EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr Martin Blake	**v**	Messrs. E Hudson Baker

Heard at: Bury St Edmunds **On:** 9 and 10 July 2024

Before: Employment Judge Laidler (sitting alone)

Appearances
For the Claimant: Ms A Defriend, Counsel
For the Respondent: Ms L Mankau, Counsel

RESERVED JUDGMENT

1. The claimant was not provided with a written statement of terms and conditions of employment within the meaning of section 1 of the Employment Rights Act 1996 (ERA) in either 2002 or 2009 as alleged or at all.

2. When the claimant requested a written statement at the Grievance Hearing on 8 May 2023 it was not provided until 10 October 2023 in breach of the provisions of Paragraph 7B of Schedule 2 of the ERA.

3. The tribunal finds it just and equitable to award the claimant 4 weeks' pay as compensation for that breach.

4. The claimant's terms at the time of issue of these proceedings were:

    4.1. Basic pay £9.99 per hour

    4.2. Overtime over 39 hours a week £14.98 per hour (1 ½ x basic rate)

    4.3. £5 per night if on call

    4.4. If called out whilst on call paid for hours worked at overtime rate

    4.5. Early starts – if working before 6 am £1 for each early start.

5. The payslips provided by the respondent were compliant with s8 ERA.

6. The claimant was not permitted to exercise his right to rest breaks within the Working Time Regulations.

7. The claimant is entitled to such compensation as the tribunal finds just and equitable but only in relation to the period after 30 March 2023 and not 2017 as claimed.

8. There has been no breach of the National Minimum Wage Regulations in relation to the claimants basic pay from April 2023.

9. The parties reached an agreement in relation to on call pay and overtime in or about 2017 that the claimant would be paid £5 when required to be on call and for every hour worked whilst on call pay at his overtime rate.

10. There is no claim in the ET1 for overtime and the tribunal does not therefore have jurisdiction to deal with that claim.

11. In seeking to use an HR professional with Birketts, its solicitors and then suggesting a solicitor at Birketts to deal with the appeal the respondent acted unreasonably in its handling of the claimant's grievance and such was a breach of the ACAS Code warranting an uplift of 5% to be applied to any award.

12. Case management orders in relation to remedy are set out in a separate document.

REASONS

Background

1. The claim in this matter was received on 10 August 2023 following a period of ACAS Early Conciliation between 30 March and 11 May 2023. In the ET1 Claim Form prepared by Solicitors acting on behalf of the Claimant, he claimed various monetary amounts ticking the boxes for holiday pay, arrears of pay and other payments. The Grounds of Complaint set the claims out in more detail and ran to some 68 paragraphs.

2. The Respondent defended all of the claims.

3. The matter was listed on receipt of the ET3 Response Form for a Preliminary Hearing on 1 March 2024 with the representatives being ordered to agree and file a List of Issues by 28 February 2024. At the same time the Full Merits Hearing was listed for 9 and 10 July 2024 and Orders made for the preparation for this Hearing. The Preliminary Hearing was vacated on a joint application by the parties. A List of Issues was contained in the Bundle at page 105 – 107 and that is now set out below.

The Issues

List of Issues

Issues are agreed save where in red, as the Respondent denies that the Tribunal has jurisdiction to make the declarations sought at 9.7, 9.10 and 9.11.

1. Was the Claimant given a statement of employment particulars which was compliant with s.1 of the Employment Rights Act 1996 (ERA)?

2. The Respondent accepts (para 50 GoR) that the Claimant was not given a statement of material changes which was complaint with s.4 ERA 1996.

3. Was the Claimant provided with itemised pay statements which were complaint with s.8 ERA 1996?

4. Did the Respondent refuse to permit the Claimant to exercise his right to daily rest period, contrary to Regulation 10 Working Time Regulations 1998 (WTR)?

5. Did the Respondent refuse to permit the Claimant to exercise his right to weekly period, contrary to Regulation 11 WTR?

6. Did the Respondent refuse to allow the Claimant to take compensatory rest, contrary to Regulation 24 WTR?

7. Unlawful deductions from wages, contrary to s.13 ERA,

    7.1. Was the Claimant paid the national minimum rate of pay when working basic hours?

        7.1.1. What is the Claimant's contractual entitlement to pay when working basic hours?

        7.1.2. Is the Respondent contractually entitled to apply an accommodation offset?

        7.1.3. If so, which accommodation offset applies, that which is specified in the NMWR or the AWO?

        7.1.4. What was the Claimant paid?

        7.1.5. What, if anything, is the underpayment of basic pay?

        7.1.6. If the Claimant's basic pay is increased, what is the Claimant's contractual entitlement when working overtime and has there been an underpayment?

    7.2. Was the Claimant paid the correct rate of pay when working on-call?

        7.2.1. What is the Claimant's entitlement to pay when working on-call?

        7.2.2. What was the Claimant paid?

        7.2.3. What, if anything, is the underpayment?

7.3. Was the Claimant paid the correct rate of pay when taking holiday?

7.3.1. What is the relevant daily rate of pay?

7.3.2. What was the Claimant paid?

7.3.3. What, if anything, is the underpayment?

Remedy

8. Is the Claimant entitled to compensation for financial losses? If so, how much? The Tribunal will need to consider the following:-

8.1. What compensation is it just and equitable for the Employment Tribunal to award to the Claimant?

8.2. Should the compensation be increased or reduced by up to 25% pursuant to s.207A of the Trade Union and Labour Relations (Consolidation) Act 1992 for failure to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures? If so, what increase, or reduction is it just and equitable for the Employment Tribunal to make?

9. What, if any, declarations should be made? The Claimant seeks the following:-

9.1. A declaration of his contractual terms;

9.2. A declaration of his statutory rights;

9.3. The deductions for on-call, holiday pay and accommodation offset are unauthorised;

9.4. The Claimant's statutory rights under WTR have been breached;

9.5. The Claimant's basic rate of pay shall be at least the rate of the NMW, currently £11.44;

9.6. No off-set shall apply to the basic rate of pay, or in the alternative the off-set of £1.50 for the provision of the house pursuant to the AWO applies;

9.7. *Overtime pay shall be x1.5 basic pay;*

9.8. Payment for on-call shall as per the AWO, save that the actual overtime rate shall apply;

9.9. Holiday pay shall be the Claimant's normal rate of pay, calculated by reference to 52 week period (bank holidays when worked should remain at the higher rate of overtime pay);

9.10. *The property provided to the Claimant during his employment should be safe and fit for human habitation; and*

9.11. *The Respondent shall take reasonable care of the Claimant's health and safety.*

10. What, if any, recommendations should be made?

it was eventually agreed that the Claimant was not pursuing 9.10 and 9.11, but was at the outset of the Hearing still pursuing 9.7 namely that overtime pay should have been at one and a half times his basic pay. In his witness statement he made a claim for legal costs. The parties were reminded that whether or not the Tribunal has a discretion to award costs, will need to be considered at a separate Hearing.

