additional payment made in April 2023. If 1657 .61 is divided by 71.64 it produces the equivalent of 23.3 days holiday pay. In the circumstances I find that Ms Walton has already received her full entitlement to accrued holiday pay for holiday year beginning 1 January 2022 and is not entitled to further compensation.
- Holidays not taken in Previous holiday Years ie before 1 January 2022.
21. The Contract provides for 28 days holiday per year but that if the employee has not taken their full entitlement it may not be carried over and shall be lost. Therefore if the claimants or any one of them did fail to take their full entitlement they may not claim it now as a breach of contract.
 22. Neither claimant has given evidence to the effect that they have raised any complaint or grievance during their employment about being denied their full holiday entitlement or that a request to take holiday had been refused.
 23. The claimants assert that the reason that they have not taken the statutory holiday due to them in the years before 1 January 2022 is because the respondent has a policy of refusing to allow staff to take holidays in December. The claimants have not made any contemporaneous complaint for having been denied holiday. Nor have they explained in their statements the dates upon which holiday was taken in any year and calculated the shortfall that I can discern.
 24. Mr Singh denies and I accept that there was no policy which prevented the staff taking holiday in December and has given unchallenged evidence to the effect that Ms Walton was granted holiday in December 2021.

25. The holiday year begins on the 1 January at which point the claimants know how many holidays they are entitled to and have twelve months in which to agree holiday dates with the respondent. They had ample time to ensure that they agreed the dates on which their holiday was to be taken and there is no evidence of any contemporaneous grievance or complaint that they had not been permitted to take their full entitlement.
26. The claim relating to holidays in past years before 1 January 2022 is that the claimants were not afforded the holiday that they were entitled to. They do not rely on Covid, maternity or sickness or any other special leave as a reason for being unable to take holiday and thus seek to carry it over under various regulations. Neither the Regulations nor the contract permit leave to be carried forward. WTR regulation 13(9) requires that holidays be taken in the leave year in which it falls.
27. The claimants make no allegation that they took holiday but were not paid.
28. A complaint that the claimants have been denied holiday must be brought within 3 months of the date on which they should have been given leave. The claims are therefore out of time in that the ET1 was lodged 20 February 2023 . The claimants have provided no explanation as to why it was not reasonably practicable to lodge their claim in time.

Unauthorised deduction by way of taxation of mileage payment

29. In addition to the hourly rate of pay made to the claimants for the time spent on assignments at clients' homes, the respondent also paid under the contract, a travel payment which in June 2022 was 27p a mile. In the contract this is referred to as a mileage rate, subsequently it became known as a travel payment. I accept the evidence of Mr Singh that it is paid to all staff irrespective of the means by which they travel between assignments it is paid through the payroll and is taxed.
30. The claimants complain that this is an unauthorised deduction from wages and the respondent has no authority to tax this payment.
31. I accept Mr Singh's evidence that the respondent has been advised to make such a deduction of tax from the travel payment , it is shown on the pay slips and the respondent properly accounts to HMRC for this deduction which is made in good faith. I have seen no evidence to show that the HMRC has a different view of the payment and its liability to deduction for tax under the PAYE system.

Calculating the Claimant's rate of Pay

32. The parties agree that working time is calculated from the beginning of the first assignment to the end of the last assignment including travel time between assignments other than that taken as breaks. The parties agree that travel time to the first assignment and from the last assignment are not to be included in working time.

33. In this case the pay reference period is a calendar month ending on the 24th. To calculate the rate paid it is necessary to look at the remuneration received in that period, divided by the number of Working hours in that period.
34. The respondent has produced spreadsheets for July to October 2022 showing the number of assignments and the gaps between them. The claimants log in and out of each assignment. In calculating the gaps between assignments the respondent has a computer system linked to Google Maps which calculates the mileage and timing of each gap. In addition the staff record the start and finish times of each assignment. Ms Walton has pointed out some minor flaws in the schedules which include one or two examples of overlapping assignments, notwithstanding these flaws, which I find to be minimal in the circumstances, I find no reason to doubt the respondents records and schedules which I accept as broadly correct and reliable
35. In her submissions Mrs Shillito asserted that Mr Singh had manufactured and manipulated these tables. There is not a shred of evidence to support such a contention.
36. In calculating whether the NMW has been met I have considered the sums paid for the hours of work on assignment and the travel payments. The claimants have not argued that these travel payments fall under the NMW regulations 10(n) and should be disregarded when calculating the NMW. I have been told by the claimant representative that some employees have made an application to HMRC for a tax rebate but have been unsuccessful. There has been no evidence or claim that this payment falls under section 338 of the Income Tax Act 2003.

