EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 6009367/2024

Held in Dundee on 05 August 2025

Employment Judge Michelle Sutherland

W MacDonald	**Claimant** **Represented by** **R Milvenan, Solicitor**
Morrison Data Services Limited	**Respondent** **Represented by** **S Davis**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Tribunal is that:

1. the complaint of unlawful deduction from wages does not succeed and is accordingly dismissed.
2. the complaint of failure to pay the minimum wage is continued to a 1 day hearing to determine liability and remedy.

REASONS

1. The claimant lodged complaints of unlawful deduction from wages and failure to pay the minimum wage which were denied by the respondent. In summary the complaints pertain to an alleged failure to count commuting time towards his basic hours (the alleged breach).

2. A split final hearing was listed to determine liability in respect of those complaints (a hearing on remedy would be listed subsequently if required). Both parties had the benefit of professional representation.

3. Parties lodged a joint bundle of documents. The claimant gave evidence on his own behalf and called Gary Crabbe (Meter Reader) and Rob Cairns (Regional Performance Manager). The respondent called Matt Hardcastle (Managing Director) and Paul Webb (Senior Field Manger) to give evidence.

4. Parties made brief oral and written submissions.

Findings of Fact

5. The tribunal makes the following findings in fact -

6. The respondent provides utility data services. The claimant works for the respondent as a water meter reader. The claimant has continuing service with the respondent from 30 April 2007 to date.

7. The claimant was employed by H2O Water Services Limited from 30 April 2007. In around 2014 Meter U Ltd acquired H2O. In June 2018 Meter U changed its name to Morrison Data Services (Water) Limited. On 27 July 2022 the claimant was advised that his employment would transfer to the respondent under 'TUPE', that his terms, conditions of employment were protected and that there were no changes or measures. On 1 August 2022 the claimant's employment transferred to the respondent.

8. The claimant was issued with a written statement of terms and conditions on 11 May 2007 and together with a company handbook (not lodged in evidence) which was described therein as forming the basis of his contract of employment ('the contract'). It expressly superseded prior agreements.

9. The contract described his place of employment as Livingstone but the claimant never in fact worked in Livingstone and instead worked predominantly throughout west Fife. The contract provided that his basic hours were 40 hours a week. He was required to work his basic hours by way of 8 hours a day 5 days a week. He tended to work an extra 15 minutes a day on average to get the job done but he was unwilling to do that after the alleged breach.

10. The contract provided that overtime could be required. In practice overtime could not be undertaken without express prior approval. The claimant's earnings from overtime were negligible.

11. The contract provided that he was paid a basic salary expressed per hour and paid weekly in arrears. In practice he was paid a fixed amount of basic pay monthly in arrears. From June 2022 to March 2023 he received a basic salary of £1,712.50 a month and any overtime at time and a half. From April 2023 to

March 2024 he received a basic salary of £1,932.58 a month (less any sick absence) and any overtime at time and a half. He received the following bonus payments in 2023: £23.04 in June, £369.49 in July, £1,943.58 in August. The claimant did not receive any bonus payments thereafter. The claimant was off sick from September to November 2023 and from January to February 2024 for which he received statutory sick pay. From April 2024 he received basic salary of £2,042.50 a month and any overtime at time and half.

12. Up until April 2024 the claimant's travel time from home to first meter read and from last meter read to home ('commuting time') was counted towards his basic 8 hours of work by his line managers. He had been expressly advised of this approach by his line managers. This was the case for all Scottish meter readers. The claimant's average commuting time was about ½ hour each day.

13. The claimant's work was and is still allocated to him using a management system called Temetra which advises what meters require to be read and by when in a given month and it records when they are read. Within those confines the claimant has flexibility to determine what meters are read when.

14. Although Temetra records when a meter is read it does not automatically generate a time sheet. Instead the claimant's hours of work were initially captured on a paper time sheet which was sent to his line manager. They were then subsequently sent by text message to his line manager.

15. The claimant was originally employed by a water meter reading business. From about 2022 the respondent started to merge and rationalise its water and energy meter reading businesses into a single field metering business. They had different approaches to meter reading which the respondent sought to harmonise.

16. A water reader bonus scheme was introduced on 1 May 2023. Around that time the respondent had a phased introduction of a time management scheme called "Workforce" which calculated hours of work automatically. If basic hours were completed, any meters read above a monthly target would result in payment of a bonus.

