Appeal No. UKEAT/0128/13/BA

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8JX

At the Tribunal
On 19 July 2013

Before

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

(SITTING ALONE)

MRS J WHITTLESTONE APPELLANT

BJP HOME SUPPORT LTD RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR STEPHEN MORGAN (Representative)
For the Respondent	MR GEOFFREY ISHERWOOD (Representative) ELAS Ltd Charles House Albert Street Eccles Manchester M30 0PW

SUMMARY

NATIONAL MINIMUM WAGE

An Employment Tribunal dismissed a claim to be paid National Minimum Wage (a) for time during which the Claimant was sleeping ("sleepovers", as required by her contract) in the home of 3 service users to whom she might have to attend (although, as things turned out, she did not do so in fact); (b) for time spent travelling during the day between an assignment to care for one service user and the next assignment to care for another; and (c) set off against the Claimant's otherwise justifiable claims an overpayment of wages said to have occurred. It also held that the sleeping arrangements provided for the Claimant in relation to her "sleepovers".

It was held in error in respect of each of (a), (b) and (c). As to (a) the Tribunal here failed to apply the appropriate authority, that of **Burrow Down Support Services Ltd v Rossiter**, had failed to recognise that on the evidence before it that the Claimant was required to work, that this was and could only in the circumstances be "time work", such that Regulation 15(1) and 15(1A) were not applicable at all, and that it was irrelevant whether any activity was actually performed. As to (b) the Tribunal had failed to deal with whether the Claimant was travelling between assignments: on the facts, there was only one answer to this, which favoured the Claimant. As to (c) the Tribunal had overlooked s.89 of the **Employment Rights Act**, on the basis of which there was no overpayment.

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

1. This is an appeal against a judgment which raises the question of the correct approach to determining what hours are to be paid at the minimum rate of the National Minimum Wage when averaged with other working hours.

2. Employment Judge Johnson at Teeside in reasons sent on 19 November 2012 dismissed the Claimant's complaints of unfair deductions from wages. The facts giving rise to her claims were these: Mrs Whittlestone was employed by BJP to provide care services to clients, so called "service users", including those nominated by Redcar and Cleveland Council. She was paid at the rate of £6.35 per hour under her contract for the time which she actually spent providing care at the home of a service user. That rate was calculated on the basis of time spent from the moment of arrival at the home to that of departure. That interval of time was termed a shift. The expression "shift" was adopted in the contract which provided under the heading "Hours of Work"

> **"You are employed on shift working. Each working week compromises of 50 shifts of hours from 7:00 am to 10:00 pm in accordance with the weekly rota prepared by your supervisor."**

3. It is plain that in the context of this particular employment "shift" had an unusual sense. It related to each individual period of time spent with each individual service user. The rota often was such that Mrs Whittlestone had a number of service users to visit during a day, frequently with little or no intermediate prospect of her going home between visits. Under her contract time spent travelling, which she did by bus, between the home of one service user and the next to be visited, was not counted.

4. The contract, also in clause 6 under the heading "Hours of Work", said this in the second paragraph:

> **"In addition to your normal working hours you will be expected to cover some "on call" shifts. You're (sic) on call days will be identified on your weekly schedule. Failure to be available for you're (sic) on call days will result in disciplinary action. You may also be required to undertake additional shift work from time to time and if so, reasonable notice of such shift working will be given to you."**

5. It was common ground that there were no fixed hours even though the description "normal working hours" appears there in the contract. In the Claimant's case she was required, whether as an on call shift referred to under clause 6 or separately, but in either event required, to undertake shifts from 11:00 pm to 7:00 am which were termed "sleepovers". This was to provide potential physical care for three young adults who suffered from Down's Syndrome. She was provided with a camp bed and, the Judge found, with bedding which she could use to sleep overnight in the living room of the house occupied by the three young adults. As it happens, there was no evidence that whilst doing that, which she regularly did, she ever woke from her sleep in order to provide any specific care.

6. The Claimant gave notice following a dispute which her husband, who had also been employed by the Respondent, had with them and as a result of which he left their service. The notice period was four weeks. During those four weeks she was not provided by BJP with the same hours of work as had been provided to her during the previous 12 weeks and for that matter before that. A schedule prepared by the Respondent setting out the hours of work was provided for the Tribunal; that showed that in the 12 weeks prior to the notice period beginning the Claimant had only once worked less than 32.25 hours during the day and only once had worked less than 18 hours during the night in the course of those weeks. The one week in which she spent no hours at all working was the week beginning 22 January 2012.