The Hearing

4. On the first morning of this Hearing the Judge was presented with two lever arch files totalling 947 pages. The file contained a vast amount of duplication and the tribunal was only taken to a small proportion of the documents. The only witnesses were the Claimant and Mr Paul Baker on behalf of the Respondent. The witness statements though ran to 56 pages. The Judge expressed concern that although solicitors had been instructed throughout on behalf of both parties, neither seemed to have had regard to the overriding objective or indeed their obligation to advise the Tribunal if the listed Hearing did not give sufficient time for it to be concluded in its entirety. The Judge read for the first morning and the Claimant was cross examined in the afternoon. The Respondent's witness was cross examined then and submissions heard on the last day. There was no time for the Judges deliberations. These Reasons have therefore been sent to the parties as soon as was possible taking into account other sitting commitments.

5. It should have been possible for the representatives to agree certain factual matters. No thought had been given to this and quite a lot of the witness statements dealt with the history to the Respondent's farm, the background to the employment and matters that the Tribunal was never going to make findings on to determine the issues before it.

6. The schedule of loss that had been prepared on the Claimant's behalf was not helpful either as in certain respects claiming a blanket £1000 which was not the sum to which the claimant would be entitled if successful in that particular claim.

7. From the evidence heard, the Tribunal finds the following facts.

Findings of Fact

8. The respondent is a family farming partnership comprising Paul Baker (who gave evidence) as the managing partner, his wife Kerry Baker and his mother who he describes as an Executive Partner who is 90 years old. It currently employs 6 staff. Two work on the arable side and four including a work experience student, work on the dairy side. They use the services of two self employed book keepers who support the administration side of the business.

9. The Claimant started working for the Respondent in 1988 which pre-dated the requirement to provide a Statement of Terms and Conditions of Employment under s.1 of the Employment Rights Act 1996. This was accepted by the Claimant in Counsel's opening note, but it is the Claimant's position that when his pay changed on 31 March 2022 he was not provided with a s.1 or s.4 statement.

10. It is the Respondent's case that the Claimant was provided with a contract setting out his terms both in 2002 and 2009. It relies on a draft statement of terms of employment seen in the bundle at page 205. This is not signed. The Claimant is adamant that he was not given it then. The Respondent relies upon a screen shot showing the Respondent's directory on its computer system for the Claimant, and an entry on 7 November 2002 at 13:44 stating, "Martin COE". It is the Respondent's case that that was the contract of employment. It is also of note that in the draft provided in the bundle the rate of pay is left blank, as is the overtime rate. When Paul Baker was cross examined he acknowledged it was incomplete and unsigned and accepted it did not show that it was provided to the Claimant at the time.

11. The Tribunal accepts the evidence of the Claimant that it was not provided to him. The Tribunal does not give weight to the statement of Karen Price who was a self-employed administrator with the Respondent and was the note taker at the Claimant's Grievance Hearing in May 2023. There is a statement from her in the bundle dated 16 May 2023 at page 172 in which she states she was "shocked" when the Claimant stated he had not received a contract as she recalled printing two copies for each employee, although accepting that some were not returned signed. The Tribunal has not heard from her so her evidence could not be challenged. The Tribunal has heard from the Claimant and found his evidence credible in this respect.

12. The Respondent further relies upon an internal memo dated 7 May 2009 (page 353 of the Bundle), in relation to holiday entitlement a copy of which is addressed to the Claimant. This refers in a few respects to all other aspects of the employee's contract of employment remaining unchanged. The Tribunal does not find that determinative of the issue of whether a contract was actually issued to the Claimant as a contract can of course exist by way of the terms having been orally agreed between the parties and then the parties working to them. The Claimant was again adamant he did not have a written contract of employment at that time.

13. There is no dispute that the Claimant requested a statement of terms of his contract during his Grievance meeting on 8 May 2023.

14. In the grievance outcome letter of 26 June 2023 (page 186) Paul Baker agreed to get one prepared.

15. It is accepted that the statement was not provided until 10 October 2023 with the appeal outcome letter (page 569). In that letter Paul Baker accepted that when the claimant's pay increased on 31 March 2022 he should have received a section 4, notification of changes, statement.

16. It is the claimant's evidence however that the issued contract bore no resemblance to his current working arrangements and no explanation was given to him as to why changes had been made. The claimant raised his concerns about it in on 25 January 2024 (page 589) and did not sign it. In his witness statement he gave evidence that he did not receive a reply to that and the tribunal heard no oral evidence in relation to that document. It is satisfied from the claimant's evidence that the respondent continues to be non-compliant with its statutory obligations as the document it has produced does not reflect the claimant's actual terms and conditions.

Terms and Conditions

17. When the Claimant commenced employment on 29 February 1988, he was offered number 2 Grange Cottage. It was accepted in these proceedings that he was not required to live there but it was an option that he took. He has lived there ever since.

18. The Tribunal saw the offer letter that was originally provided to him at page 351. This is dated 11 February 1988. It confirmed that the Claimant's salary would be in accordance with the Agricultural Wages Order of £106.64 for a 40 hour week with £4 an hour overtime rate. That was said to be equivalent to 7.5% above the standard rate. The Claimant was required to take some proficiency tests and the letter noted that upon completion of those tests the employer would consider whether his rates of pay should be increased in accordance with the Agricultural Wages Order. The Claimant would in addition be entitled to £1 per day for early starts, i.e. 4.30am. He was also entitled to a further bonus of £20 per month that "TBC averages are below 20".

19. The Claimant's reasonable removal costs would be reimbursed to him for moving into 2 Grange Cottages. This was to be provided for his occupation "rent and rate free whilst you are in my employment".

20. The Claimant was jointly responsible for the herd of approximately 300 cows. This included all aspects of their health and welfare and the movement to a robotic milking system. The Claimant has to devote a considerable amount of time to maintaining those robots.

On-Call Allowance Payment

21. The tribunal accepts Mr Baker's evidence that around November 2017 due to the introduction of the robot milking process, he brought in on-call working arrangements. There was a rota to supply 24 hour cover to ensure all cows were milked and to train the cows to go through to the milking robots on their own. If there was a technical problem either Mr Baker or one of the team would sort this out at the time or call over a Technician. He suggested a £5 payment when someone was required to be on-call and then for every hour worked while on call there would be an overtime rate. No one disputed this

and Mr Baker was not applying the Agricultural Wages Order believing it to have, in his words, *"become defunct".*

22. In 2017 the Claimant was paid £9.26 basic rate and £13.89 overtime rate. This was above the Agricultural Wages rate which was around £8 and it was also above the National Minimum Wage of £7.50.

23. In relation to overtime the claimant accepted in cross examination that he was required to work it if asked but there was no guarantee of overtime.

24. The Claimant agreed in his witness statement (paragraph 97) that they would be paid on-call £5 per night, whether called out or not and overtime rate for the time they were called out to work. The Claimant states in his evidence that it was only later when he sought legal advice in connection with his Grievance that he discovered that the rate of pay for working on-call was less than his statutory entitlement. It is not credible however to now seek to argue that the claimant had for 5 years being working 'under protest' and there is no evidence that was the case.

25. As part of the outcome of the Claimant's Grievance, Mr Baker agreed to a variation but only in an attempt to try and resolve the matter. He agreed to increase the Claimant's on-call pay to £12.32 x 2 each time he was on-call in line with two hours as set out in the Agricultural Wages Order, rather than the £5 rate which they had agreed and which he had been paying. The ongoing on-call at the additional two hours of £12.32 x 2 had been agreed and included in the Claimant's salary in order to try and compromise. He remains of the view, however, that this is above what the Claimant was actually entitled to receive. A payment was made to the Claimant in or about October 2023 of £2,768.60 in respect of on-call payments. This was for the last two years. This was purely done as a compromise with Mr Baker still believing that the Agricultural Wages Order on-call rate did not apply.

