



EMPLOYMENT TRIBUNALS (SCOTLAND)

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**Case No: 4105853/2023 Hearing by Cloud Video Platform at Edinburgh on 8
January 2024**

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Employment Judge: M A Macleod

Amy Mitchell

In Person

Claimant

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Cera Care Operations (Scotland) Limited

**Respondent
Represented by
Mr M Islam-Chaudhury
Barrister**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

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**The Judgment of the Employment Tribunal is that the respondent acted in
breach of Regulation 4(4) of the Transfer of Undertakings Regulations 2006;
that no compensation is awarded to the claimant in this regard; and that the
claimant's other claims all fail and are dismissed.**

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REASONS

1. The claimant presented a claim to the Employment Tribunal on 11 October 2023 in which she complained that she had been unlawfully deprived of holiday pay, that her contract had been breached by the respondent, and

that the respondent had breached the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE).

2. The respondent submitted an ET3 in which they resisted all claims made by the claimant.
- 5 3. A Hearing was listed to take place by CVP on 8 January 2024. The claimant appeared on her own account, and gave evidence. Mr Islam-Chaudhary, Barrister, appeared for the respondent. Elizabeth MacDonald, Regional Operations Manager, and Theresa Cull, Regional Director, both gave evidence for the respondent.
- 10 4. Documents were presented to the Tribunal and relied upon in the course of the Hearing.
5. At the outset of the Hearing, the claimant confirmed that she had already received payment in respect of the outstanding holiday pay which she was claiming, and accordingly that claim no longer proceeds.
- 15 6. Based on the evidence led and information presented, the Tribunal was able to find the following facts admitted or proved.

Findings in Fact

7. The claimant, whose date of birth is 22 July 1999, commenced employment with U Care Limited on 1 October 2017, and was transferred to the employment of Allied Healthcare Limited under TUPE on or around 21
20 November 2022. Allied Healthcare Limited merged into the wider Cera Care Group. The claimant worked latterly as a Team Leader, on a 40 hour contract, based in the respondent's Macmerry office, before moving to their North Berwick office.
- 25 8. The claimant was Team Leader for Musselburgh and Prestonpans. Gavin Bryce, who the claimant said was her manager with U Care Limited, wrote to the respondent in late 2022 (C3) confirming that the claimant had this position.

9. The claimant's contract of employment (R46ff) stated that her start date as Homecare Team Leader was 1 September 2021. Her salary was £26,000 per annum, paid monthly in arrears on the last Friday of each month. Her hours of work were variable each week as rostered. Additional hours of work, above her contracted hours, would be classified as overtime, and paid at £11 per hour.

10. The contract specified that the claimant had a number of "Out of hours responsibilities":

"As part of your normal duties you are required to undertake specific duties relevant to your position including management of the company on-call phone service, staff meetings and mandatory training, which may be outside of your normal working hours as follows:

On-call phone service

On a rotational basis, you will be assigned management of the company's on-call phone service. When this falls outside of your normal working hours, you will be paid a flat-rate for being 'on call'. Any care delivered while on call will be paid at £10.00 per hour..."

11. The claimant signed her contract on 19 August 2021 (R54).

12. A job specification was provided to the claimant (R55ff). It included a table setting out the rotational shift pattern, as follows:

Week 1 (front): Monday, Tuesday, Saturday, Sunday: 0700 to 1700

Week 2 (front): Tuesday, Wednesday, Thursday, Friday: 0700 to 1700

Week1 (back): Monday, Tuesday, Saturday, Sunday: 1200 to 2200

Week 2 (back): Tuesday, Wednesday, Thursday, Friday: 1200 to 2200

13. The claimant confirmed in evidence that this was the pattern which she worked.

14. On 10 August 2023, the claimant raised a grievance about her pay (R130). She stated that since she had been transferred to the respondent's employment under TUPE, *"my contract has not been upheld or protected under tupe regulations/laws as it should be. I am not being paid for the oncall where my contract (sic) clearly states I should be. I have had two meetings now and still do not have any answers, first my contract couldn't be found to later being told that the company's oncall doesn't work the way my contacts (sic) states rather than trying to find a mutual solution. On trying to resolve the matter with management again I have been dismissed and somewhat forgotten about and told from management that tupe is only for a certain amount of time when in fact they cannot change my terms without a meeting to come to a mutual agreement. My contract should be upheld at all times and not changed for the gain of the employer. I also have been discriminated against from management as my rate of pay is higher than other staff members with (sic) means that they are not willing to give me overtime due to this. These issues have left me with extremely high levels of stress and worry everyday, and due to having to lose days off in order to take oncall phone without payment has caused me to lose valuable time with my family along with not being able to maintain much of a social life..."*