7. The Claimant claimed that she was entitled to be paid the National Minimum Wage in respect of time spent travelling between service users' homes, that is not from home to the first service user nor from the last of the day back to home, but between the assignments to service each service user. Secondly, she claimed she was entitled to be paid, at the rate of National Minimum Wage for the eight hour sleepover, more than the £40 per week which she was paid by the Respondent, which was plainly less than the National Minimum Wage at the time if calculated on an hourly basis.

8. Thirdly she claimed to be paid the various sums which were conceded or found by the Tribunal Judge but in respect of which the Respondent claimed to offset what it is said was an overpayment of wages utilising the terms of section 14 of the **Employment Rights Act 1996** to do so. That extinguished the payment of £214.10 which otherwise would have been due.

The law

9. The **National Minimum Wage Act 1998** provides by section 1(1) that:

> **"A person who qualifies for the National Minimum Wage shall be remunerated by his employer in respect of his work in any pay reference period at a rate which is not less than the National Minimum Wage"**

10. The Claimant qualified. Under section 2 headed, "Determination of Hourly Rate of Remuneration" it is provided:

> **"2(3)(a). The regulations may make provision with respect to –**
>
> **(a) circumstances in which, times at which, or the time for which, a person is to be treated as, or as not, working, and the extent to which a person is to be so treated."**

11. Thus what is "work" for the purposes of the Act is to be determined by those Regulations made under its powers. It is not to be determined by the **Working Time Regulations** which

derive from European obligations nor by any common law or conventional view of what constitutes work.

12. The Regulations (the **National Minimum Wage Regulations 1999**) deal with the concepts of time work, salaried hours work, output work and unmeasured work. It is common ground that the Claimant's contract and what occurred fell within the scope of time work. Regulation 3 headed, "The Meaning of Time Work" provides as follows:

> **"In these regulations "time work" means -**
>
> **(a) work that is paid for under a worker's contract by reference to the time for which a worker works and is not salaried hours work."**

13. The work which was time work so far as the Claimant was concerned was therefore the work which the contract, which in this case was both written and, judging from the findings of fact the Tribunal, oral, required her to do as work. That was both the shifts and the night time sleepovers.

14. Regulation 15 makes provisions in relation to time work. Those provisions insofar as material to the issues in this case are as follows:

> **"(1) Subject to paragraph (1A) time work includes time when a worker is available at or near a place of work for the purpose of doing time work and is required to be available for such work except where:**
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> **(a) the worker's home is at or near the place of work and;**
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> **(b) the time is time the worker is entitled to spend at home.**
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> **(1A) In relation to a worker who by arrangement sleeps at or near a place of work and is provided with suitable facilities for sleeping, time during the hours permitted to use those facilities for the purpose of sleeping shall only be treated as being time work when the worker is awake for the purpose of working.**
>
> **(2) Time when a worker is travelling for the purpose of duties carried out by him in the course of time work shall be treated as being time work except where:**
>
> **(a) the travelling is incidental to the duties carried out in the course of time work, the time work is not assignment work and the time is time when the worker would not otherwise be working or;**

(b) the travelling is between the worker's home or an address where he is temporarily residing other than for the purposes of performing work, and his place of work or a place where an assignment is carried out.

(3) For the purposes of paragraph 2(a) -

(a) travelling is incidental to the duties carried out by a worker unless duties involved in his work are necessarily carried out in the course of the travelling, as in the case of a worker driving a bus, serving in a bar on a train or whose main duty is to transport items from one place to another, and

(b) time work is assignment work if it consists of assignments of work to be carried out at different places between which the worker is obliged to travel that are not places occupied by the worker's employer."

15. The following observations can be made. First Regulation 15(1) deems some work which is not otherwise time work to be regarded as time work. If work is being done which is time work as defined by Regulation 3 then 15(1) has no application. It only applies to oblige an employer to treat as time work that which otherwise would not be. Second, that work is not to be equated to any particular level of activity. The saying, "they also serve who only stand and wait" is true but it does not necessarily assist in knowing whether the standing and waiting is work or whether it is not: however, it is only to be time work if deemed to be under section 15(1) or (2), and not excluded from the scope of 15(1) by Regulation 1A nor excluded from paragraph 2 by the exceptions in 2(a) and 2(b).

16. Thus the cases, as I shall show, note that where a person's presence at a place is part of their work the hours spent there irrespective of the level of activity are classed as time work. Difficult cases may arise where a worker is obliged to be present at a particular place. That presence may amount to their working. Conversely it may not. An example of the latter might typically be where a requirement is imposed upon an employee to live at or near a particular place but it is not necessary for that employee to spend designated hours there for the better performance of the contractual duties. This is unlikely to be time work: presence facilitates work but it is not itself work. Conversely where specific hours at a particular place are

required, upon the pain of discipline if they are not spent at that place, and the worker is at the disposal of the employer during that period, it will normally constitute time work.