26. From the payslips in the bundle it can be seen that the Claimant was paid the following basic rates:-

    26.1. April 2020 – £9.55;

    26.2. December 2021 – £9.79 (back dated to August); and

    26.3. April 2022 – £9.99.

27. Mr Baker gave evidence which was not challenged that these were above the National Minimum Wage rates which would have been applied, which were:-

    27.1. 2020 – £8.72;

    27.2. 2021 – £8.91; and

    27.3. 2022 – £9.50.

28. For the avoidance of doubt the Judge has checked those rates to be correct on the Government website.

29. It appears to be the Claimant's case that the unauthorised deduction is from April 2023.

Failure to provide itemised pay statements – s.8 ERA 1996

30. There were numerous payslips in the bundle, although the Tribunal was taken only to a few of those. For example, at page 330 was a payslip for 1 December 2022. This showed:-

    30.1. Basic pay 78 hours at £9.99 total £779.22;

    30.2. Overtime 35.5 hours at the rate of £14.98 giving a total of £531.75; and

    30.3. Early mornings / nights £23.

31. It was Mr Baker's evidence that the early mornings and on-call could easily be calculated from that payslip as 4 on-calls at £5 per on-call and three earlies at £1. These would have been recorded on time sheets that the Claimant had completed.

32. There is no dispute that the Claimant's basic rate of pay was £9.99 per hour for 39 hours per week with an overtime rate of pay £14.98 per hour (one and a half times basic pay). If the Claimant started before 6am he got an early morning allowance of £1. Since June 2023, when the Claimant is on-call he receives a daily allowance of £24.64 and if he is called out and the time exceeds two hours he is paid overtime of £14.98. It is his case that prior to lodging his Grievance he received an on-call allowance of £5 daily and overtime pay of £14.98 when he attended work. He maintains there is still an ongoing underpayment and that his on-call allowance should be twice his actual rate of overtime and if he is required to attend work and it exceeds two hours, then overtime pay.

33. The basic rate is undisputed by Mr Baker (paragraph 74 – 77 of his witness statement).

34. Mr Baker gave evidence that after the Claimant's Grievance he spoke to the payroll provider and they advised they could not add any further details to the standard format payslips. His evidence was that this is a nationally recognised software program which understood the standard format payslip to be compliant. Nor could they extract historic payslip data for individual employees. Any extra details would need to be added manually at the point of running the payroll. In order therefore to provide the Claimant with a clearer payslip, Mr Baker started to create an Excel spreadsheet with all of the Claimant's pay information despite the amount of time this took. He tried to modify the payroll to meet with the Claimant's request but the software only had a certain number of lines and cannot input the complexities such

as £1 for early mornings and £5 on-call supplement. Karen had to manually put that in on the software and had occasionally forgotten. The spreadsheet was seen at pages 587 and 838.

35. The Tribunal was also taken to a payslip for 2023 at page 718. That showed on-call of £93.56. Mr Baker explained that was the flat rate for being on-call. He explained again the issue with the computer system. The actual work done was included within the on-call payment and not shown as overtime.

36. The Claimant accepted at paragraph 48d of his witness statement that the payslip at page 718 for 29 June 2023 was post the Grievance and was an improvement as it separated on-call and early mornings. His case, however, is that it still did not specify the number of hours worked or the rate of pay for working on-call or early mornings, or the total number of hours he worked in the period.

The Claimant's Rota

37. The Claimant worked a rolling three week rota which involved working nine days and receiving the third Wednesday off, which he took as holiday and then working nine days and then having a weekend off. Mr Baker accepted that was the rota that was worked. Every third Wednesday is therefore taken as holiday, which the Claimant does not believe is fair or correct. On his case that should have been provided as a day off, (a weekly rest period) allowing him to take holiday separately. That is on his case a breach of the obligations under the Working Time Regulations 1998 to provide an adequate weekly rest period.

38. The Claimant also states he has worked regularly in excess of the average 48 hour week. The Claimant only signed on his case an Opt Out Agreement on 31 March 2023 (page 135).

39. One week in every three weeks the Claimant works on-call which is 24 hours for seven days. Whoever is working on-call has to respond to the red alarm if it sounds out of hours. It is the Claimant's case he is restricted in what he can do and has to be within 30 minutes of the farm. That is disputed by Mr Baker. When on-call he is required to go to the dairy and carry out a stockman's check of the cows and change the robot milking filters which takes around 30 minutes to do and the Claimant usually does that between 7:15 to 7:45 each evening and he may, or may not, be called out at night when on-call.

40. Prior to the on-call week, the Claimant will have had the weekend off giving him two days' rest. During the day when he is on-call he is working his normal hours from 5pm to 6am and then from 5pm to 6am on-call. It is on his case difficult to rest because of knowing you may be called out at any time and his time is not his own. He is required to start the same time each morning as per the rota, even if he has been called out during the night. It is the Claimant's case that when on-call all those hours are working hours and as such he does not receive a daily rest period before he is back at

work and no compensatory rest is provided either. This was raised as part of the Claimant's Grievance. Paul Baker partially upheld his Grievance regarding working time and accepted there had been occasions that he had not been able to take daily or weekly rest, or compensatory rest (pages 186 – 203).

41. In these proceedings the Respondent accepts that the Claimant was not always afforded the opportunity to take the rest breaks to which he was entitled and that the issue for the Tribunal is only what amount of compensation is to be awarded. The Claimant is again claiming £1,000. As with other amounts in the schedule it was not clear how the Claimant had calculated that sum which appeared in the Schedule of Loss. In submissions Counsel maintained that it was a just and equitable award and that a,

> "broad brush approach should be applied".

Failure to Pay National Minimum Wage

42. In his witness statement at paragraph 76 the claimant had stated that he is currently paid £9.99 per hour for basic hours and that his rate of pay had not changed since 1 April 2020 and fell below the rate of national living wage on 1 April 2023.

43. The claimant was taken in cross examination to various payslips in 2021 and 2022 which he had to accept did show that his hourly rate had increased to £9.65, £9.79 and then £9.99. The claimant also accepted the proposition that he agreed to those increases as they were to his advantage being above both the AWO rate and the NMW rates. The Tribunal accepts the Respondent's position that each increase was significantly above the Agricultural Wages Order where the final rate was £8.21.

44. In considering salaries in March 2023, knowing that the National Minimum Wage was due to increase in April 2023, the Tribunal accepts Mr Baker's evidence that he had not even considered the Agricultural Wages Order accommodation offset as he did not believe they were following the Agricultural Wages Order and had not been for some considerable time. Following the Grievance he reviewed all salaries and filled in the National Minimum Wage and National Living Wage calculator which confirmed that the Claimant was receiving the National Living Wage with the accommodation offset in the National Minimum Wage Regulations. This was seen in the Bundle at page 212. The Claimant also had made an application to HMRC and disclosed the result of that at page 872 which showed compliance with the National Minimum Wage.

