



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4105681/2023

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Held in Glasgow on 24 & 25 July 2024

Employment Judge M Kearns

10 **Mr P Nelson**

**Claimant
In Person**

15 **North Lanarkshire Council**

**Respondent
Represented by:
Ms K Carrick -
Solicitor**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal was to dismiss the claims.

REASONS

1. The claimant has been employed by the respondent as a home support worker since 18 November 2019. Having complied with the early conciliation requirements, he presented an application to the Employment Tribunal on 6
25 October 2023 in which he claimed that the respondent had made unlawful deductions from his wages for the full period of his employment by failing to pay him the amount properly payable for overtime, non-core hours and designated user allowance. The respondent resisted the claims.

30 **Issues**

2. At the outset of the hearing, I discussed with the parties the issues for determination by the Tribunal. These were agreed by the parties as follows:
 - a) Has the Claimant been underpaid for his overtime?

- b) Has the Claimant been underpaid non-core hours payment? and
- c) Has the Claimant been underpaid designated user's allowance?

Evidence

3. The parties lodged a joint bundle of documents. The claimant gave evidence
5 on his own behalf. The respondent called Linda Cullen, Employment and
Policy Manager and Gail Mainland, HR Business Partner.

Findings in Fact

4. The following material facts were admitted or found to be proved.
5. The respondent is a Scottish local authority. The claimant commenced
10 employment with the respondent as a home support worker on 18 November
2019. He continues in their employment.
6. Many of the respondent's employees, particularly home support workers,
work an average week across a rota comprising multiple weeks. The
respondent contracts with its employees in this way to ensure flexibility and
15 to meet fluctuating service user demand. The respondent's contracts and
associated contractual documentation such as Schedule A - Terms and
Conditions of Employment for Local Government Employees and Craft
Workers which contains the applicable overtime and other pay rules expressly
provide for "*an averaged week in circumstances where employees may have*
20 *variable working weeks*". Schedule A has been in place since 2007 and it has
been agreed with the relevant trade unions.
7. The claimant's contract of employment (J109) stipulates at paragraph 8 that
his normal working hours are 28 per week. The claimant works over a two
week rota: he works 40 hours one week and 16 the following week giving him
25 total contractual hours of 28 per week on average. In relation to overtime,
paragraph 7(f) of the claimant's contract (J111) refers to Schedule A. So far
as relevant for present purposes, Schedule A provides as follows:

"7. OVERTIME

7.1 General

(a)

5 (b): *Overtime payments at enhanced rates will not be made to employees until they have worked in excess of 37 hours (39 hours for craft employees) in any one week or averaged week, in circumstances where employees may have variable working weeks.”*

(c)

7.3 Overtime Payments

(a) *Monday to Friday*

10 *Hours in excess of 37 hours per week (39 hours for craft workers), or averaged week, Monday to Friday, will be paid at time and a half.*

(b) *Saturday and Free Days*

15 *Hours in excess of 37 hours per week (39 hours for craft workers), or averaged week, worked on a Saturday or a free day, will be paid at time and half.*

(c) *Sunday, Rest days and Public Holidays*

Hours in excess of 37 hours per week (39 hours for craft workers), or averaged week, worked on a Sunday, rest day or public holiday, will be paid at double time.

20 **8. CORE HOURS**

8.1 Working Week

(a) *The working week will be worked over five days, including Saturday and Sunday.*

(b)

25 (c) *From 1 July 2009, core hours will be 7.00 am to 8.00 pm Monday to Friday.*

8.2 Enhanced Payments

- (a) No enhanced payments will be made for hours worked, as part of the normal working week, within the core hours specified at paragraph 8.1 above.
- 5 (b) Where the normal working week is worked outwith the core hours no additional payment will be made for the first four hours in the week, or averaged week.
- (c) Where five or more hours are worked as part of the normal working week, or averaged week, outwith the core hours, a 15% enhancement on the hourly rate will be paid for all hours worked outwith core hours.
- 10 (d) The 15% enhancement on the hourly rate will not be paid to employees whose contract of employment requires them to work exclusively on Saturday and or Sunday.