The Tribunal Decision

17. With those observations, and bearing in mind that the jurisdiction is entirely statutory and governed entirely by the statute and regulations, I turn to the decision made in the present case by the Judge. The Judge drew very heavily upon **City of Edinburgh Council v Lauder**. That was a decision of Lady Smith sitting in the Appeal Tribunal, delivered on 20 March 2012 UKEATS/0048/11. Sheltered housing residential wardens had tied accommodation. Their contracts provided that they should have salaried hours of work of 36 hours per week. In addition they were required to be on call at the tied houses outwith their normal working hours on four nights during the working week. She held that the Employment Judge fell into error by failing to recognise a distinction drawn in the authorities between those cases where a worker was at work, and where a worker was one who, being merely "on call", was not. Lady Smith observed in paragraph 48 that matters might have been different if the entirety of the work the claimants were employed to do was to be available during the night time hours to be called on if required, but that was not the position in the case before her. She found that the claimants were not performing what was, in that case, salaried hours work on the nights that an alarm system was connected to their tied accommodation, even though had it rung whilst they were in the accommodation they would have answered the summons.

18. The Tribunal Judge drew from that in paragraph 12 that there is a dichotomy between cases where an employee is working merely by being present at an employer's premises and those where the employee is simply "on call". He observed:

> **"Lady Smith noted that although regulation 15(1A) does not use the words "on call", it was plain that the subsection covers the situation where the worker's normal work is something he does other than during the sleeping hours, albeit that after that work is finished the worker at**

some point sleeps at or near his place of work and may, but will not necessarily, be woken up and called upon to work."

19. At paragraph 14, the Judge said this by way of self direction of law:

"14. What the Tribunal must therefore do is recognise the two distinct categories of workers and, in particular, decide whether the worker's core job is separate from and not done at the same time as the "on call" period. It is particularly useful to note whether the worker's remuneration is stated to be for their "core work". The position may be different if the worker is recruited solely to be available to be called upon during the night by the telephone operators from British Nursing Association or the night watchman in *Scottbridge*. It is therefore crucial for the Tribunal to identify whether the on call work is additional to the worker's core or normal work.

15. In the claimant's case she was clearly recruited to provide care to a number of different service users at their own homes or premises. The claimant would have travelled between those various service users' premises to provide care. That was the claimant's core or normal work. The claimant was not obliged to accept overnight work caring for the three young adults with Down's Syndrome, she did however agree to do so and that overnight work was separate from and different to her core or normal work.

16. The claimant agreed to carry out the overnight work for a fixed fee of £40. Throughout her period of employment with the respondent when she carried out the overnight work she was never called upon to actually perform any work. She effectively slept throughout the overnight shift. The Tribunal found that the claimant's overnight work for the respondent was not a "sleep over job" such as in *Scottbridge* or *British Nursing Association*, the claimant was effectively "on call" as in *Hopkins*. Accordingly, the overnight shift fell within regulation 15(1A). Accordingly time during the hours when the claimant was sleeping over could only be treated as "time work" when she was at work for the purposes of working. By her own admission there were no such hours. It must therefore follow that the claimant was not entitled national minimum wage for the entirety of the sleep over shift."

20. The Judge then turned to deal with travelling time. He had earlier set out the regulations. He regarded the question as being whether the travelling between each service users' premises was incidental to the duties carried out in the course of time work and that time was time when the Claimant would not otherwise be working and distilled that into:

"The simple question for the Tribunal to ask in the claimant's case is whether the travelling between service users' premises was incidental to the duties she was carrying out in the course of her time work."

21. The answer he gave was this, again following at paragraph 17:

"17. The Tribunal found it clear and obvious that the claimant was not carrying out any care work or care duties during the time when she was travelling between one service user's premises and the next. The claimant was simply transporting herself from one set of premises to another and effectively from one shift to the next. During that time no care work was being done and no care services were being provided. The mode of transport was entirely at the claimant's discretion, the time taken was entirely at the claimant's direction and the route adopted was entirely at the claimant's discretion. If the period of time between one shift and the next exceeded the amount of time required to do the travelling then the claimant was free