45. The Tribunal accepts the evidence of Mr Baker, that there had never really been consideration of an "offset" as such in the early days under the Agricultural Wages Order, rather individual wages had reflected the provision of accommodation. In April 2023, the Claimant was not the only

employee who had accommodation and so the offset was considered. The offset being £4.82 for each day accommodation is provided. It can be seen that where the Claimant was being paid £9.99 for 78 hours adding back in the £4.82 for 7 days, would have brought him to £10.42 the Minimum Wage for April 2023 to March 2024. The Tribunal is satisfied that that is no doubt why the tool that he used on the Government website showed that the Claimant was being paid the National Minimum and National Living Wage and why the Claimant's application to HMRC (page 872) also showed compliance with the National Minimum Wage.

46. The claimant accepted in oral evidence that he was not required to live in the accommodation offered but that it was 'an option I took'. He accepted that it was of considerable value as he had not had to pay rent or mortgage or council tax or water rates.

Holiday Pay

47. The Respondent has accepted that the Claimant was paid incorrectly and has paid £1,918.63 in October 2023 as part of his Grievance outcome.

Overtime Pay

48. This is set out in the Claimant's Schedule of Loss stating it should be 1.5 times his basic pay but calculated on the NMW rate of currently £11.44

49. In his witness statement the claimant relied on the AWO (October 2012) in the bundle at p 232. This showed his basic rate at Grade 4 of £8.21 per hour and the minimum rate of overtime as £12.32. The claimant takes from that that his overtime should now be 1 ½ times the current NMW rate.

50. The Claimant did not specifically claim this in the ET1 and the Respondent argues that the Tribunal does not have jurisdiction to determine this issue.

Breach of the ACAS Code/ The Claimant's Grievance

51. The allegation is that there was unreasonable delay in handling the Grievance, that the involvement of Birketts, the Respondent's Solicitors, in the Grievance and Appeal amounted to "unreasonable conduct" and that the Grievance Outcome Report failed to address the action the Respondent intended to take to resolve the Claimant's Grievance.

52. As has already been referred to, the Claimant's Grievance was submitted on 30 March 2023.

53. A Grievance was submitted by Solicitors acting for the Claimant on 30 March 2023. This dealt with property matters which are not the subject of these proceedings, but also hours and wages. The Grievance primarily focused on the failure to provide a written statement, the Claimant regularly working more than 48 hours per week without the appropriate rest breaks,

holiday pay wrongly calculated and the on-call pay wrongly calculated. The latter two refer to the Agricultural Wages Order 2012.

54. It clearly did not deal with the allegation that is now before this Tribunal that from April 2023 the Claimant had been paid incorrectly insofar as his basic pay was concerned.

55. It was acknowledged on 5 April 2023 by Paul Baker. He explained that they needed to investigate the matters raised and would then invite the Claimant to a Formal Grievance Hearing and would write separately to him in connection with that. He was advised of his right to be accompanied to that meeting.

56. In a subsequent letter of 18 April 2023, Mr Baker wrote inviting the Claimant to an Investigatory Meeting and gave him a number of possible dates in late April. He set out what he understood the scope of the Claimant's Grievance to be and reminded the Claimant of his right to bring a fellow employee or trade union representative. By letter of 20 April 2023 the Claimant confirmed that he had received the letter and would like to attend on 28 April 2023. He was aware that work colleagues did not wish to be included in the matter and as he did not have a trade union representative asked if he could bring his wife Claire Blake who he also described as his carer to the Grievance Hearing, stating it would also amount to a reasonable adjustment under the Equality Act 2010. Although the Claimant was advised there was no statutory entitlement to have his wife at the meeting, Paul Baker wrote confirming that she might attend. The Claimant was advised that the meeting would be chaired by Catherine Hodds, an HR Consultant at Birketts LLP and that Natasha Thompson would be present to take notes.

57. On 26 April 2023 the Claimant wrote back to Paul Baker expressing his concern about the involvement of Birketts in the Grievance Hearing. He stated that although the letter did not explain who Natasha was, he believed that she was also from Birketts and employed as a trainee solicitor. He was concerned that it appeared that no one from the business would be present at the Grievance. He asked for a copy of the letter of engagement with Birketts so that he could understand the basis on which they had been appointed to consider his Grievance and the scope of their authority to resolve it. He expressed how he felt it was "very heavy handed" for an internal Grievance meeting to be conducted by representatives from a firm of solicitors. They were also advising on a wider dispute concerning the Claimant's property that he resided in on the farm and he did not feel they were impartial in any way. He considered that their attendance would represent a conflict of interest. He made reference to the ACAS Code of Practice stating that the employer should arrange to hold a meeting and believed that instructing Birketts to attend was in breach of the Code. He concluded his letter by formally objecting to the Grievance meeting being held by Birketts.

58. Mr Baker replied on 27 April 2023 stating that Catherine Hodds is a qualified HR professional with extensive experience of managing Grievances. Her

role would have been to listen to the Claimant's Grievance, ask questions which then Mr Baker could use to make a decision on whether to uphold the Claimant's Grievance. It would not have been part of her remit to make the actual decision. Natasha would only be attending to take notes. He emphasised that Catherine was not involved in the wider dispute. As the Claimant was unhappy, however, Mr Baker agreed to change the date to 3 May 2023 and he would be present to hear the Claimant's Grievance. As he would prefer someone from outside the farm to take notes to preserve confidentiality he proposed that Catherine Hodds still attend as a note taker.

59. The Claimant replied on 28 April 2023 agreeing the date, but stating that he still felt it was inappropriate for Catherine to attend the hearing and requesting that she did not attend. In that letter the Claimant raised his issue with the National Living Wage increase to £10.42 from 1 April 2023 stating he had been informed by his manager that he would not receive that rate as he had the house for free and his rate would remain as £9.99. He considered that to be unfair and unlawful. He stated that at no point had the accommodation offset been applied to him in the past. He also understood that the Agricultural Wages Order governed his employment and that the Order provided that it was only permissible to deduct £1.50 per week for accommodation if the house is to be taken into account, which he did not accept and his rate of pay remained below the rate permitted by law.

60. The Grievance Meeting went ahead on 4 May 2023, attended by Paul Baker, the Claimant, the Claimant's wife and Karen Price attended to take notes. The minutes were sent to the claimant on 9 May 2023 and the claimant returned them with comments/amendments on the 12th.

61. On the 26 May Paul Baker wrote to the claimant explaining there were still a number of issues raised in the grievance that required investigation and he hoped to be able to get a substantive response to the claimant by the end of May.

62. On 2 June 2023 the claimant replied sending details of his on call hours from 2020. On the same day the respondent's solicitor wrote to the claimant's solicitor explaining that they were still working on the grievance outcome but also having to work concurrently with another firm of solicitors in relation to other property issues that had been raised in it. They hoped to be able to respond by the end of the following week.

63. The outcome was given to the Claimant by letter of 26 June 2023 and ran to 17 pages. The tribunal accepts that shows the detail that the respondent had had to go into. Attached were a bundle of documents which were cross referenced throughout the letter and ran to 197 pages. Some aspects were rejected and others upheld or partially upheld. In relation for example to matters concerning rest within the Working Time Regulations the respondent explained the difficulties in operating the farm and set out how matters would work going forward.