8.4 General

- 15 *Employees have an entitlement to one enhancement only and cannot receive an enhancement on an already enhanced rate.”*

Overtime payments

8. The claimant is free to accept voluntary overtime as and when he chooses. His overtime is not compulsory or guaranteed under his contract. It is paid four-weekly in arrears.
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9. The respondent pays enhanced overtime rates per Schedule A. As set out above, this provides that 37 hours must be worked in an average week where employees have variable working weeks. For the claimant, this means that he must work nine additional hours each week at basic rate before overtime rates apply. This is because his average contractual hours are 28 per week, plus nine hours gives the total of 37. The claimant is then eligible for enhanced rates of overtime. Where he works overtime in excess of the 37 hours in a week, he gets time and a half on a Monday – Friday, a Saturday and his Free Day and double-time on a Sunday, a Rest Day or a Public Holiday.
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10. In any given week, the claimant must first work the nine additional hours at basic rate before the overtime rates apply. In the case of an employee working on the claimant's variable two weekly rota, averaged at 28 hours per week, this means that in his 40 hour week, the claimant must work 49 hours before overtime rates apply, whereas, in his 16 hours week, he must work 25 hours before overtime rates apply.
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11. Where an employee has a Sunday off, this will always be considered the Rest Day and the first non-working day that week will be the Free Day. Conversely, where the Sunday is worked as part of the employee's rota, the first non-working day that week will be deemed the Rest Day.
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12. The first nine hours of overtime worked in any week will be paid at basic rate irrespective of whether they are worked on a Free Day, a Rest Day or in addition to contractual hours on a working day. Overtime is calculated on an individual weekly basis.
13. In relation to the dispute about the claimant's overtime pay, the claimant met with the respondent in April 2024 and emailed them on 17 June 2024 with a description of his issues. In the email, the claimant selected four weeks from 8 May to 4 June 2023 as representative of his typical overtime pattern. The respondent replied to the claimant's email on 9 July 2024 by commenting in red on his email (J300 – 306) explaining how they had applied Schedule A to working out his overtime payments. One of the two week periods in the email suffices for present purposes. (The respondent's responses are in red):
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"Short week

[Monday] 22nd [May 2023] Overtime 6 hours agree

25 *[Tuesday] 23rd Overtime 7 hours 6 hours*

[Wednesday] 24th contracted hours 8 hours agree

[Thursday] 25th contracted hours 8 hours agree

[Friday] 26th OFF agree

[Saturday] 27th Overtime 7 hours **6.5 hours**

[Sunday] 28th Rest day, overtime 4 hours **agree**

Total hours worked 40 **38.5**

5 Did I work more than 37 hours? Yes **agree**

Did I work my rest day? Yes. **agree**

As my contract states this should mean 37 hours at normal rate of pay.

3 hours at double time. **Paul works a 2 week rota, average 28 hrs average basic pay hours per week. Hours worked over 37 hrs are paid at an enhanced rate i.e. 9 extra hours at basic pay rate before enhanced rate paid. In this week 9 hrs additional basic paid and then enhanced rates were paid for, 9.5 hrs at time and a half and 4.5 hrs at double time.**

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Big week

[Monday] 29th May contracted hours 8 hours **agree**

15 [Tuesday] 30th May contracted hours 8 hours **agree**

[Wednesday] 31st May Rest day, overtime 4 hours **agree**

[Thursday] 1st June Off **agree**

[Friday] 2nd June contracted hours 8 hours **agree**

[Saturday] 3rd June contracted hours 8 hours **agree**

20 [Sunday] 4th June contracted hours 8 hours **agree**

Total hours worked 44 **agree**

Did I work more than 37 hours? Yes **agree**

Did I work my rest day? Yes **agree**

As stated in my contract this would mean 37 hours at normal rate of pay, 4 hours at double time and 3 hours at time and a half. *Paul works a 2 week rota, average 28 hrs average basic pay hours per week. Hours worked over 37 hrs are paid at an enhanced rate i.e. 9 extra hours at basic pay rate before enhanced rate paid. In this week 4 hrs additional basic worked and paid. The Rest Day was worked but Schedule A criteria not met for double time rate. 28 hrs plus 4 additional hours totals 32 hours. "Sunday, Rest days and Public Holidays Hours in excess of 37 hours er week (39 hours for craft workers), or averaged week, worked on a Sunday, rest day or public holiday, will be paid at double time.*

Now can I point out I have worked 26 days out of 28 and went over 37 hours every week and worked my rest day every week. *Paul is on an averaged week contract as set out within Schedule A, 28 hours basic pay has been made each week whether a 16 hr rota has been worked or a 40 hr rota. Enhanced rates have been paid on hours in excess of 28 hrs (contract) + 9 hrs (additional basic) i.e. in excess of 37 hours, average per week, as these hours meet the Schedule A criteria.*

So, when I was only paid 8.5 hours at double time, I thought this was a mistake as I have been clearly under paid. *Disagree incorrect rate of payment made, as per Schedule A and the explanations above.*

Please see my wage slip I have attached.