> **to do as she pleased in the surplus time. She could return if she had sufficient time or could take a rest period or break. The Tribunal found that the travelling was purely incidental to the duties carried out in the course of the claimant's work for the respondent and therefore could not be treated as being "time work". The claimant is therefore not entitled to be paid for the period of time during which she was travelling and accordingly the provisions of the National Minimum Wage Regulations do not apply to that time."**

22. As to the third point, the allegation that there had been an unlawful deduction from wages, it was agreed that a sum of £214.10 should not have been deducted but no money was ordered to be paid by the Respondent to the Claimant by the Employment Judge because at paragraph 18:

> **"The respondent gave evidence to the effect that the claimant had been paid during her notice period for a total of 200 hours whereas she had in fact only worked 80.25 hours and had therefore been overpaid for 119.75 hours in the sum of £760.42 … The respondent is entitled to set off against that overpayment of £760.42 the sum owed to the claimant in the sum of £214.10."**

23. He thought that although the balance was due from the Claimant to the Respondent, the Respondent could not raise a claim for it before the Tribunal and so did not order the Claimant to pay any of the balance to the Respondent.

24. A further issue arose which has featured on this appeal; that is whether the sleeping facilities provided for the Claimant were suitable. This would be relevant if Regulation 15(1A) operated in the present case as a qualification to Regulation 15(1) which itself would only come into operation as a deeming provision if the work being done by the Claimant was not otherwise time work. The evidence for the Claimant had been that there was no bedding provided, but the Judge concluded as a matter of fact that it was available. Mr Morgan challenges that decision as being perverse since it did not reflect the whole of the evidence nor consider whether the bedding provided could have been washed, if it had been used by those previously engaged in a sleep over and dried so as not be sopping wet when the Claimant herself had to use it.

25. However forceful those points might be they are evidential points. Mr Morgan accepts that although there had been nothing in advance to predict that the evidence of the Respondent would be that there was bedding, that was what was said in the course of evidence orally at the Tribunal. It follows that there was evidence before the Judge upon which he could come to the conclusion he did. It cannot be said that the conclusion is perverse. It is a conclusion of fact. It must stand. So far as the appeal concerns that finding it must be rejected.

The submissions

26. Mr Morgan argued that the Judge had failed to have regard to the proper direction that should have been applied in respect of time work when dealing with sleepovers. He argued that the principles were clearly set out in **Burrow Down Support Services Ltd v Rossiter** [2008] ICR 1172, a decision of the Appeal Tribunal presided over by Elias P. That was a case in which it had been contended that a night watchman who slept as a night sleeper throughout much of the night was not entitled to the minimum wage. The Appeal Tribunal concluded that he was.

27. The argument before the Tribunal below had concerned two earlier cases, **British Nursing Association v Inland Revenue** [2002] IRLR 480 [2003] ICR 19 and **Scottbridge Construction Ltd v Wright** [2003] IRLR 21 in which the Regulations as they had originally been made had been construed. Those two cases involving employees who were entitled to sleep during their night time shift.

28. In the **British Nursing Association** case the workers worked at night from home; they took telephone bookings for nursing staff who were on the bank. Whereas they had done that by day from the employer's premises, when it came to night time they did it from their own homes. Plainly they could sleep when there was no phone call to answer. The Court of Appeal

upheld a decision at first instance that the claimants were working for the whole of the period in which they were waiting to answer the phone and not simply when they answered it. There was no reason to treat night workers any differently simply because they carried out the task from home. Buxton LJ made it clear that Regulation 15 had no application because it only arose in a case where a worker was not in fact working but was on call waiting to work. It was that principle, which I have already expressed earlier in this Judgment, which Elias P drew from the case; see paragraphs 14 and 15 of **Rossiter**.

29. **Scottbridge Construction** concerned a night watchman. It was agreed that he performed actual tasks physically whilst awake for no more than four hours of a night lasting over 14 hours. There were considerable periods when he was allowed to sleep. He was given sleeping facilities. An Employment Tribunal decision that he had been only working for the four hours when he had to be awake performing tasks was rejected by the Appeal Tribunal, Lord Johnston presiding, who held that the worker was working for the whole of the period since he was required to be on the premises for the duration of the 14 hours. On appeal to the Inner House of the Court of Session the court agreed with Lord Johnston. Of importance for the present case, as it seems to me, is paragraph 11:

> **"The work which was paid for under his contract by reference to the time from which he worked was for the purposes of regulation 3 his attendance as a night watchman for the whole of those hours. The fact that the activities of a night watchman were not spelt out in the letter is neither here nor there. More importantly, the fact the respondent had little or nothing to do during certain hours when he was permitted to sleep does not take away from the fact that he was throughout in attendance as a night watchman and required at any time to answer the telephone or to deal with alarms. The Employment Tribunal in our view confused their estimate of the hours during which the respondent was generally active with an overall consideration of what was required of him as a night watchman at any time. Thus we do not accept as conclusive the decision of the Employment Tribunal as to the period which was relevant for the purposes of the national minimum wage. On the facts before it the whole 14 hour period fell to be regarded as "time work."**

30. The Lord President there made very clearly the point that work is not to be confused with any particular and specific activity. Colloquially, work might bring to mind images of physical or sustained mental effort. Neither is necessary for something to constitute work, though the

context will be the contract and the facts which surround that contract under which the work is said to be performed.