64. The Claimant was advised that he had a right of appeal and this should be submitted within 5 days of receiving that letter. This was to be submitted to Kerry Baker who is Paul Baker's wife.

65. By letter of 4 July 2023 (page 371), the Claimant advised Paul Baker that he did intend to Appeal but was not in a position to do so as in his view the Grievance Outcome was incomplete as it did not set out what action he intended to take to resolve the Grievance contrary to paragraph 40 of the ACAS Code. Paul Baker responded on 4 July 2023 and the Claimant submitted his Appeal in more detail on 21 July 2023 (page 375) which also included the failure to provide a resolution to the Claimant's Grievance.

66. Kerry Baker responded on 29 July 2023 (page 379) stating that once the Grounds of Appeal had been fully investigated she would deliver her outcome by way of a written response. The Claimant wrote on 31 July 2023 requesting an in person Appeal Hearing. The Respondent then, through Birketts Solicitors, suggested Sam Cass in a telephone call with the Claimant's Solicitors on 4 August 2023 to conduct the Appeal. Green and Green objected to Birketts Hearing the Appeal for the same reasons that had been advanced previously.

67. Natalie Breen of NGAGE HR Limited carried out the Grievance Appeal Meeting. Mr Baker confirmed she had not been referred work by Birketts or instructed on matters where Birketts were also instructed. The claimant was again accompanied by his wife and Alex Rawlings took notes.

68. The Appeal Hearing took place on 25 August 2023. Notes of the meeting were sent to the Claimant on 8 September 2023 and the Claimant returned his notes of the meeting on 13 September 2023. The claimant is critical of Natalie Breen putting questions to Birketts. The tribunal accepts she was dealing with very legalistic matters, Birketts were already instructed and it was not unreasonable for her to seek their legal advice.

69. Natalie Breen reported to Paul Baker on 25 September 2023 and they met on 26 September 2023 to discuss the matter and then her recommendations were provided on 30 September 2023. Mr Baker stated he then provided the outcome on 10 October 2023 at the earliest opportunity. In view of the complexities the tribunal does not consider there was unreasonable delay.

Relevant Law

70. Employment Rights Act 1996:

> 1. **Statement of initial employment particulars**.
>
> (1) Where a worker begins employment with an employer, the employer shall give to the worker a written statement or particulars of employment.
>
> (2) Subject to sections 2(2) to (4)-

(a) the particulars required by subsections (3) and (4) must be included in a single document; and
(b) the statement must be given not later than the beginning of the employment.

(3) …

(4) The statement shall also contain particulars, as at a specified date not more than seven before the statement (or the statement given under section 2(4) containing them) is given, of-

(a) the scale or rate of remuneration or the method of calculating remuneration.

4. **Statement of changes**.

(1) If, after the material date, there is a change in any of the matters particulars of which are required by sections 1 to 3 to be included or referred to in a statement under section 1, the employer shall give to the worker a written statement containing particulars of the change.

(2) …

(3) A statement under subsection (1) shall be given a the earliest opportunity and, in any event, not later than-

(a) one month after the change in question, or
(b) where that change results from the worker being required to work outside the United Kingdom for a period of more than one month, the time when he leaves the United Kingdom in order to begin so to work, if that is earlier.

Schedule 2 Part 1

7B(1) Where an existing employee (as defined in paragraph 7A(1)) or a pre-TURERA employee (as defined in paragraph 7(1)) at any time—

(a) on or after 6 April 2020, and

(b) either before the end of the employee's employment or within the period of three months beginning with the day on which the employee's employment ends,

requests from the employer a statement under section 1 of this Act, the employer shall (subject to section 5 and any other provisions disapplying or having the effect of disapplying sections 1 to 4) be

treated as being required by section 1 to give him a written statement under that section not later than 1 month after the request is made and section 4 of this Act shall (subject to that) apply in relation to the employee after he makes the request.

11. **References to employment tribunals**.

(1) Where an employer does not give a worker a statement as required by section 1, 4 or 8 (either because the employer gives the worker no statement or because the statement the employer gives does not comply with what is required), the worker may require a reference to be made to an employment tribunal to determine what particulars ought to have been included or referred to in a statement so as to comply with the requirements of the section concerned.

12. **Determination of references**.

(1) Where, on a reference under section 11(1), an employment tribunal determines particulars as being those which ought to have been included or referred to in a statement given under section 1 or 4, the employer shall be deemed to have given to the worker a statement in which those particulars were included, or referred to, as specified in the decision of the tribunal.

(2) On determining a reference under section 11(2) relating to a statement purporting to be a statement under section 1 or 4, an employment tribunal may—

(a) confirm the particulars as included or referred to in the statement given by the employer,

(b) amend those particulars, or

(c) substitute other particulars for them,

as the tribunal may determine to be appropriate; and the statement shall be deemed to have been given by the employer to the worker in accordance with the decision of the tribunal.

(3) Where on a reference under section 11 an employment tribunal finds—

(a) that an employer has failed to give a worker any pay statement in accordance with section 8, or

(b) that a pay statement or standing statement of fixed deductions does not, in relation to a deduction, contain the particulars required to be included in that statement by that section or section 9,

the tribunal shall make a declaration to that effect.

(4) Where on a reference in the case of which subsection (3) applies the tribunal further finds that any unnotified deductions have been made from the pay of the worker during the period of thirteen weeks immediately preceding the date of the application for the reference (whether or not the deductions were made in breach of the contract of employment), the tribunal may order the employer to pay the worker a sum not exceeding the aggregate of the unnotified deductions so made.

(5) For the purposes of subsection (4) a deduction is an unnotified deduction if it is made without the employer giving the worker, in any pay statement or standing statement of fixed deductions, the particulars of the deduction required by section 8 or 9.

8. **Itemised pay statement**

(1) A worker has the right to be given by his employer, at or before the time at which any payment of wages or salary is made to him, a written itemised pay statement.

(2) The statement shall contain particulars of—

(a) the gross amount of the wages or salary,

(b) the amounts of any variable, and (subject to section 9) any fixed, deductions from that gross amount and the purposes for which they are made,

(c) the net amount of wages or salary payable,

(d) where different parts of the net amount are paid in different ways, the amount and method of payment of each part-payment; and

(e) where the amount of wages or salary varies by reference to time worked, the total number of hours worked in respect of the variable amount of wages or salary either as—

(i) a single aggregate figure, or

(ii) separate figures for different types of work or different rates of pay.

71. Working Time Regulations 1998:-

30. **Remedies**

(1) A worker may present a complaint to an employment tribunal that his employer—

(a) has refused to permit him to exercise any right he has under—

(i) regulation 10(1) or (2), 11(1), (2) or (3), 12(1) or (4) or 13(1);

(ii) regulation 24, in so far as it applies where regulation 10(1), 11(1) or (2) or 12(1) is modified or excluded; or

(iii) regulation 25(3) or 27(2); or

(b) has failed to pay him the whole or any part of any amount due to him under regulation 14(2) or 16(1).

(2) An employment tribunal shall not consider a complaint under this regulation unless it is presented—

(a) before the end of the period of three months (or, in a case to which regulation 38(2) applies, six months) beginning with the date on which it is alleged that the exercise of the right should have been permitted (or in the case of a rest period or leave extending over more than one day, the date on which it should have been permitted to begin)

or, as the case may be, the payment should have been made;

(b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three or, as the case may be, six months.

