Appeal No. UKEAT/0256/16/BA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 28 July 2017

Before

HIS HONOUR JUDGE DAVID RICHARDSON

(SITTING ALONE)

ABBEYFIELD WESSEX SOCIETY LIMITED — APPELLANT

MS C EDWARDS — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MS KATHERINE REECE (Representative) Peninsula Business Services Ltd The Peninsula Victoria Place Manchester M4 4FB
For the Respondent	MR ANDREW MacPHAIL (of Counsel) Instructed by: Messrs Ellis Jones Solicitors Sandbourne House 302 Charminster Road Bournemouth Dorset BH8 9RU

SUMMARY

NATIONAL MINIMUM WAGE

The Employment Judge erred in law in his approach to the question whether the Claimant was engaged in time work while she was employed overnight as a Sleep-in Assistant. In particular he (1) did not take the terms of the contract as his starting point - he did not make any satisfactory determination of what those terms were, or how they were operated in practice; and (2) proceeded largely by analogy with a decided case, rather than making findings of fact and assessing his findings as a whole. **Focus Care Agency Ltd v Roberts** [2017] IRLR 588 applied.

HIS HONOUR JUDGE DAVID RICHARDSON

Introduction

1. This is an appeal by Abbeyfield Wessex Society Limited ("the Respondent") against a Judgment of Employment Judge Reed, sitting alone in the Employment Tribunal at Southampton. By his Judgment dated 24 March 2016, he upheld a claim by Ms Carrie Edwards ("the Claimant") on the grounds that the Respondent had not paid her what was due under the **National Minimum Wage Act**. Following his ruling the parties agreed that the amount outstanding was £24,975.72, and he gave Judgment for this sum together with a ten percent uplift for a failure by the Respondent to comply with the relevant **ACAS Code of Practice**.

The Relevant Background

2. The Respondent is a charitable organisation offering accommodation for persons over the age of 55. At its house in Wimborne, Dorset, it offers what it calls "very sheltered shared housing". Residents each have a room which they rent under an assured periodic tenancy. There are communal facilities including their dining room/lounge, laundry room and bath/shower rooms. Support services include lunch and evening meal, promoting social activities, maintaining daily contact with residents, and liaising with external bodies, sponsors and relatives on behalf of residents.

3. The Claimant was employed as a Sleep-in Assistant from 19 February 2012 until 29 June 2015. Her statements of terms and conditions of employment includes the following provisions:

> **"2.** ***Job title***
>
> **You shall be employed as a Sleep-in Assistant reporting to the House Manager.**

3. *Duties*

Your principal duties will be as set out in the attached list. You may from time to time be required to undertake such other duties as the Society may reasonably require.

…

5. *Job flexibility*

It is an express condition of employment that you are prepared, whenever necessary, to transfer to alternative departments or duties within our business. This flexibility is essential for operational efficiency as the type and volume of work is always subject to change.

…

7. *Remuneration*

7.1. The rate for this role is £25.00 per night. All payments will be made calendar monthly in arrears in the week in which the 25th of the month falls. This will be subject to statutory deductions if applicable. Staff salaries are reviewed annually as at 1st April.

7.2. If such additional hours arise as a result of you dealing with an emergency situation occurring between 10.30pm and 7am and you are not already scheduled to work during these times, you will be paid £12.50 per hour gross for the first hour (or part thereof) and £10.00 per hour gross for each subsequent hour worked during the same night.

…

9. *Hours of work*

9.1. Your normal nights to work are 7 per fortnight on a rota basis, and includes weekends. The hours of work are 10.30pm to 8.30am.

The Society may require you to work additional hours to meet its reasonable needs of caring for residents. The Society shall endeavour to give you reasonable advance notice, but this may not be possible in emergency situations. If there is a requirement to work additional hours, you will be paid for such additional hours."