31. In **Rossiter**, Elias P, having referred to the two cases which I have expanded upon, had to consider whether the change in the regulations by the introduction of Regulation 15(1A) in its present form would result in cases such as **British Nursing Association** and **Scottbridge** being decided differently. At paragraph 23 he concluded it would not. 15(1A) is a qualification to 15. 15(1) is only relevant if no actual time work is being done. It is a deeming provision to make that which is not otherwise time work be regarded as such.

32. In paragraph 24 Elias P observed:

> **"The claimant was at work for the whole of the shift essentially for the reasons given in *Scottbridge*. Like the claimant in that case even during the time when he was permitted to be asleep he was still required to deal with anything untoward that might arise in the course of his shift […] so neither regulation 15(1) nor regulation 15(1A) were ever engaged."**

33. He added at paragraph 25:

> **"We recognise that there is some artificiality in saying that someone is working when he is sleeping, but the justification for this and the steps which the employer might take to ensure that he is getting value for the wage paid was summarised as follows by Lord Johnston when hearing the *Scottbridge* case in the EAT at paragraph 9:**
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> > **'It is wholly inappropriate for the employer while requiring an employee to be present for a specific number of hours to pay him only for a small proportion of those hours in respect of the amount of time that reflects what he is physically doing in the premises. The solution for an employer who wishes an employee to be present as a night watchman or the equivalent is to provide him with alternative and additional work on the premises which enables him both to provide the employer with remunerated time and also the protection of someone on the premises for security reasons.'"**

34. Mr Morgan argues that that approach was recognised by Underhill J as President in this Tribunal in the case of **Wray v JW Lees & Co (Brewers)** in a judgment delivered on 14 July 2011 UKEAT/0102/11. That was a case in which a temporary pub manager was required to sleep on the premises. His claim that the hours that he slept there should be taken into account

was dismissed by the Tribunal. On its findings of fact it was clear that the claimant was not working during the periods in question.

35. The case is important in Mr Morgan's submission not for the particular decision which was made, but for what is said in the course of the judgment about the general principles which are applicable. At paragraph 11 Underhill J said this:

> **"11. There is now a fair amount of case law on whether sleeping periods of one kind or another constitute work, whether time work or salaried hours work for the purpose of NMWR. The authorities are helpfully reviewed in the recent decision of this Tribunal, HHJ Reid QC presiding, in *South Manchester Abbeyfield Society v Hopkins & Woodworth* [2011] ICR 254. There is no point in our performing the same exercise. Judge Reid QC said at paragraph 38 of the Reasons, pages 264 to 265:**
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> > **'We take the view that for national minimum wage purposes the cases show a clear dichotomy between those cases where an employee is working merely by being present at the employers premises, e.g. a night watchman, whether or not provided with sleeping accommodation and those where the employee provided with sleeping accommodation is simply on call. In the latter class of case the employee may be able to call the Working Time Regulations 1998 into issue to assert that all the hours on call are working hours within the regulations, a breach of those regulations and a claim for compensation arising from the breach. However, in the latter class of case the employee cannot bring into account all the hours spent on call for the purposes of a national minimum wage claim. He could only do so […] for such hours as he is awake for the purpose of working […]'**
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> **12. We would venture for the purpose of the issues which arise in the present case slightly to expand that summary …**
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> **1. there are cases where an employee is required during the night to perform certain tasks or undertake certain responsibilities, such as dealing with phone enquiries as in *British Nursing Association v Inland Revenue* or undertaking the responsibilities of a night watchman as in *Scottbridge Construction Ltd v Wright*. If that is the nature of the job the employee is in truth working throughout the period in question even if actual tasks only come up intermittently or infrequently and even if he or she is free to sleep in the intervals between those tasks. In such cases paragraphs (1) and (1A) of Regulations 15 and 16 do not come into play at all as explained in *Burrow Down Support Services v Mr E Rossiter*. The role of paragraph (1) is to deem the employee to be working in periods when he is in fact not working but is required to be available to work.**
>
> **2. In other cases the employee is not required to work but is required to be at or near his place of work and available to work. Usual shorthand for such cases is "on call" though that term is not used in the Regulations. That is the kind of case where the employee is deemed to be working by paragraph 1 of Regulations 15 and 16 but subject to, (a) the at home exception in paragraph 1 itself and; (b) the sleeping facilities exception in paragraph (1A). The distinction between the two classes of case may be difficult to draw in some particular factual situations. The cases of night sleepers in residential homes such as for under consideration in *Burrow Down* and *Mr A Smith v Oxfordshire Learning Disability Trust* [2009] ICR 1395 may be examples."**