(3) Where an employment tribunal finds a complaint under paragraph (1)(a) well-founded, the tribunal—

(a) shall make a declaration to that effect, and

(b) may make an award of compensation to be paid by the employer to the worker.

(4) The amount of the compensation shall be such as the tribunal considers just and equitable in all the circumstances having regard to—

(a) the employer's default in refusing to permit the worker to exercise his right, and

(b) any loss sustained by the worker which is attributable to the matters complained of.

72. The Agricultural Wages Board for England and Wales (AWB), which had the power to make orders relating to wages, holidays and certain other terms and conditions for agricultural workers, was abolished in 2013 by S.72 of the Enterprise and Regulatory Reform Act 2013 (ERRA). Since then there has been no special working time provision for agricultural workers in England. Such workers are covered by the Working Time Regulations.

73. Agricultural Wages Act 1948:-

11. **Avoidance of agreements in contravention of this Act and saving for other agreements**

(1) Any such agreement as the following shall be void, that is to say,—

(a) **…**
(b) an agreement as to holidays that is inconsistent with a direction of the Board in that behalf, or for abstaining from exercising the right to holidays conferred by any such direction.

(c) any term or condition of a contract of employment that is inconsistent with a term or condition of employment fixed by an order of the Board under this Act or any agreement for abstaining from enforcing a term or condition so fixed.

(2) Nothing in this Act shall prejudice the operation of an agreement or custom for the payment of wages at a rate higher than the minimum rate fixed under this Act or an agreement or custom as to holidays that is not inconsistent with a direction of the Board in that behalf or a term or condition of a contract of employment that is not inconsistent with a term or condition so fixed.

74. Agricultural Wages Order:-

2. **Interpretation**

(1) …

'house' means a whole dwelling house or self – contained accommodation that by virtue of the worker's contract of employment the worker is required to live in for the proper or better performance of their duties…

33. **On-call allowance.**

(1) Subject to the provisions of this article, where a worker is on-call, they are entitled to an allowance for that on-call period in accordance with paragraph (2).

(2) The amount of the on-call allowance payable to a worker under paragraph (1) is a sum equivalent to two hours overtime pay at the rate applicable to the worker's grade or category under this Order.

(3) The on-call allowance is not payable to a worker if the worker is called upon by their employer to attend work pursuant to the on-call arrangements and the provisions of paragraph (4) shall then have effect.

(4) Where a worker is called upon by their employer to attend work pursuant to the on-call arrangement, that worker is entitled to be paid whichever is the greater of the following:

(a) pay at the minimum overtime rate applicable to the worker's grade or category under this Order for the hours worked in consequence of being on-call; or
(b) a sum equivalent to two hours overtime pay at the minimum rate applicable to the worker's grade or category under this Order.

75. Enterprise and Regulatory Reform Act 2013:-

4. **Savings provisions**

(1) Subject to paragraph (2) and notwithstanding article 2(c), the 2012 Order continues in force-

(a) in relation to England until 1 October 2013.

(2) …

(3) …

(4) Notwithstanding article 3(b), the sections of the Agricultural Wages Act 1948 specified in Schedule 3 to this Order continue in force in relation to England on and after 1 October 2013 but only in relation to the employment of a worker employed in agriculture before that date which continues after 30 September 2013.

(5) …

Schedule 2

Repeals and revocations coming into force on 1at October 2013

(1) The Agricultural Wages Act 1948, sections 3A, 4, 6(1) to (7), 7(3), 8, 9(1), 10 to 12, 15A, 17(1), 17(1A) and 17A.

76. Trade Union and Labour Relations (Consolidation) Act 1992:-

207 – Effect of failure to comply with Code:-

(1) A failure on the part of any person to observe any provision of a Code of Practice issued under this Chapter shall not of itself render him liable to any proceedings.

(2) In any proceedings before an employment tribunal or the Central Arbitration Committee any Code of Practice issued under this Chapter by ACAS shall be admissible in evidence, and any provision of the Code which appears to the tribunal or Committee to be relevant to any question arising in the proceedings shall be taken into account in determining that question.

(3) In any proceedings before a court or employment tribunal or the Central Arbitration Committee any Code of Practice issued under this Chapter by the Secretary of State shall be admissible in evidence, and any provision of the Code which appears to the court, tribunal or Committee to be relevant to any question arising I the proceedings shall be taken into account in determining that question.

77. 207A – Effect of failure to comply with Code: adjustment of awards:-

(1) This section applies to proceedings before an employment tribunal relating to a claim by an employee under any of the jurisdictions listed in Schedule A2.

(2) If, in the case of proceedings to which this section applies, it appears to the employment tribunal that-

(a) the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies,
(b) the employer has failed to comply with that Code in relation to that matter, and
(c) that failure was reasonable,

the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 25%.

(3) If, in the case of proceedings to which this section applies, it appears to the employment tribunal that-

(a) the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies,
(b) the employee has failed to comply with that Code in relation to that matter, and
(c) that failure was unreasonable,

the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, educe any award it makes to the employee by no more than 25%.

(4) In subsections (2) and (3), "relevant Code of Practice" means a Code of Practice issued under this Chapter which relates exclusively or primarily to procedure for the resolution of disputes.

(5) Where an award falls to be adjusted under this section and under section 38 of the Employment Act 2002, the adjustment under this section shall be made before the adjustment under that section.

(6) The Secretary of State may by order amend Schedule A2 for the purpose of-

(a) adding a jurisdiction to the list in that Schedule, or
(b) removing a jurisdiction from that list.

(7) The power of the Secretary of State to make an order under subsection (6) includes power to make such incidental, supplementary, consequential or transitional provision as the Secretary of State thinks fit.

(8) An order under subsection (6) shall be made by statutory instrument.

(9) No order shall be made under subsection (6) unless a draft of the statutory instrument containing it has been laid before Parliament and approved by a resolution of each House.

ACAS Code

78. In relation to the section dealing with the handling of Grievances, the ACAS Code provides that employers should arrange for a formal meeting to be held "without unreasonable delay after a grievance is received". The Code also provides for the right to be accompanied and following the meeting a decision should be made on what action, if any, to take. Decisions should be communicated to the employee in writing without unreasonable delay and where appropriate should set out what action the employer intends to take to resolve the Grievance. The employee should be informed they can Appeal if they are not content with the action taken.

Conclusions

Written statement

79. The tribunal has accepted the claimant's evidence that he was not provided with a written statement in either 2002 or 2009 and the respondent was therefore in breach of its obligation to provide one within the meaning of s1 ERA/

80. When the claimant asked at his grievance meeting on 8 May 2023 it is accepted by the respondent that the statement was not provided until 10 October 2023 with the appeal outcome letter (page 569). In that letter Paul Baker also accepted that when the claimant's pay increased on 31 March 2022 he should have received a section 4, notification of changes, statement.

81. When the claimant was provided with the statement in October 2023 the tribunal accepts that it did not reflect the claimant's current terms and that again therefore it was not compliant. Further it was not in compliance with paragraph 7B of Schedule 2 requiring the Respondent to provide the statement within a month of that request.

82. In submissions counsel accepted that the award the tribunal can make is 2 or 4 weeks' pay and submitted it should be 4 weeks as the claimant had nearly 40 years without a contract. Counsel agreed that it was for the tribunal to determine the relevant terms at the date of the ET1.