15. A meeting was arranged by the respondent on 18 August 2023 at 2.30pm via Google Meet (R136). In the meantime, the claimant confirmed that she had handed in her notice to resign.

16. The grievance meeting took place on that date. The claimant attended, and the grievance was heard by Liz MacDonald. Sharon Traynor took notes (R138).

17. In the meeting, the claimant explained that she was complaining that the respondent was not abiding by her contract of employment. She said that she was being paid weekly, and not monthly, and that the flat rate payable under on call work had been changed.

18. Following the meeting, an outcome letter was sent to the claimant on 15 September 2023 (R143).

19. With regard to Point 1, the change to when she was being paid, the respondent advised that this was a change to her pay cycle, not to her terms and conditions of employment. They explained: *"If you had delivered supervisory duties you would have continued to be paid monthly however due to your role predominantly being care while you were transitioning into some supervisory duties the majority of your weekly working hours are delivering care which falls under the weekly payroll. This did not impact on your annual salary this was further confirmed during consultation in April during the internal transfer to Cera from Allied."*

20. This point was partially upheld.

21. Point 2 related to her complaint that she should have been paid a flat rate on top of her salary for on-call work. The respondent stated that as part of the TUPE transfer the employee liability information provided confirmed her salary but there was no information of any additional payment for on-call work. They said that they checked with her previous employer who confirmed that no additional payments were made to her. They noted what she had said in the grievance meeting, but observed that the payslip from 2020 did not state what the flat rate was.

22. They confirmed that following the meeting, the claimant had advised that the flat rates were £20 for a weeknight and £50 for a weekend day. They went on: *"Having looked at the times you have been on call it amounts to 13 week nights and 12 weekend days. This would amount to £869. Your contract states that any care being delivered during the period of you doing on call would be paid at the rate of £10 per hour. Having looked through the system I have found that the weekends are primarily the period when you have been out delivering care whilst being on call and the total amount for this paid would have been 44.25 hours which would have been paid at the Cera rate of £11.50 per hour resulting in an overpayment of £60.76. therefore the outstanding amount due for any on call will be £799.24."*

23. They advised that they had taken the decision to make this payment as a gesture of goodwill that did not constitute liability for on-call payments, and that the point was not upheld.
24. Point 3 related to outstanding payments in relation to annual leave, which
5 have now been resolved.
25. Point 4 was not upheld. The claimant had complained that it took a week to have access to HR and the respondent replied that they could not understand why this should have been so.
26. She was asked during the grievance meeting whether or not she would be
10 prepared to reconsider her resignation, but she advised that she would not, but that she would like to receive what she believed she was due for on-call work.
27. The claimant confirmed before the Tribunal that she then received a payment of £799.24 after this.
- 15 28. She left the respondent's employment on 11 September 2023.
29. The claimant wrote to Theresa Cull to appeal against the outcome of the grievance, as she did not consider that responsibility had been taken by the respondent (R148), on 23 September 2023.
30. The claimant agreed that the grievance appeal could be dealt with in writing
20 alone, without the need for a meeting. Ms Cull therefore wrote to the claimant on 6 October 2023 to confirm the outcome (R152).
31. Point 1 was not upheld, and the original reasons were affirmed by Ms Cull.
32. Point 2 was partially upheld. Ms Cull acknowledged that when the
25 claimant's former employer provided the required TUPE data to them, it was clearly documented that no additional payments were made to staff for on-call regardless of what individual contracts may suggest, and that the respondent also received written confirmation that additional payments were not made for on-call. Ms Cull stated that once the claimant had explained how on-call had worked with her previous employer, it was realised that this

was different and accordingly, a payment was calculated and paid to her in terms of the grievance outcome. She accepted that the respondent could have been more reactive as soon as her concerns about on-call payments were raised.