36. He then went on to say in paragraph 13 that the appellant in the case before him was not in a position analogous to that of a night sleeper in a residential care home who, "has a

responsibility throughout the night for those present in the home". The very limited degree of responsibility which she had was "different from the responsibility falling on a manager in a hotel or a night sleeper in a home for the disabled".

37. The dichotomy between working cases and on call cases was, submitted Mr Morgan, further recognised by Lady Smith in the case of **City of Edinburgh Council v Lauder & Ors** upon which the Tribunal had heavily relied. In paragraph 37 she accepted submissions which related to that dichotomy.

38. It followed, submitted Mr Morgan, that the Tribunal here had simply failed to deal with the appropriate authority, that of **Rossiter**, had failed to recognise that on the evidence before them that the Claimant was required to work and that Regulation 15(1) and 15(1A) were not applicable at all, and that on a proper view of the authorities there could only be one answer to her claim.

39. So far as travel time was concerned he argued that the Tribunal had simply paid no attention to asking whether here there was assignment work within the meaning of Regulation 15(3)(b). If it had done so, it would have concluded in favour of the Claimant.

40. Thirdly he argued that the Judge was in error in accepting the Respondent's evidence that the sum of £760.42 was an overpayment against which the sums due could be offset. He did so both for reasons of fact and reasons of law. As a matter of fact not referred to by the Tribunal he argued that in a letter of 23 May 2012 the Tribunal had accepted that the Claimant had worked only 80.25 hours in her last four weeks being her notice period, that the contract was 50 hours and it agreed to pay on the basis that there were 200 possible hours of work, leaving 119.75 hours to be paid. That, he said, was a settlement of this argument before the Tribunal

and it should not have been open to the Respondents to rely upon a sum which they themselves had calculated as actually being due to the Claimant.

41. So far as the law was concerned, he submitted that the **Employment Rights Act** provides specifically for pay during a period of notice. By section 89 it is provided, following rights established by section 87, that if an employee does not have normal working hours under the contract of employment in force in the period of notice, the employer is liable to pay the employee for each week of the period of notice a sum not less than week's pay. The parties accepted that Mrs Whittlestone did not have normal working hours. A week's pay is to be calculated in accordance with section 220 to 223. Where there are normal working hours that remuneration is to be taken as an average over the 12 preceding weeks. Mr Isherwood accepts that that is what the legislation provides.

42. Mr Morgan drew my attention to the schedule provided at page 83 of the bundle by the Respondent to the Tribunal which showed that over the previous 12 weeks the Claimant had worked at least 50 hours per week on average. She had worked a little more, but Mr Morgan on her behalf restricted her claim to 50 hours. He regards that as having been settled factually by agreement between the parties, but legally he submits that the Claimant was entitled to be paid a sum which represented remuneration for at least 50 hours per week during each of the four weeks of her notice period. Mr Isherwood, he notes, has no answer to that particular submission.

Mr Isherwood's submissions

43. Mr Isherwood focuses centrally upon the contract which the Claimant made. Paragraph 5.5 of the decision was to the effect that there had been no physical work actually done by the Claimant during the time that she was asleep. The **Scottbridge** case had recognised by

paragraph 8 of the Judgment of the Court of Session that what was then the Regulation 15(1), provided that time spent asleep when someone was permitted to sleep was not time work. The core element of the Claimant's work was the work she did during the day for the service users. It was not the night sleepovers. The focus should be upon the core employment. The Tribunal was correct to extract that proposition from the case law.

44. As for travelling time the way in which the work was structured was in separate shifts. Just as if a shift had been on one particular day with the next shift the day following, time travelling from home to the start of a shift and back again home afterwards would not count as working time, so too did it not so count where there were separate shifts during the course of the day rather than on successive days. Here the Tribunal had, he submitted, found that each visit was a separate shift and that it had been entirely open to the Claimant how she spent her time between one shift and the next. On occasions she was able to return home had she wished. That was a matter for her, but was relevant to whether the time spent moving from one service user to another could be classed as travelling time. If she had used a car the travelling time and the arrangements she made might have been very different.