83. Whilst not dealing with quantum as part of this Hearing the tribunal has concluded that it would be just and equitable to award 4 weeks pay in view of the length of time the claimant was without a contract, the failure to provide a statement of changes in 2022 and the delay in issuing a statement following the grievance but issuing one that did not reflect the actual terms.

Payslips

84. The allegation by the Claimant is that his payslips do not contain all amounts of variable pay and hours worked. From 29 June 2023, following his Grievance, his payslips have changed so as to include details of holiday and on-call pay. However, it is alleged they have remained incomplete in failing to include the applicable rate of pay and hours worked for on-call work and early mornings (paragraph 34 of the Grounds of Complaint). At the stage of submissions, Counsel accepted that they were not now seeking compensation in relation to this alleged breach which had been put in the Schedule of Loss at £1,000 but were seeking only a declaration. It remains the Claimant's case that he was not provided information for the total hours worked on-call which is a wage / salary within the definition in s.8(2) and the amount of overtime was not clearly set out. From 9 November 2023, hours were added but not referred to in the payslip. On-call hours, it is submitted, should have been reflected in the payslip the purpose of which is to provide the worker with means of calculating what is due to him.

85. The Tribunal accepts the submissions made on behalf of the Respondent that the payslips are compliant with s.8 ERA 1996. Applying the provisions of s.8(2)(e) this provides that the pay statement must contain particulars of,

> "Where the amount of wages or salary varies by reference to time worked, the total number of hours worked … either as,
>
> i. a single aggregate figure; or
>
> ii. separate figures for different types of work or different rates of pay."

86. The Tribunal accepts the Respondent's argument that the pay for 'earlies' and the on-call allowance are exactly that, allowances. They do not vary according to the time worked, are not payments for hourly work and are not hourly rates and consequently do not fall within s.282(e).

87. If the Claimant was called out to work whilst on call he was paid his overtime rate for any work done. These were included in the overtime section of the payslip and a total aggregate figure payable for overtime work. The payslips were compliant in that respect.

88. The payslips also showed holiday pay within the basic pay section which contained the total number of hours rate of pay and aggregate figure paid.

89. It was argued on behalf of the claimant at paragraph 25 of counsel's opening statement that insofar as the tribunal considers the respondent is entitled to apply the accommodation offset to the claimant's basic salary that has not been included in any payslips. The claimant contends that this would be a deduction within the meaning of s8 and that the respondent has failed to comply with that section. The tribunal does not accept that submission and accepts the argument advanced on behalf of the respondent that the 'offset'

is not a deduction within the meaning of the ERA. Nothing is being deducted.

Daily, weekly and compensatory rest (issues 4, 5 & 6)

90. The Respondent accepts that the Claimant was not always afforded the opportunity to take the rest breaks to which he was entitled and the issue therefore is what compensation should be awarded. Again, in the Schedule of Loss this was a claim for £1,000 which was not explained.

91. The Claimant seeks compensation from at least 2017. The Respondent relies upon the provisions of Regulation 30(2) and the decision in Corps of Commissionaires v Hughes [2009] ICR 345, where the Employment Appeal Tribunal held that compensation could only be awarded in respect of the three month time period before the submission of the ET1. The ET1 in this case was submitted on 10 August 2023. It was agreed that this Hearing would not deal with the calculation of any compensation to which the Claimant is entitled. Counsel for the Claimant in her closing submissions appeared to suggest that it had not been reasonably practicable for the Claimant to present the claim in time as he only became aware of his rights when instructing Solicitors. The Grievance process was followed and it was only once it became apparent that was not going to resolve all matters that the Claimant considered bringing a claim and it had not been reasonably practicable to bring the claim prior to that. The Tribunal should adopt a "broad brush approach" to what is just and equitable to award.

92. The Tribunal heard no evidence from the Claimant that it was not reasonably practicable to bring the claim and is satisfied that in relation to compensation, the Tribunal can only award in respect of the three month time period before submission of the ET1. There is no concept of a 'continuing act' in the Working Time Regulations.

93. In the bundle the Tribunal saw, the Claimant's record of his working hours on-call and overtime for the last three years (pages 174 – 181) which he supplied to Paul Baker during the Grievance process. The Tribunal does not recall hearing any evidence on that document, but it would seem to it at this point (although further submissions could be made at the Remedy Hearing) that the Claimant would only be entitled to compensation for the later events of the failure to give adequate rest from March to May 2023.

Unauthorised deductions from wages

94. As set out in Counsel's opening note (paragraph 53) the Claimant alleges the Respondent has made unauthorised deductions from wages to his basic pay since April 2023, when it informed the Claimant that his basic salary of £9.99 would not be increased in line with the National Minimum Wage increase to £10.42 on the basis that he received accommodation and the accommodation offset of £9.10 specified in the National Minimum Wage Regulations 2015 applied. It is the Claimant's case that he was entitled to £10.42 per hour in line with the National Minimum Wage increase during the relevant period. Since 1 April 2024 the rate had increased to £11.44 which

the Claimant contends he is entitled to. Consequently the claimant argues he was underpaid for his overtime and questions whether he was paid the correct rate of pay when working on-call and taking holidays

95. It is the Respondent's position that the parties varied the terms and conditions relating to the Claimant's basic pay by consent, such that the Claimant's basic pay rate is no longer governed by the Agricultural Wages Order and that it is accordingly only the National Minimum Wage legislation that has relevance to the Claimant's claim.

95.1. Basic rate of pay £9.99 per hour for 39 hours per week (the Claimant maintains this is an underpayment and that he should have received £11.44 being the rate of the National Living Wage);

95.2. Overtime rate of pay £14.98 per hour (one and a half times basic pay), again he maintains that is an underpayment and should have been basic pay of £11.44 x 1.5;

95.3. It is his case that overtime is compulsory and paid for all hours worked in excess of 39 hours a week and all weekend hours;

95.4. If the Claimant started before 6am he got an early morning allowance of £1; and

95.5. Since June 2023, when the Claimant is on-call he receives a daily allowance of £24.64 and if he is called out and the time exceeds two hours he is paid overtime of £14.98. It is his case that prior to lodging his Grievance he received an on-call allowance of £5 daily and overtime pay of £14.98 when he attended work. He maintains there is still an ongoing underpayment and that his on-call allowance should be twice his actual rate of overtime and if he is required to attend work and it exceeds two hours, then overtime pay.

96. The National Minimum Wage and National Living Wage calculator which confirmed that the Claimant was receiving the National Living Wage with the accommodation offset in the National Minimum Wage Regulations. This was seen in the Bundle at page 212. The Claimant also had made an application to HMRC and disclosed the result of that at page 872 which showed compliance with the National Minimum Wage.

97. The AWO provided for a deduction of £1.50 where a worker was 'required' to live in the accommodation. The claimant confirmed that he was not and the tribunal is satisfied that was indeed the case from the evidence heard.

98. The respondent therefore was correct in adding to the claimant's hourly rate an amount equal to the accommodation offset in the NMW Regulations. This was not a deduction and there was no unauthorised deduction. It is a

statutory right and the claimant is still receiving the £9.99 agreed between the parties.