4. The Claimant's job description, to which reference is made in that paragraph 3, states that her the main purpose of her job was to provide overnight sleeping-in cover, responding to any emergencies which may arise. There were however, other duties. She was to ensure that the house was secure and safe, checking the diary for up to date information concerning the residents. She was to sleep in the house "when on duty". She was to respond to calls or disturbances, and ensure that residents were looked after in a caring and sympathetic manner. She had to complete records, ensure that Health and Safety and emergency procedures were followed, report maintenance faults, and attend training courses and meetings. She was expected to be flexible and perform duties not specifically identified in the job description, but which were commensurate with the general responsibilities of the post.

The Employment Tribunal Proceedings and Reasons

5. The ET hearing took place on 24 March 2016. The Claimant was represented by Mr Andrew MacPhail, who represents her today. The Respondent was represented by a consultant, Mr Reynolds. The ET heard evidence from the Claimant and from Mrs Booker-Card an employee of the Chief Operations Officer of the Respondent, not someone actually employed at the sheltered accommodation in question.

6. It is relevant to mention two features of the Claimant's witness statement. Firstly she said she was required by her manager to perform additional duties over and above the sleeping-in duty. She said:

> **"4. In addition to my main duties, I was required by my manager, Shirley Wilkins, to perform additional duties including the laying of tables and clearing of crockery, checking fridges and freezers, receiving early morning deliveries and assisting with house 'functions', for example family meals or Easter. These additional duties were carried out frequently."**

Secondly, she said the following:

> **"7. The sleep-in work was a fundamental part of the service offered by the Respondent at Harleston House. I believe that the Respondent was, at the time, advertising and selling to customers as having staff present overnight to provide immediate support and assistance to residents. A number of residents and their families informed me that they chose the home specifically because of this service. If you search Google for 'Harleston House the Abbeyfield Wessex Society' the second result is www.housingcare.org which describes the home as having 24-hour housing staff and confirm that that description was last updated on 11 September 2012 …"**

7. A copy of the web pages to which the Claimant referred appeared in the bundle for the ET hearing. Under the heading "Management / costs", the page stated that housing staff were on duty 24 hours and that there was a staff overnight room with en-suite. It said that it was last updated on 11 September 2012 although the page itself had been downloaded on 14 January 2016.

8. The Employment Judge's Reasons were not reserved. The Employment Judge set out hardly any findings of fact at all. The section, which I have included above is gleaned from the papers.

9. Subject to one point, to which I will come, such findings of fact as the Employment Judge made were set out in paragraphs 3 and 4:

> **"3. The Society is a charitable organisation offering accommodation for people aged over 55. Miss Edwards was employed as a Sleep-In Assistance. She had a range of duties which included sleep-in work. When she was undertaking that duty, as the name suggests, she was entitled to be asleep, in an apartment on the premises. If there was an emergency she would be called upon to undertake active duties but otherwise she was entitled to do nothing.**
>
> **4. For the periods when she was called into action during a night duty she would be paid at or above the national minimum wage. However, otherwise she simply received a lump sum payment for such duties. It was common to the parties that, dividing that sum by the number of hours she would have been present produced a figure that was below the national minimum wage."**

10. The Employment Judge then made reference to the **National Minimum Wage Regulations 1999** ("NMWR"), **Whittlestone v BJP Home Support Ltd** [2014] IRLR 176, **Esparon (trading as Middle West Residential Care Home) v Slavikovska** [2014] IRLR 598 and **Shannon v Rampersad (trading as Clifton House Residential Home)** [2015] IRLR 982. For understandable reasons he found reconciling these authorities difficult.

11. The operative parts of his reasoning appears in paragraphs 17 to 22:

> **"17. Pausing there, I found myself confronted by two cases not materially different from the one in front of me, in which completely different positions had been taken by the Employment Appeal Tribunal. Even if I was right and the relevant declaration in the *Shannon* case was dicta only, it presented me with problems.**
>
> **18. In attempting to reconcile the *Whittlestone* and *Shannon* cases I did derive assistance from the case of *Esparon v Slavikovska*. Again, the facts were not, on the face of it, materially different from the ones before me. It was pointed out in that case that an important consideration was the reason for the respondent requiring the employee to be on the premises. If he requires the employee to be there pursuant to a statutory requirement to have a suitable person on the premises "just in case", it was considered that that would be a powerful indicator that the employee is being paid simply to be there and thus deemed to be working regardless of whether active work is actually carried out.**
>
> **19. In this case, the Society represented to potential residents that there would be 24 hour cover and that that cover would be provided by someone in the position of the claimant.**

20. Whilst there was no statutory obligation engaged, the Society had made representations upon which it seemed to me reasonable to assume that at least some of the residents would be relying. A breach of that obligation would therefore have exposed the Society potentially to liability.