45. When it came to the question of the deduction he argued that here the Tribunal factually recognised an overpayment. Accordingly its logic based on section 14 of the **Employment Rights Act 1996** was impeccable.

Discussion

46. The case of **South Manchester Abbeyfield Society v Hopkins & Woodworth** [2010] UKEAT/079/10 (a decision of 10 November 2010, HHJ Reid presiding) is one which is relied upon by Mr Isherwood. The case involved the employment of a deputy housekeeper and housekeeper at sheltered accommodation. The housekeeper worked hours which were between

8.30 am and 2.00 pm and 16.00 to 18.00 Mondays to Thursdays but was also required to be on call in a flat provided to her from 9.00 pm until 8.00 am the following morning each day.

47. The Tribunal held that they were entitled to the minimum wage. The Judge set out authorities which included authorities under the Working Time Regulations as well as those to which I have already referred, and others, in particular **Anderson v Jarvis Hotels Plc** and **Hughes v Graylyns Residential Home** UKEAT/0159/08.

48. He said at paragraph 17:

> **"The actual or core working hours for the claimants were set out in their contracts and remunerated in accordance with the NMWA. The claims concern on call work, that is work that is above and beyond the core hours that make up the individual's job and for which the individual was paid."**

49. Therefore, the view of the facts which he took no doubt based upon findings of fact of the Employment Tribunal, was that being present over the nights concerned was not part of the individual's job, certainly not part of the core hours. He distinguished **Rossiter** and **British Nursing**, **Scottbridge**, and **MacCartney v Oversley House Management** [2006] UKEAT/0500/05/3101 where the appellant had worked time defined as "four days per week of 24 hours site cover" and came back to the essential factual finding with which he had to deal in paragraph 30. The contract in the case before him was, he considered one in which the Respondents before him were required to work respectively 37 ½ hours and 16 hours per week but to be on call at night outside those hours.

50. HHJ Reid QC drew a critical distinction between core hours and other time, holding in paragraph 35 that the distinction between the case before him and **Rossiter** was that in **Rossiter** the employee had no core hours other than the two eight hour shifts he was required to be on

site. Once it was accepted that the amount he received for his presence was not an attendance allowance over and above his wages, it was clear that he was "working" throughout the shifts whether or not he was in fact asleep.

51. Secondly at paragraph 38 he founded himself upon the view that

> **"….for NMW purposes the cases show a clear dichotomy between those cases where an employee is working merely by being present at the employer's premises (e.g. a night watchman) whether or not provided with sleeping accommodation and those where the employee is provided with sleeping accommodation and is simply on call."**

52. That was picked up by Lady Smith in **City of Edinburgh and Lauder** to which I have already referred. She distinguished within the on call category between those cases where the worker's main job was separate from and done at a time other than the on call period, and those when being "on call" was part and parcel of it.

53. I have no difficulty with the principle expressed by this Tribunal in the **South Manchester** case that a distinction is to be drawn between those people who by being present are doing the job they are employed to do, and those for whom that is not the case. I do however have substantial difficulty in accepting that there is a proper distinction to be made between core hours and other hours in the contract. On reflection the point is obvious. If a contract provides that hours are to be worked they could be classified into core and non-core hours, but they would equally be working hours. It cannot properly be said in a case where there are hours of work that it is only those which are core hours which are to attract the protection of the National Minimum Wage Regulations.

54. Nor is it helpful to consider the **Scottbridge** case as if the reason for Mr Wright being paid the national minimum wage and being treated as doing time work was that that was the only work which he was employed to do. It was indeed work he was employed to do: but if,

suppose, he had had work during the week to do as well, of a security nature, for his employers, to regard his hours as a night watchman as being outside his core hours of work and that they therefore should attract no minimum remuneration, whereas if there were no core hours or other work they would do so, is to draw a distinction which does not appear in the regulations nor the legislation. The issue is not whether work is done within "core hours" or not; that expression does not appear in the regulations.

55. There is a danger, as it seems to me, in the use of concepts such as "on call" or "core hours". They are liable to be misleading if they are used as tools of analysis rather than as handy descriptions of the circumstances of a particular case. The expressions were used in the original cases, **Scottbridge,** and **British Nursing Association** as handy descriptions. They are not terms which come from the statute. But the jurisdiction is entirely statutory. A decision of a Tribunal is not to be made by taking an epithet and applying it in analysis in a way which was never intended. The job of the Tribunal is to apply the law. Those expressions do not arise from statute. The only distinction in statute, as the cases demonstrate, is between that which is time work and that which is not but which might be deemed to be.