99. The appropriate offset cannot now be the AWO as the claimant was not required to occupy the accommodation.

100. There is no dispute that the Agricultural Wages Order (England and Wales) 2012 (AWO) applied to the Claimant's employment. He was a Grade 4 worker as defined in Article 7 of that Order.

101. Agricultural minimum wages were abolished in England from 1 October 2013 from which time agricultural workers were covered by the Working Time Regulations.

102. The Agricultural Wages Act 1948 does not apply to agricultural workers who commenced employment in England from 1 October 2013, but it continued to have effect in relation to those employed before that date which included the Claimant but only in relation to those sections as set out in Schedule 2 & 3 of the Enterprise and Regulatory Reform Act 2013 (Commencement No. 1, Transitional Provisions and Savings) Order 2013. (The relevant Regulations are set out below). Schedule 2 (1) makes it clear that section 11 was revoked.

103. It is section 11 that the claimant sought to rely on in asserting that it was not open to the parties to agree terms inconsistent with any term under the AWA. Counsel for the claimant maintained in her opening note (para 59) that section 11 still applied. It clearly did not in view of the Transitional Provisions and she accepted that at submissions, stating that the issue now was whether the parties did as a matter of fact contract out of the AWA. The tribunal is satisfied that they did namely the £5 allowance per night for being on call and the usual overtime rate for every hour actually worked if called out. (£13.89 in November 2017). In her submissions counsel sought to argue the claimant had 'worked under protest' but there was no evidence that was the case. The claimant accepted the changes in 2017 and it was only when he sought legal advice and submitted his grievance that he sought to challenge the situation.

104. The tribunal accepts the submission of the respondent that the claimant is seeking to 'cherry pick' the arrangements and which parts of the AWA or NWR he wishes to apply. If the claimant's alternative position as set out in counsel's submissions is that the AWO accommodation offset of £1.50 should be applied it would have to follow that it was against the rates of pay in the AWO.

105. It follows that the tribunal accepts that with the payment to the claimant in an attempt to resolve his grievance of £2768.60 the claimant has been overpaid.

106. The tribunal further accepts that there was no claim for overtime pay in the ET1 and that is not therefore a claim before this tribunal. In any event it is not now open to the claimant to rely on Article 33 of the AWO 2012 or any

other Article in that Order. The tribunal accepts the position as stated by counsel for the respondent in paragraph 5.3 and 5.4 of her closing submissions. If the AWO applied (which it does not) then he would be entitled to an allowance of 2 x the AWO overtime rate of £12.32 plus the same amount for any hour worked over the 2 hours.

Failure to follow the ACAS Code of Practice.

107. The claimant claims an uplift of 25% stating:

107.1. There was an unreasonable delay in handling the grievance

107.2. The seeking to involve Birketts in the grievance and appeal amounted to unreasonable conduct

107.3. The grievance outcome report failed to address the action the respondent intended to take to resolve the grievance.

108. The tribunal does not find there was unreasonable delay in handling the grievance in all the circumstances of the case. The respondent is a very small business. The grievance came from solicitors instructed on behalf of the claimant. It was included in a document raising other property related matters not the subject of these proceedings. The respondent clearly had to take time to consider how best to deal with it. The grievance was submitted on the 30 March 2023 and acknowledge on the 5 April. On the 18 April Paul Baker invited the claimant to put forward dates to attend an investigatory meeting and he suggested the 28 April. The respondent agreed to allow the claimant to bring his wife to that meeting.

109. On the 25 April Mr Baker confirmed the arrangements for the meeting advising it would be chaired by Catherine Hodds and HR Consultant with Birketts solicitors. On receiving the claimant's objections Mr Baker agreed that he would chair the meeting and it would now take place on the 3 May. It actually went ahead on the 4th.

110. The outcome was not sent to the claimant until the 26 June, approximately 7 weeks later. During the intervening period however new allegations were added to the grievance and further information provided by the claimant about on call hours. As other property matters had also been raised in the grievance the respondent was also having to deal with those but with different solicitors. The respondent kept the claimant updated at all times.

111. Bearing in mind the fact that the respondent is a small family run business and the complexity of the issues raised the tribunal does not find there was unreasonable delay in dealing with the grievance.

112. The claimant also asserts that it was further unreasonable conduct to involve Birketts in the grievance process. The tribunal understands why Mr Baker

wanted to involve someone else to deal with it and he chose someone who was an HR professional although is working for the solicitors used by him. The tribunal can therefore also understand why the claimant didn't find that acceptable. Mr Baker accepted that and heard the grievance himself. Up to that point the tribunal does not find the respondent acted unreasonably.

113. The tribunal does then find that it was unreasonable to again suggest someone from Birketts to deal with the appeal, having already accepted the claimant's objections to their involvement. For the appeal it was also a solicitor, who was proposed. Again the respondent took note of the claimant's objections and employed an HR company to hear the appeal.

114. The claimant is critical that Ms Breen raised queries with Birketts but due to the complexities the tribunal cannot accept that was unreasonable conduct of the grievance procedure.

115. Whilst not expanded upon in closing submissions in the claimant's opening submission one of the alleged breaches of the Code was the failure to address the action the respondent intended to take to resolve the grievance. That is not accepted. Where complaints were upheld or partially upheld Mr Baker set out how matters would proceed going forward. For example in relation to the calculation of pay for holiday pay purposes he confirmed that going forward the claimants pay would be based on the previous 52 weeks for both types of annual leave eg the 1.6 weeks and the 4 weeks. In relation to bonuses, this was upheld and he confirmed that they would be included in the calculation going forward.

116. Taking all those conclusions on the grievance process into account the tribunal finds there should be an uplift of 5% on any award.

<u>Calculation of a week's pay for compensation purposes under the ERA</u>

117. Although it was agreed that this Hearing was not dealing with remedy it might be of assistance if conclusions were given on the calculation of a 'week's pay' the respondent taking issue with how it has been calculated by the claimant in the schedule of loss.

118. Sections 222 and 223 ERA deal with how the week's pay should be calculated. In view of the evidence heard the tribunal accepts the submissions of the respondent that as overtime was not guaranteed the calculation should be the claimant's basic week of 39 hours @ £9.99 per hour giving a weeks pay of £389.61 gross as opposed to the figure of £644.69 or the statutory cap of £643 applied in the schedule of loss.

119. The judge had to remind the parties and representatives a number of times of their obligations under Rule 2 of the Employment Tribunal Rules, the overriding objective. In particular this requires them to deal with cases 'in ways which are proportionate to the complexity and importance of the issues'. Rule 3 also now requires the tribunal to encourage the parties to use alternative dispute resolution methods of resolving their disputes. These provisions apply equally to remedy. Case management orders are

set out in a separate document but it is hoped that the remedy issues can be resolved between the parties.

_____

Employment Judge Laidler

Date: 15 August 2024

Sent to the parties on: 30 August 2024

For the Tribunal Office.

Public access to Employment Tribunal decisions

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Recording and Transcription

Please note that if a Tribunal Hearing has been recorded you may request a transcript of the recording, for which a charge is likely to be payable in most but not all circumstances. If a transcript is produced it will not include any oral Judgment or reasons given at the Hearing. The transcript will not be checked, approved or verified by a Judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings, and accompanying Guidance, which can be found here:

https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/