5 33. Point 3, relating to annual leave, was not upheld.

34. That concluded the appeal process.

Discussion and Decision

35. As Mr Islam-Chaudhary pointed out, there are essentially 3 heads of claim advanced by the claimant in this case.

10 36. Firstly, the claimant claimed that she was unlawfully deprived of pay in respect of holiday accrued but untaken as at the date of termination of her employment. However, the claimant confirmed at the outset of this Hearing that this claim is not being pursued as she has been paid in respect of her holiday pay.

15 37. Secondly, the claimant claimed that her contract of employment was breached by the respondent.

38. The claimant argued that she was entitled to be paid monthly rather than weekly, according to her contract of employment. The respondent argued that the claimant has waived the right to claim that that contract was
20 breached. Mr Islam-Chaudhary accepted that she may not have received notice of the change, as had happened before with changes to the pay cycle, but that she had affirmed the breach of contract because she continued to work under the contract and to be paid weekly from November 2022 until August 2023. As at the date of her resignation, he argued, she
25 had not raised this matter in writing, though he accepted that she may have raised the matter verbally.

39. In my judgment, the claimant has waived any breach of contract, though it is my view that any breach here is minor. However, the fact that she continued to work while being paid weekly for a period of some 10 months without

submitting any written complaint amounts, in my view, to affirmation of the breach of contract; in other words, that while she says she did not accept the change, her actions in continuing to work for the respondent for such a long time paint a different picture.

5 40. The other complaint of breach of contract made by the claimant was whether or not she was properly paid for on-call payments. The contract, (48) provided that for work on the management of the company's on-call phone service falling outside her normal working hours, she would be paid a flat rate for being on-call. The rate was not defined in the contract. If she
10 required to provide care to a service user while on-call, she would be paid £10 per hour.

41. The respondent argued that even if she were due sums in respect of on-call work, they have already made payment to her of the sum of £799.24 in relation to such hours, accepted by the claimant. They also argued that as a
15 result the claimant has not proved any loss in this regard, given the payment made.

42. The parties' positions on this matter were not well defined. The claimant was unable to present clear evidence to the effect that she had been underpaid, though she accepted that she received the payment of £799.24
20 from the respondent. The respondent was not clear as to precisely what rate of pay was due and payable for out of hours work to the claimant, and the terms of the contract are unhelpfully vague.

43. I accept, in the end, that it is for the claimant to prove that she has suffered loss. In light of her acceptance of the sum of £799.24 paid to her by the
25 respondent expressly in relation to this matter. In this case, it is not at all clear that the claimant has suffered any loss. While the respondent said that the payment was an ex gratia payment, it was clearly related to this aspect of her grievance. I am not persuaded on the evidence that the claimant has suffered any loss and accordingly I do not find that in this regard the
30 respondent has breached the claimant's contract of employment.

44. Thirdly, the claimant complains that there was a breach of the TUPE Regulations, in respect of the on call flat rate payment. The respondent argued that there was no evidence that they had failed to adhere to the terms of the contract of employment.

5 45. Ultimately, however, the respondent accepted that they were in breach of Regulation 4(4) of TUPE 2006, which provides:

“Subject to Regulation 9, any purported variation of a contract of employment that is, or will be, transferred by paragraph (1), is void if the sole or principal reason for the variation is the transfer.”

10 46. Mr Islam-Chaudhary accepted that in relation to the change of pay cycle from monthly to weekly the respondent was in breach of Regulation 4(4). However, he submitted that there is no remedy available for breach of that Regulation, and accordingly that no compensation should be awarded. A declaration would be the only finding which the Tribunal could make.

15 47. I accept this. There is no compensation to be awarded to the claimant, but I do make a declaration that the respondent acted in breach of Regulation 4(4) of TUPE 2006 in its variation of the claimant’s contract of employment.

20 **Murdo A Macleod**
Employment Judge

18 March 2024
Date of Orders

25 Date sent to parties 19/03/2024-----

30 I confirm that this is my Note and Orders in the case of Mitchell v Cera Care Operations (Scotland) Limited and that I have signed the Note and Orders.