17. A form was ultimately created on Workforce which automated the management of 'commuting time' (travel time from home to first meter read and from last meter read to home). From April 2024 the first 30 minutes of the claimant's commuting time was not counted towards his basic 8 hours of work and was deemed to be unpaid commuting time. Any commuting time in excess of 30 minutes would be deemed "downtime" if approved by his line manager and would count towards basic 8 hours of work.

18. On 14 April 2024 the claimant raised a grievance regarding the asserted change, namely that he would only be paid for travel time greater than 30

minutes. His grievance was allocated to Paul Webb, Senior Field Manager. Mr Webb understood from HR that the grievance was not competent because it pertained to his terms and conditions of employment. He did not therefore investigate his grievance with the claimant or his line manager and he did not hold a grievance meeting with the claimant. On 18 April he wrote to the claimant to advise that all meter readers are paid from the first job (meter read) to their last and that travel time from or to home was only paid if in excess of 30 minutes. He noted that it had become apparent since the introduction of Workforce that many individuals were not adhering to the excess travel policy. The claimant replied noting that the company was now requiring them to work 1 hour for free.

Observations on the evidence

19. The standard of proof is on balance of probabilities, which means that if the Tribunal considers that, on the evidence, the occurrence of an event was more likely than not, then the Tribunal is satisfied that the event did occur. Facts may be proven by direct evidence (primary facts) or by reasonable inference drawn from primary facts (secondary facts).

20. The claimant candidly explained that unfortunately a bout of covid had affected his ability to sequence events but it was apparent that he was able to recall matters with sufficient clarity when prompted by documentary evidence.

21. The claimant stated in evidence that from the start of his employment in 2007 to April 2024, his travel time from home to first read and from last read to home counted towards his basic 8 hours of work and that this was the case for all Scottish meter readers. He said that he was expressly advised of this approach by his line managers from the start of his employment. The claimant's line managers were Robert English until 2012, then Michael Wilson until 2017, and then Robert Cairns until 2023. There was evidence from the claimant, a colleague and a line manager to this effect. There was no evidence from the respondent witnesses that this was not the case.

22. The respondent witnesses instead insisted that this approach to commuting time was contrary to company policy but it appeared that this policy was a feature of the Grey Book collective bargaining agreement which did not apply to the Scottish water meter readers. The Scottish meter readers undertook commercial water meter reading which entailed travel to disparate locations on a daily basis. Unlike their English counterparts they were not engaged in domestic water meter reading which entailed multiple readings in proximate locations. The respondent's current senior management were unaware of the Scottish approach to commuting time. They would have been had they checked their management system Temetra which showed the times of the first and last jobs.

23. In July 2023 the claimant's then line manager Robert Cairns sent a text message to his direct reports noting "we are still paying you guys door to door, the business know if they do that there will be a munity". It was reasonably inferred that the word "do" should have been "don't". Out of a Scottish workforce of about 60 who were said to be affected only 3 grievances were raised. The putative change was part of a package of changes including the introduction of the bonus scheme which resulted scope for substantially higher earnings and this may explain the low number of complaints. One member of staff raised a grievance in March 2024 noting that he had been told that he was not to be paid for the first and last half hour of travel time despite this being verbally agreed at interview 15 years ago and this meant he would be having to work an extra 5 hours a week i.e. 2 ½ days a month.

24. The claimant asserted in evidence that a change of approach to commuting time occurred in April 2024. He accepted that the change arose as a consequence of an introduction of the Workforce time management system. Workforce was introduced sometime after the bonus scheme in May 2023. The bonus scheme FAQs stated "If your first visit is more than 30 minutes away then you should speak to your line manage to apply for downtime". Mark Hardcastle stated in evidence that Workforce was introduced mid to late 2023. The claimant stated in evidence that initially not everyone could use Workforce and forms required to be created. Robert Cairns text suggests that the change of approach to commuting time had not occurred by July 2023 ("we are still paying you guys door to door"). The relevant staff grievances were not raised until March and April 2024 (March 2024: "I've just been told that you intend to stop paying me for the first and last half hour of travel time each day"; April 2024: "On 20 March 2024 myself and my colleagues were informed that from 2 April 2024 we would no longer be paid from door to door") . It is therefore considered likely that whilst workforce was introduced around the same time as the bonus scheme and the change of approach to commuting time was not in fact implemented until April 2024.