21. Furthermore, it was clear that Miss Edwards would have exposed herself to potential disciplinary proceedings had she absented herself (although in fairness it is only right to point out that that was a consideration in both the *Whittlestone* and *Shannon* cases).

22. It seemed to me that there were factors present in Miss Edwards' case that brought it within the rubric of the *Esparon* case and enabled me to distinguish the *Shannon* case. In all the circumstances I considered that she was undertaking time work throughout the period that she was actually present on the Society's premises pursuant to her contract and therefore that she was entitled to the national minimum wage for those periods."

Submissions

12. Two grounds of appeal have proceeded to this Full Hearing; other grounds were dismissed at a Preliminary Hearing before her Honour Judge Eady QC on 2 February 2017. The Preliminary Hearing Order contains the usual provision (paragraph 4) found in EAT Orders sending a case to a Full Hearing, setting out how the parties are to address issues where an appeal cannot be argued without reference to evidence.

13. On behalf to the Respondent, Ms Katherine Reece, who did not appear below, seeks to support both the grounds. Firstly, she submits that the ET gave inadequate reasons for a key point in his decision; namely, the finding in paragraph 19 that the Respondent represented to potential residents that there would be 24 hour cover provided by someone in the position of the Claimant. She says the ET did not explain what evidence there was for this finding. She said there was a dispute as to whether any representation was made to residents in any way. She says the web page on which the Claimant relied in her witness statement was inadequate support for her assertions. Ms Reece has, however, neither produced any note of evidence on this point for agreement by the Claimant, nor applied for the notes of the ET under paragraph 4 of the Order dated 2 February. She said she no longer has access to the notes of the consultant who appeared at the ET hearing. She also submits that there was no reasoning for the finding that the Claimant could be subject to disciplinary action if she did not sleep on the premises.

14. Secondly, she submits that the Employment Judge misapplied the law relating to time work under the **NMWR**. She argues that the Employment Judge erred by holding that an employee was necessarily carrying out time work if that employee was required to remain on premises with the possibility of disciplinary action. She derives this proposition from paragraphs 10 and 11 of the Employment Judge's Reasons where he discusses **Whittlestone** and submits that they are carried over into his conclusions. She then submits that this would be an error of law, as she has taken me, in this respect, to the recent decision of Simler P in **Focus Care Agency Ltd v Roberts** [2017] IRLR 588. In any event, she submits that the Employment Judge has concentrated impermissibly on one or two factors and has not applied the multi-factorial test which is laid down in **Focus Care**.

15. Mr MacPhail answers the first submission in the following way. He says the finding in paragraph 19 was effectively not disputed at the ET hearing; it rested on the Claimant's witness statement as well as the advertisement. The Respondent's representative did not cross-examine the Claimant. No evidence was given on the Respondent's behalf to undermine the finding; a point which the Employment Judge confirmed when he was asked to reconsider his decision. There was therefore no need to explain the factual finding.

16. As to the second submission, Mr MacPhail says the Employment Judge did not fall into the error of supposing that an employee was necessarily carrying out time work if the employee was required to remain on the premises with the possibility of disciplinary action. His Reasons show he took into account a number of factors. Mr MacPhail took me through those factors. He submitted that the Employment Judge, while not having the benefit of **Focus Care**, did not fall into the error of regarding one individual factor as determinative.