56. Secondly, the danger of the expression "core hours" like terms is that applying them might involve an investigation as to what work is actually done and an impermissible focus upon the level of physical or mental activity. That is not the issue. The issue, as the Lord President demonstrated in **Scottbridge**, is whether it is properly to be regarded as time work in the first place or not. The question is a factual enquiry. The first question for any Tribunal is, "is the claimant working during the hours for which he claims?" If he is not, then Regulation 15 might apply.

57. Work is to be determined upon a realistic appraisal of the circumstances in the light of the contract and the context within which it is made. So viewed, the distinctions which I drew earlier in this judgment may be helpful. But I emphasise they are intended to be helpful, and not words which should incline a Tribunal to repeat the error into which in my view this Tribunal fell in concentrating upon the question of core hours or the opposite when what mattered was asking whether what was done was work.

58. In the circumstances of this particular case there could, in my view, have been no answer other than that it was work, and this, being a time work contract, was time work. That is because the evidence was that there had been agreement between the employer and the Claimant that she would work; she would have been disciplined if she had not been present throughout the period of time; she could not for instance slip out for a late night movie or for fish and chips.

59. The fact that her physical services were not called upon during the night were on the basis I have expressed irrelevant since her job was to be there. This is a case which in principle is on all fours with that of **Rossiter**. The case of **Anderson v Jarvis** demonstrates the same approach in a different factual context; that was of a guest care manager in the employment of a hotel company who was required to sleep over in the hotel several nights each week. The primary reason for his being required to do so was to cover emergencies such as fire or flood. The Tribunal found that he was not entitled to be paid, but the Appeal Tribunal reversed that decision: it was plainly wrong to say that he was not at the Respondent's disposal during sleepovers given that the Respondents required him to be in their premises during those periods for a stated purpose; he was clearly working. The same reasoning applies here.

60. Accordingly, the first ground of appeal succeeds.

61. I turn to the second. The Tribunal simply did not deal with the question of assignments. Travelling time is time work, except where incidental to the duties being carried out and the time work is not assignment work. It is clear that if the work which the Claimant was doing was properly to be regarded on the facts as "assignment work" the travelling time which she spent should have been remunerated. Here the general principle must be that for someone working the hours as indicated on the Respondent's schedule, to which I have already referred, the fact that the contract called each separate visit a "shift" does not have the consequence that this was the same arrangement as if the Claimant had been starting work at her employer's premises at the start of an 8 hour shift or thereabouts and returning home after. She was on the rota and obliged to visit each service user in turn during the course of the day, and there inevitably was travelling time between them.

62. That time was within the general control of the employer who was arranging the assignments. The finding seems inescapable in the present case that with the exception of those periods, none of which were clearly identified in the decision, when the Claimant might have had so long between the end of one assignment and the next as to return home, such that the time would not be travelling time because it would be removed by Regulation 15(2)(b) from consideration, the work would be assignment work. It could be nothing else within a common sense meaning of the word "assignment".

63. Accordingly, in my view not only was the Employment Judge wrong by failing to apply the law to which he had directed himself appropriately, but the conclusion to which he came was wrong. The opposite conclusion was that to which he should have come, subject only to any argument that on occasions for which a claim was to be made the Claimant might not be doing time work because she had gone home or was travelling from home to the assignment.

64. The third ground of appeal also succeeds. It succeeds upon the basis set out in Mr Morgan's submissions about which I need say no more. The Tribunal was wrong in overlooking the impact of section 89.

65. I should finally say this. The Tribunal did not here have the assistance of two qualified lawyers. That may be why it fell into error. This is not intended to be any disrespect to either Mr Morgan or to Mr Isherwood. But the application of time work and the National Minimum Wage Regulations has proved factually and legally problematic for Tribunals in the past. I hope that, with these few additional words of mine, future occasions will be rarer.

66. The consequence is that on each of the grounds, save only that in respect of sleeping accommodation for the reasons I have given, the appeal is allowed. A finding will be substituted that the Claimant was entitled to have the time she spent doing sleepovers included in the overall calculation of the national minimum wage. That is not a calculation which I can perform because it involves considering the pay which she received for her other hours of work which was in excess of the national minimum wage and striking the appropriate balance. The time spent travelling too is a matter of computation and argument.

67. I recommend to the parties that they conciliate and mediate the remaining differences between them which are essentially financial.