25. In the circumstances therefore it was considered more likely than not that until April 2024 the claimant's travel time from home to first job and from last job to home was counted towards his basic 8 hours of work, that this was the case for all Scottish meter readers, and that he had been expressly advised of this approach by his line managers from the start of his employment.

26. The claimant did not keep a record of his commuting time until a few months ago. For commuting time in excess of 30 minutes the respondent would have a record in Workforce of all claims for downtime. For commuting times under 30 minutes this could be calculated by reference to their management system Temetra which would show the start and finish locations of his first and last job and his commuting time could then be estimated. The claimant had sought information from the respondent on a voluntary basis but did not apply for an

order on the assumption that this would only be relevant to remedy. The claimant said in evidence he averaged just above ½ hour commuting time each day. His shortest drive out was 10 minutes and his longest 1 hour . The drives back were shorter. Robert Cairns thought his average commute would be 15 to 20 minutes each way. It is considered likely that the claimant's average commuting time was about ½ hour each day.

27. The claimant accepted that the asserted change in approach to commuting time didn't affect his overall pay but meant he now had to work for longer. He had hoped that his grievance would result in the re-instatement of commuting time.

28. It was put to the claimant in cross examination that based upon working 160 hours month he was paid significantly more than the minimum wage min wage. However the claimant in fact worked 173 hours a month excluding commuting time (40 hours a week x 52 weeks / 12 months).

Submissions

29. The claimant's submissions were in summary as follows –

    a. Commuting time had counted towards his basic hours from the start of his employment for 17 years. It was a consistent practice applied by his line manager to all water meter readers in Scotland with the knowledge and approval of management.

    b. The practice was long standing, well known, accepted and relied upon such that it is a contractual term implied through custom and practice. For mobile workers with no fixed workplace, time spent travelling from home to the first customer and from the last customer back home constitutes "working time" under the Working Time Directive (*Tyco Integrated Security SL v Jaume Ortega (C-266/14)*, ECJ) and is not merely unpaid commuting time.

    c. The change to exclude commuting time from his basic hours meant the claimant was no longer being paid for his commuting time. He was now working more hours for the same pay such that his hourly rate has been reduced.

    d. The claimant was paid his basic hours at the national minimum wage rate such that any increase to those basic hours would reduce his hourly rate to below the minimum wage.

30. The respondent's submissions were in summary as follows –

    a. The basis of the complaints have changed over time from an initial assertion of an express contractual entitlement was changed to an

implied term; from an assertion of actual loss to a reduction in hourly rate of pay.

b. The payslips show that the claimant has had no wages deduced. His basic pay has remained the same. The claimant had difficulty identifying any asserted loss.

c. The claimant's grievance does not assert that he is working more than 40 hours a week for basic pay

d. It can reasonably be inferred that not all Scottish meter readers were paid for their commuting time because only 3 of 60 complained about the asserted change.

e. The written contract envisaged a fixed place of work on a habitual basis such that *Tyco* cannot be relied upon.

f. The asserted change occurred in May 2023 and was affirmed by his failure to challenge it until April 2024

g. The payslips showed he was paid more than the national minimum wage

Discussion and decision

Was it a contractual term that commuting time counted towards basic hours?

31. Contractual terms may be express (written or oral) and implied. The claimant had a written contract of employment which expressly superseded all previous verbal or written agreements. It did not however declare that it represented the entire agreement of the parties. Specifically, it did not expressly state whether commuting time (travel to from home to the first meter read and from the last meter read back to home) would count towards basic hours. It was therefore open to the parties to agree this either explicitly or by implication through conduct of the parties or wider custom and practice (*Carmichael v National Power plc [1999] ICR 1226, HL)*.

32. The contract expressly stated that the claimant's primary place of work was Livingston, that he may be required to work at other places, and that he may also be required to travel on company business. The written contract therefore envisaged that his place of work was a town and travel beyond his place of work would be regarded as business travel. The claimant never worked in Livingston and instead worked predominantly in West Fife. Livingstone is a town in the geographic area of West Lothian whereas West Fife is a geographic area comprising a number of towns.

33. His line manager advised him that travel from home to his first meter read and from his last meter read back to home would count towards his basic hours and on one view this amounted to an express oral term of his contract. In any event that was the consistent practice of the claimant and his line managers from the start of the contract for 17 years. It is therefore reasonable to infer from the conduct of the parties that it was their objective mutual intention that his commuting time would count towards his basic hours.