Statutory Provisions

17. For all but the last few months of her employment, payment of the national minimum wage to the Claimant was governed by the **NMWR 1999** as amended from time to time. With effect from 6 April 2015, this was replaced by the **NMWR 2015**. It has not been suggested, either here or in what was the leading case, **Focus Care**, that the **NMWR 2015** is intended to change the law in relation to sleep-in work, although the structure of the provisions is somewhat different and a little easier to follow.

18. A fuller rehearsal of the statutory provisions in their context will be found in the judgment of the President in **Focus Care** in paragraphs 5 to 16. I gratefully adopt it. It is sufficient to set out the terms of regulations 30 and 32 of the **NMWR 2015**, which replaced broadly similar provisions in regulation 15 of the **NMWR 1999**:

> **"30.** ***The meaning of time work***
>
> **Time work is work, other than salaried hours work, in respect of which a worker is entitled under their contract to be paid -**
>
> **(a) by reference to the time worked by the worker;**
>
> **(b) by reference to a measure of output in a period of time where the worker is required to work for the whole of that period; or**
>
> **(c) for work that would fall within sub-paragraph (b) but for the worker having an entitlement to be paid by reference to the period of time alone when the output does not exceed a particular level."**

> **"32.** ***Time work where worker is available at or near a place of work***
>
> **(1) Time work includes hours when a worker is available, and required to be available, at or near a place of work for the purposes of working unless the worker is at home.**
>
> **(2) In paragraph (1), hours when a worker is "available" only includes hours when the worker is awake for the purposes of working, even if a worker by arrangement sleeps at or near a place of work and the employer provides suitable facilities for sleeping."**

Discussion and Conclusions

19. I do not accept that the Employment Judge provided inadequate reasons for the finding which he made in paragraph 19 concerning the representation made to potential residents.

20. The overall duty to give reasons is derived from Rule 62 of the **Employment Tribunal Rules 2013**; see Rule 62(4) and (5). General guidance as to the giving of reasons in ETs was set out in **Meek v City of Birmingham District Council** [1987] IRLR 250. Reasons are not expected to be elaborate; they are expected to give an outline of the relevant facts, a summary of important conclusions, and explanation of the way in which the conclusions are reached given the basic facts. There should be sufficient account of the facts and reasoning to enable an appellate Court to see whether any question of law arises.

21. Here the complaint is about an individual finding of fact by the ET. The extent to which an ET should give reasons for an individual finding of fact will depend on the extent to which the fact was in dispute and the importance of that dispute to the ET's overall conclusion. In any given case there will be many factual matters which are not really in issue. The ET cannot be expected to give detailed chapter and verse for every finding.

22. In this case there was ample material on which the ET could conclude that the Respondent represented to potential residents that there would be 24 hour cover provided by a sleep-in worker. The witness statement of the Claimant was backed up by the advertisement. The advertisement specifically stated that housing staff were on duty for 24 hours and there was a staff overnight room with en-suite. The Employment Judge was fully entitled to conclude that this was a matter of importance to potential residents. It is matter of common experience that night time emergencies can lead a potential resident and her family to decide that the time has come for sheltered care.

23. If paragraph 7 of the witness statement of the Claimant and the meaning of the advertisement to which it referred had been seriously in issue at the hearing, one would expect

that there would have been cross-examination of the Claimant. Mr MacPhail has told me there was none and Ms Reece has not been able to point to any. There has been no application for the Employment Judge's notes. The Employment Judge himself said that he understood the matter not to be one that was seriously in dispute (see paragraph 4 of the Employment Judge's Reasons when he was asked to reconsider the case).

24. Against this background I am satisfied that the finding was not seriously in issue and that no more reasoning was required than was given for it.

25. The fact that this Respondent made this representation did not of course mean that the Respondent was bound forever to maintain the same system of overnight care. Indeed, I understand that it changed the system in 2015, resulting in the redundancy of the Claimant. But the representation that housing staff were on duty for 24 hours and that there was a staff overnight room with en-suite is a factor which the Employment Judge was fully entitled to take into account in reaching his decision that the Claimant was undertaking time work during the period in question.