When I calculate my over time, it should be 69 hours over time. Agree

20 hours at double time, 10 hours at time and a half and 39 hours at normal rate of pay. 25 hrs at additional basic rate, 9.5 hrs at time and a half, 8.5 hrs at double time and 6 hrs public holiday enhanced rate."

Non-core hours payments

14. The claimant is also eligible for non-core hours payment in the terms of Schedule A set out above. This is a top-up of 15% payable on those contractual hours which fall outwith the respondent's core hours. The claimant works eight hours each day on a Wednesday and Thursday during his short

(16 hours) week from 2.30pm until 11pm. The three hours he works after 8pm each day are outwith core hours and attract the 15% payment. In his big week, the claimant works Monday, Tuesday and Thursday to Sunday, 2.30pm until 11pm. He gets 15% on the hours worked after 8pm and for the full eight hours worked on each weekend day. He therefore receives non-core hours payment for 31 hours in total across his two-week rota.

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15. As stated in Schedule A paragraph 8, non-core hours payment is not payable on overtime. It is applicable to contractual hours only. Paragraph 8.4 makes clear that employees cannot receive an enhancement on an already enhanced rate.

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Designated user allowance

16. Those employees who use their own vehicles to carry out their work for the respondent (including the claimant) receive a mileage allowance of 45 pence per mile. Those who claim mileage of more than 2,000 miles per year (again, including the claimant), are also entitled to a 'designated user allowance'. This is a flat sum paid every four weeks on top of the mileage allowance. It is not affected by the number of hours worked, either contractually or on overtime.

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Discussion and Decision

Claim for unauthorised deductions from wages

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17. Section 13 Employment Rights Act 1996 gives workers the right not to suffer unauthorised deductions from their wages. Under section 13(3) a deduction occurs where *"the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion."* The 'wages properly payable' are ascertained with reference to the contract of employment.

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Overtime payments

18. In this case, the actual hours worked by the claimant by way of overtime are broadly agreed by the parties. The claimant accepted in his evidence that the

Schedule A rules about overtime apply to his contract of employment and that his overtime payments should be calculated accordingly. The dispute is over the rate of pay in respect of those hours. Initially, it appeared that the claimant differed from the respondent in his interpretation of Schedule A and its application. However, it transpired during the claimant's evidence that his issue was more to do with his sense of what was fair. The claimant explained his issues in his evidence and elected to rely on this in place of making submissions. I have therefore set out in the following paragraphs the main passages of the claimant's evidence where he explained the basis of his complaint.

19. The claimant's understanding of the contract (as explained in his evidence in chief) was as follows: *"We work a big week and a small week. One week I work 16 hours, the next week I work 40 hours. As it's a 28 hour contract, they take 12 hours from the big week and add it to the small week so that it makes 28 hours a week...Therefore, every week, as long as I work over nine hours on top of my contractual hours, because it's a 28 hour contract, I move over onto time and a half. That takes me up to the 37 hour threshold."* The claimant was clear in his evidence that whether the week was a big week or a small week, in order to qualify for enhanced overtime pay of time and a half or double time, he must first work nine hours at his normal rate of pay. He explained that on his big week, because he was scheduled to work a Sunday, his rest day was a Wednesday and that on a 'big week', Wednesday was therefore the only day he could qualify for double time. Although the claimant referred to 12 hours being deducted from his 'big week' and given to his small week, actually his hours are simply averaged over the two week period, so that in each week he starts from 28 hours and requires to work 9 hours at his normal basic pay rate before he qualifies for overtime. This gives him a 12 hour head start in his short week, which is effectively earned in his big week.
20. The claimant testified in relation to his complaint that: *"Even though my employment contract says I'm happy to work these hours, nothing in the contract says I'm happy to work over 37 hours and not be paid time and a half. Currently, without doing overtime, I'm working 40 hours every second*

week, which is over 37 hours. They're 3 hours I don't get paid at time and a half. My understanding is I've agreed to work a big week and a small week but I've not agreed to work over 37 hours and not be paid time and a half." He went on: "Every single week I've worked over 37 hours and I have worked on my rest day, so I thought I would be paid double time for my rest day and time and a half for the other days."... "My contract clearly states if I go over 37 hours, I should be paid time and a half." The claimant complained that on his big week, he did not start receiving time and a half until he had worked 49 hours at basic rate. I considered this argument carefully but I concluded that it simply fails to acknowledge that the contract provides for the averaging set out above. Like all averaging, what the claimant loses on his big week, he gains on his short week. On both weeks, he starts at his contractual 28 hours. On his big week, enhanced overtime pay kicks in after 49 hours but on his short week, this is compensated for because enhanced overtime rates kick in at 25 hours. The position therefore averages out and the claimant is not disadvantaged.