NMW Calculations Taylor

37. I accept the schedule produced by Mr Singh which shows
- 37.1 In the pay period to 24th of October 2022 Mrs Taylor received a total of £2917. 89 from both her travel payment and her hourly pay. The respondents records show that she worked 275 .97 hours on assignments and travel time. Pay divided by working time produces an hourly rate of £10.57 which is greater than the NMW of £9.50.
- 37.2 In the pay period to 24th of September 2022 Mrs Taylor received a total of £2737. 36 from both her travel payment and her hourly pay. The respondents records show that she worked 246.47 hours on assignments and travel time. Pay divided by working time produces an hourly rate of £11.10 which is greater than the NMW of £9.50.
- 37.3 In the pay period to 24th of August 2022 Mrs Taylor received a total of £2737. 36 from both her travel payment and her hourly pay. The respondents records show that she worked 246.47 hours on assignments and travel time. Pay divided by working time produces an hourly rate of £11.10 which is greater than the NMW of £9.50.

NMW Calculations Walton

38. I accept the schedule produced by Mr Singh which shows

38.1 In the pay period to 24th of October 2022 Ms Walton received a total of £1218.88 from both her travel payment and her hourly pay. The respondents records show that she worked 108.27 hours on assignments and travel time. Pay divided by working time produces an hourly rate of £11.25 which is greater than the NMW of £9.50.

38.2 In the pay period to 24th of September 2022 Mrs Ms Walton received a total of £1182.17 from both her travel payment and her hourly pay. The respondents records show that she worked 106.20 hours on assignments and travel time. Pay divided by working time produces an hourly rate of £11.10 which is greater than the NMW of £9.50.

38.3 In the pay period to 24th of August 2022 Ms Walton received a total of £1640.40 from both her travel payment and her hourly pay. The respondents records show that she worked 143.72 hours on assignments and travel time. Pay divided by working time produces an hourly rate of £11.41 which is greater than the NMW of £9.50.

Credibility

39. I found Mr Singh to be a reliable and credible witness. The calculations he produced and the explanations he gave were cogent and reasonably detailed and the schedules he produced were clear. Generally I preferred his evidence to that of the Claimants whose statements were much less detailed and whose calculations were confusing and in some cases based on guesswork. For example the time between assignments for which the claimants gave a blanket approximation of 10 minutes each. Whereas Mr Singh explained that in addition to the claimants logging their start and finish times at each assignment the travel payment was calculated using an embedded computer programme linked to google maps from which the respondent's system calculated mileage for the purpose of making the travel payment and from which the time intervals were calculated in the Schedules produced for this Hearing.

Conclusions

Deduction of tax from travel payment

40. The claim for compensation for unauthorised deduction from wages fails and is dismissed in respect of the deduction of tax from the travel payment I accept Mr Singh's evidence that the respondent has been advised to make such a deduction, that it is made in good faith and the respondent properly accounts to HMRC for it and includes it on the payslip.

41. I conclude therefore that it is an excepted deduction and not an unauthorised deduction, Employment Rights Act 1996 section 14. The claim fails and is dismissed

Failure to pay compensation for accrued holiday not taken at the EDT (Effective date of Termination).

42. In the holiday year beginning first of January 2022 the parties calculate that the proportion of holiday accrued at the EDT equates to 23.3. Taking into account the claimants average daily rate over 52 weeks as set out in the schedule by the respondent it would appear that each has been paid holiday pay for a period equivalent to 23.3 days and I therefore find that the claimants have received all the statutory holiday pay that they are entitled to. In the circumstances their claim for compensation for holiday accrued but not taken fails and is dismissed.

Failure to allow the Claimants their full statutory holiday entitlement in the years before 1 January 2022

43. The claimants allege that they were denied the opportunity to take statutory holiday in the years prior to the first of January 2022 because they were compelled to work on Christmas Day and Boxing Day and were refused holiday in December. I accept the evidence of Mr Singh that neither claimant has had a holiday request refused and neither has made any complaint or raised any grievance to that effect prior to this employment tribunal application. The claimants have failed to show any evidence of having raised a complaint or grievance about being denied holiday. They have failed to show that they have made any relevant request for holiday. They have failed to show that they have taken holiday without payment. They were entitled to 28 days holiday, They knew they were entitled to 28 days holiday and at the beginning of every holiday year they had ample time to ensure that they were able to take their full amount of statutory holiday. They do not rely on covid, sick leave, maternity or any other special leave to justify carrying forward untaken holiday into the year beginning 1 January 2022. In the circumstances their claim fails and is dismissed.

44. In any event the claim is out of time.

Failure to pay wages properly payable under the NMW regulations

45. The relevant period is the monthly pay period to 24th of each calendar month. In any calendar month the claimants receive pay for the hours they work on their assignments and a payment called a travel payment for each mile travelled between assignments latterly paid at 27p a mile. The hourly rate of NMW for the period from April 2022 was £9.50. The contractual hourly rate for time spent on an assignment was from April 2022 £11.75 per hour and in the case of Mrs Taylor £12 per hour from August 2022 plus travel payment.

46. The questions therefore to be determined are

- a. what was the claimant paid for that hourly paid work and the travel time in the relevant period
- b. how many hours did they work in that period including travel time
- c. if one divides the pay by the number of hours worked is the hourly rate less than the national minimum wage

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47. Calculating the figures as above at paragraph 38 and 37 I conclude that in the three months ending with the effective date of termination no payment has fallen below the National Minimum Wage. In the circumstances the claims fail and are dismissed.

9 November 2023

Employment Judge O'Neill

Sent to the parties on:

13 November 2023