26. I also reject Ms Reece's submission, which is not in fact a ground of appeal, that the Employment Judge was required to give reasoning for his finding that the Claimant could be subject to disciplinary action if she did not sleep on the premises. Given the express provision of her job description, it is so obvious that she could be subject to disciplinary action that no reasoning was required.

27. I turn then to Ms Reece's submissions concerning the Employment Judge's legal approach. First, she argues that he erred in law by holding in effect that an employee was

necessarily carrying out time work if that employee was required to remain on the premises with the possibility of disciplinary action. I am sure that he did not make this mistake. The passage in his Reasons on which Ms Reece relies is no more than a summary of **Whittlestone**; it is not the operative part of the Employment Judge's reasoning. In the operative part of his reasoning the Employment Judge did not only or even mainly rely on the fact that the employee was required to remain on the premises. Indeed, he noted that this was a feature of both **Whittlestone** and **Shannon** (see paragraph 21). In so far as a single factor led him to his conclusion, it was the fact that the Respondent had made representations on which it seemed to the Employment Judge reasonable to assume that at least some residents would be relying (see paragraph 20 of his Reasons).

28. I turn secondly to Ms Reece's submission that the Employment Judge was bound to follow **Shannon**. I disagree with this submission. The Employment Judge's task was to address the factors present in his case and decide whether they persuaded him that the Claimant was engaged on time work throughout the hours of the night. **Shannon** did not lay down any proposition of law which bound the Employment Judge to decide the case against the Claimant.

29. As to the correct legal approach, I would without any hesitation follow the decision of Mrs Justice Simler (the President) in **Focus Care**. In the light of **British Nursing Association v Inland Revenue (National Minimum Wage Compliance Team)** [2002] IRLR 480 and **Scottbridge Construction Ltd v Wright** [2003] IRLR 21 I think it would be very difficult at EAT level to hold other than she did. It follows that the Employment Judge did not err in law by following **Shannon**.

30. I turn then to what I regard as the most difficult point in the case. Has the Employment Judge sufficiently applied the correct test derived from **Focus Care** or has he impermissibly based his conclusion by working on a single factor or by analogy from other cases?

31. In **Focus Care** the President, Mrs Justice Simler, said:

> **"42. Having rejected Mr Reade's contentions in favour of a multifactorial evaluation, the question remains how is the multifactorial evaluation to be applied and the line between the cases to be drawn? It seems to me that the proper approach is to start by considering whether the individual is working during the period for which he or she claims. Work, as Langstaff P explained, is to be determined on a realistic appraisal of the circumstances in the light of the contract and the context within which it is made (*Whittlestone v BJP Home Support Ltd* at [57]). So, the contract must be considered together with the nature of the engagement and the work required to be carried out. Tribunals should consider whether the contract provides for the period in question to be part of the employee's working hours as a matter of construction (whether the terms are written and/or oral) and in light of the factual matrix and any relevant and admissible material that might supplement them. Depending on the facts it may be relevant to consider whether the contract provides for pay to be calculated by reference to a shift or by reference to something else, and if so, to what; or to whether an identifiable period is specified during which work is to be done.**
>
> **43. The fact that an employee has little or nothing to do during certain hours (see *Scottbridge Construction Ltd v Wright* at [11]) does not mean that he or she is not working. Regulation 30 is not to be equated with any particular level of activity (see *Whittlestone v BJP Home Support Ltd* at [15]). An employee can be working merely by being present even if they are simply required to deal with something untoward that might arise, but are otherwise entitled to sleep and even where an employee has never had to wake and deal with an untoward matter (see *Burrow Down Support Services Ltd v Rossiter* [[2008] ICR 1172] at [24] and [25]).**
>
> **44. The authorities identify a number of potentially relevant factors. No single factor is determinative and the weight each factor carries (if any) will vary according to the facts of the particular case. The following are potentially relevant factors in determining whether a person is working by being present:**
>
> **(i) The employer's particular purpose in engaging the worker may be relevant to the extent that it informs what the worker might be expected or required to do: for example, if the employer is subject to a regulatory or contractual requirement to have someone present during the particular period the worker is engaged to be present, that might indicate whether and the extent to which the worker is working by simply being present.**
>
> **(ii) The extent to which the worker's activities are restricted by the requirement to be present and at the disposal of the employer may be relevant. This may include considering the extent to which the worker is required to remain on the premises throughout the shift on pain of discipline if he or she slips away to do something else.**
>
> **(iii) The degree of responsibility undertaken by the worker may be relevant: see *Wray & J W Lees & Co (Brewers) Ltd* [[2012] ICR 43] at [13] where the EAT distinguished between the limited degree of responsibility in sleeping in at the premises to call out the emergency services in case of a break-in or a fire on the one hand, and a night sleeper in a home for the disabled where a heavier personal responsibility is placed on the worker in relation to duties that might have to be performed during the night.**
>
> **(iv) The immediacy of the requirement to provide services if something untoward occurs or an emergency arises may also be relevant. In this regard, it may be relevant to determine whether the worker is the person who decides whether to intervene and then intervenes when necessary, or whether the worker is woken as and when needed by another worker with immediate responsibility for intervening."**