34. Alternatively a contractual term may be implied through custom and practice where it can be inferred objectively from all the circumstances that this was the mutual intention of the parties. The practice must be 'reasonable, notorious and certain;' it must be consistently and regularly applied for a substantial period, widely known and rational in all the circumstances (*Park Cakes Ltd v Shumba & Ors 2012 IRLR 800, CA*).

35. This practice of including commuting time was certain given that it was consistently and repeatedly applied by different line managers to all water meter readers in Scotland without known exception for at least 17 years. The practice was notorious given that it was known to the water meter readers and to line management. Senior management after the TUPE transfer were not explicitly aware of that practice but would have been had they checked their management system Temetra which showed the times of the first and last jobs. The practice was reasonable given that a commercial water meter reader did not have a consistent place of work and could not therefore control the duration of their commute. It is therefore reasonable to infer from custom and practice in Scotland, in the alternative to conduct of the parties, that it was the objective mutual intention of the parties that a water meter reader's commuting time would count towards basic hours.

<u>Unlawful deduction from wages</u>

36. Section 13 of the Employment Rights Act 1996 provides that "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 (after deductions), the amount of the deficiency shall be treated … as a deduction made by the employer from the worker's wages on that occasion".

What sum was properly payable to the claimant on each occasion?

37. Following the removal of commuting time from his basic hours, the claimant worked on average an extra ½ hour each day for the same pay. The claimant was entitled under his contract to be paid basic salary for working basic hours. Although the contract referred to an hourly rate he was paid a fixed amount a month. He was not entitled under his contract to be paid overtime without

express prior approval. He was not entitled under his contract to additional pay for the additional ½ hour worked each day.

38. Whilst the failure to count commuting time towards his basic hours amounted to a breach of his contract giving rise to a claim for damages, it did not amount to an unlawful deduction from wages. The claimant remains in employment and the tribunal does not therefore have jurisdiction to determine any complaint for breach of contract.

National Minimum Wage

39. Under Section 1 of the National Minimum Wage Act 1998 the claimant was entitled to be remunerated by the respondent in respect of his work in any pay reference period at a rate which is not less than the national minimum wage. Where a complaint is made it is presumed that the worked was remunerated at less than the national minimum wage unless the contrary is established.

40. Under the National Minimum Wage Regulations 2015 the claimant's pay reference period is a month. The parties accepted that the claimant undertook salaried work in respect of his basic hours.

41. This hearing was to determine liability and not remedy. However in order to determine liability it is necessary to determine whether the claimant has been paid less than the minimum wage in the relevant pay reference period(s).

42. The claimant's basic hours in a year were 2080 (40 hours x 52 weeks). From April 2024 the claimant worked an additional 130 hours a year (on average 1/2 hour commuting time x 5 days x 52 weeks). The claimant therefore worked more than the basic hours in the calculation year. Accordingly the hours of salaried work in a pay reference period fall to be determined under Regulation 28. It is understood that the claimant exceeded his basic hours sometime in March 2025.

43. The claim was lodged on 23 August 2024 which is prior to the claimant having exceeded his basic hours and was arguably premature. It is understood from the claimant's schedule of loss that the period of claim was then extended to the date of this hearing and that the respondent did not object to that approach. It appears that this arguable defect has been cured by amendment.

44. The parties did not provide payslips or other evidence regarding the claimant's earnings in 2025. Parties were however insistent that a broad brush assessment could be made without undertaking the precise calculations.

45. The claimant worked on average 184 hours a month (2080 basic hours + 130 hours travel time/12 months). He received basic pay of £2,042.50 a month from April 2024. The national living wage from 1 April 2024 was £11.44 an hour. The

claimant was on the face of it paid £11.10 an hour (£2042.50/ 184) which was 34p less than the minimum wage.

46. Whilst there is a case on the face of it, it is not possible to determine whether the claimant has in fact been paid less than the minimum wage in the relevant pay reference period(s) without evidence as to the actual hours worked in that period. The issue of whether the claimant has been paid less than the national minimum wage in the relevant pay reference period(s) is therefore continued to a 1 day final hearing before me to determine both liability and remedy. In advance of that hearing both parties must specify the wages earned and the hours worked (specifically by way of unpaid commuting time) in each pay reference period. It is however anticipated that this dispute is capable of resolution between the parties given the likely amount of the pay differential.

Date sent to parties **29 August 2025**