21. Helpfully, the parties had corresponded (J300 – 306) about two two-week periods between 8 May 2023 and 4 June 2023, which the claimant accepted were fairly typical of his overtime pattern. The claimant and the respondent's witnesses referred to these weeks in their evidence, which helped to focus the dispute. The respondent explained how they had applied Schedule A in working out the claimant's overtime payments. The exchange in relation to two of the four specimen weeks is set out in paragraph 13 above. This helps to illustrate the way in which Schedule A is applied by the respondent. In the short week beginning Monday 22 May 2023, the claimant worked 38.5 hours. (He believed he had worked 40 hours but he accepted the respondent's record that it was 38.5). He thought he was entitled to 3 (corrected to 1.5) hours' double time but as the respondent commented, he was paid for much more that week, having been credited by them for 22.5 hours' overtime, 13.5 hours of which was at enhanced overtime rates as follows: In addition to his 16 contractual hours that week (worked on a Wednesday and Thursday) he was paid for 9 hours of his 22.5 hours' overtime at his basic pay rate; 9.5 hours at time and a half and 4.5 hours at double time (those hours having

been worked on his rest day, which was Sunday that week). This was well in excess of the sum he had calculated he was due. By contrast, in his 'big week' beginning Monday 29 May 2023, in addition to his contracted hours, he had worked 4 hours on his rest day (which was Wednesday that week). However, since these were among the first 9 hours' overtime he worked that week, they counted towards his 9 hours' additional basic to be worked and were not paid at double time.

22. It appeared to me that this was consistent with the contract which states at paragraph 7.1(b) of Schedule A that: *"Overtime payments at enhanced rates will not be made to employees until they have worked in excess of 37 hours (39 hours for craft employees) in any one week or averaged week, in circumstances where employees may have variable working weeks."* (My emphasis). The claimant works variable weeks. Since both the 40 hour 'big' week and the 16 hour 'short week' are averaged at 28 hours, it is necessary in both weeks to work 9 hours on top of either the 40 or 16 hours (depending on the week) at basic pay before the enhanced rates kick in. This is consistent with Schedule A because the claimant's weeks are averaged to 28 under paragraph 8 of his employment contract. I have therefore concluded that on the evidence before me, the claimant has been paid the sums properly payable under his contract of employment and his claim for unauthorised deductions from wages must fail in relation to this head of claim.

Non-core hours payments

23. The claimant's complaint in relation to this payment was that if he was working overtime after 8pm alongside someone who was working their contractual hours, they would be getting an additional 15% non-core hours payment for those hours, whereas he would not get that payment. Indeed, his overtime might be at the basic (unenhanced) pay rate (if it was in respect of the first 9 hours of overtime). It seemed clear to me that the non-core hours payment applies to contractual hours only and that the claimant had been paid the amount properly payable under the contract. Indeed, the claimant accepted in cross examination that he had been paid the amount properly payable under the contract in respect of his non-core hours. He stated: *"I still feel that*

the fact that you can have two people doing the same job and one going home with a higher rate of pay would be classed as workplace inequality when they're on the same rate of pay." The claimant's argument on this was not that he had been paid incorrectly per the contract but that he perceived that the contract was unfair in a certain set of circumstances. That does not assist him. He has not shown that he has been underpaid in respect of his non-core hours and this head of claim is dismissed.

Designated user allowance

24. The claimant agreed that he receives 45 pence per mile as a mileage allowance for his car. He accepted in cross examination that the designated user allowance is paid in addition to the mileage allowance and is a set payment paid to anyone who meets the threshold of 2,000 miles in the previous year. The claimant's complaint was that it was not fair that if he was doing 12 extra days and someone else was doing 6, because he would then be doing twice as many miles on his car and getting the same designated user allowance. It did not seem to me that there was anything in this argument. The claimant's mileage is compensated by his mileage allowance. The designated user allowance is a flat rate payment made to anyone who meets the 2,000 threshold, whether they do 2,001 miles or 10,000. The claimant has not shown that the amount paid to him is less than the amount properly payable under his contract and this head of claim is also dismissed.

Employment Judge: M Kearns
Date of Judgment: 07 August 2024
Entered in register: 09 August 2024
and copied to parties