A

32. Given the state of authorities at the time when this employment matter was before the Employment Judge, I have some sympathy with the position in which he found himself, but I have concluded that he did not apply the **Focus Care** test.

B

33. I start with the contract; it was important that the Employment Judge should carefully consider it, for the reasons which Simler P explained in paragraph 42 of **Focus Care**. On the face of it, the contract provided considerable support for the Claimant's case. It identified her hours of work as being 10.30pm to 8.30am without qualification. It included a job description, which described her as having a responsibility to "sleep in the house when on duty". But the Employment Judge does not appear to have taken the contract at face value. He found, it seems, that the Claimant was entitled to say no to anything apart from emergencies. Mr MacPhail attempted to persuade me that the Employment Judge meant that she was entitled to do nothing until she was called on to do something, but with respect, I do not think the Employment Judge's words can bear that meaning. He also appears, so far as I can see, to have rejected or at least made no findings about paragraph 7 of the Claimant's witness statement where she says in terms that she did have other duties - which would be entirely consistent with the terms of the contract.

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34. In the end I have no real secure basis in his Reasons by which I can understand how the Employment Judge reached such conclusions as he did about the contract. I conclude that the very absence of any close consideration of the terms of the contract indicates that he did not take it as a starting point in the way he should have done in the light of **Focus Care**.

G

35. To my mind the Employment Judge largely proceeded by way of analogy with **Esparon**. That was an error of law. Although the feature to which he referred is one among

H

many features to which he should have regard, it is not to be elevated into a principal feature of the case (see paragraph 34 of the judgment of the President, Mrs Justice Simler, in **Focus Care**).

36. There are only limited findings related to other matters which might be said to form part of the multi-factorial assessment. In particular, so far as the factor in paragraph 44(iii) of **Focus Care** is concerned - that is, the degree of the responsibility undertaken - there are no real findings. The job description attached to the contract might lead one to suppose that the Claimant would be significantly involved if there was a call of an emergency nature or indeed some other kind of disturbance. It is not clear whether the Employment Judge accepted that this was the case or not. Ms Reece submits that his findings are equally consistent with a role where the sleep-in worker would almost immediately call emergency services. Given that this was not a care home with any statutory responsibility to provide care, I simply cannot see what the Employment Judge made of points of this kind.

37. I have reached the conclusion therefore that the appeal must be allowed on this ground and the matter remitted for reconsideration. The question then arises as to whether remission should be to the same Employment Judge or to a different one. I conclude that it is best, applying the criteria in **Sinclair Roche & Temperley v Heard** [2004] IRLR 763, to remit the matter to a different Employment Judge. This case requires careful findings of fact and close attention to the contract. I think that for the Employment Judge to attempt to remind himself of factual issues some time ago only from his notes might prove a difficult exercise for him. It is better for the matter to start afresh. Also it may be highly desirable to wait before this case is heard again for at least one appeal to be heard and disposed of in the Court of Appeal. I leave that matter, however, for further consideration.