



# EMPLOYMENT TRIBUNALS

**Claimant:** Mrs J Larner

**Respondent:** AMG Consultancy Services Limited  
t/a AMG Nursing & Care Services

**Heard at:** Nottingham      **On:** Monday 26 November 2018

**Before:** Employment Judge P Britton (sitting alone)

## Representatives

**Claimant:** Mr C Fender of Counsel

**Respondent:** Mrs I Bishop, Solicitor

# JUDGMENT

1. The claim for holiday pay is dismissed upon withdrawal.
2. The breach of contract claim is dismissed.
3. The claim for non payment of the National Minimum Wage is dismissed.

# REASONS

## Introduction

1. The claim before me (ET1) was issued to the Tribunal on 24 January 2018. It had been prepared for the Claimant by the Derbyshire Law Centre. In due course the response was filed on 22 March 2018. The following are no longer issues that I need to resolve. Thus:-

1.1 Was the Claimant a worker or an employee of the Respondent? The latter concedes that for my purposes she would be a worker.

1.2 As to whether or not there is outstanding holiday pay? That has been settled.

1.3 Breach of contract, failing to pay travel expenses. For reasons I shall come to that is no longer pursued before me.

2. The claim that I am left with is whether the Claimant was underpaid in terms of the national minimum wage (now the living wage) ("the NMW") and which relates to what I shall refer to as the travelling issue. In passing it is not disputed by the

Respondent that in particular post the jurisprudence that led to the changes to the national minimum wage regulations and which are incorporated in the National Minimum Wage Regulations 2015 ( “ the Regs”) that the Claimant would be entitled to be paid travelling time in-between her assignments<sup>1</sup> t: thus the issue becomes as to whether or not she was. She was employed between 15 February 2015 and 5 September 2017.

### **Findings of fact**

3. Much of the discussion before me was submissions cross referenced to the bundle before me. However I heard under oath for the Respondents, in each case evidence in chief by written statement, from first Chris Nash, the finance manager, and then from Elizabeth Davies-Kohler, branch manager of the Chesterfield branch from which the Claimant worked. I had read in the statements of the Claimant and her daughter Kaylie Larner-Newton, albeit Mr Fender decided not to call them .

4. In summary the Claimant commenced working for the Respondent on 15 February 2015. She resigned giving one week’s notice to go to another job on 5 September 2017. During the employment she worked alongside her daughter Kaylie. As to the Respondent, it is a large scale provider of care primarily to those who are terminally ill: in other words palliative care. The vast bulk of its work is for the NHS and Social Services. Occasionally it will undertake private client work but it is few and far between. The workers that it engages such as the Claimant are what I would describe as peripatetic care workers. In other words they visit the homes of those to whom the Respondent provides its caring services (“the clients”). The frequency of the visits of course will depend upon the level of care that is required. Not perhaps surprising is that the Claimant like her colleagues worked on the basis of a rota compiled the previous week. The Claimant for the purposes of her role was required to travel to the clients using her own motorcar.

5. The Claimant when she commenced the work entered into a contract which is before me commencing at bundle page (Bp) 36. She signed this contract on 6 February 2015. This contract attempts to suggest that the Claimant was a temporary worker not employed between assignments. I do not need to go there given the concession by the Respondent. And in any event it is self evident from the evidence that the Claimant was a worker<sup>2</sup> and that there was a continuity of work throughout the time that she was “employed” by the Respondent. Core to what I have to deal with is as per the contract:

6. Thus first at paragraph 5.4:

*“For the avoidance of doubt and for the purposes of the Working Time Regulations the temporary worker’s working time shall only consist of those periods during which she is carrying out activities or duties for the Client as part of the assignment. **Time spent travelling**<sup>3</sup> to the client’s premises, lunchbreaks and other rest periods shall not count as part of the Temporary Worker’s working time for these purposes.*

7. Stopping there “the Regs” came into effect on 6 April 2015 and so from

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<sup>1</sup> See reg 34 in particular: note travel from home to first assignment isn’t included for the NMW.

<sup>2</sup> As per the definition at **2 Interpretation** of the Working Time regulations 1998, and thus entitled to inter alia the NMW and such as statutory holiday pay.

<sup>3</sup> My emphasis .

thereafter this stipulation viz travelling was unlawful.

8. That brings me to paragraph 6.2:

*“Subject to any statutory entitlement under the relevant legislation referred to in clauses 7 and 8 below and any other statutory entitlement, the Temporary Worker is not entitled to receive payment from the Employment Business or the client for time not spent on Assignment, whether in respect of holidays, illness or absence or any other reason unless otherwise agreed.”*

9. But under Paragraph 7 headed statutory paid annual leave was made the usual reference to entitlement to be paid annual leave according to the statutory minimum as provided by the Working Time Regulations in force from time to time from time to time<sup>4</sup>. As to payment 7.6 engages:

*“The amount of payment which the Temporary Worker will receive in respect of periods of annual leave taken during the course of an Assignment will be calculated in accordance with and paid in proportion to the number of hours which the Temporary Worker has worked on Assignment.”*

10. Thus so far contractually this means that the Claimant wouldn't be paid anything other than when on "Assignment" and this would be reflected in inter alia the holiday pay. As part of the contract at Bp 45 there was set out a table for the current rates of pay. Put simply pay is determined first in terms of 3 categories as to the complexity of the care needs of the client. The rates are set out in the right hand column. Second the rate increases for anti social hours first with an enhanced rate for Saturdays; then a further increase for a Sunday; finally a further hike for a bank holiday worked.

11. Those rates are clearly variable from time to time as they reflect the negotiations that take place between the Respondent and the end user ie the NHS or Social Services.

12. That brings me to the heading "Mileage Payment"

*Mileage **where applicable**<sup>5</sup> is paid at 20 pence per mile. (NB. NHS and Social Services do not reimburse mileage) .....*

13. Leaving aside the issue of payment for mileage to which I will return, otherwise in reality I find as a matter of fact that the Claimant was in fact paid an additional rate of remuneration. Thus for every visit that she made irrespective of the time taken or the distance travelled post the preceding assignment the Claimant was also paid £1.68. She seems to have done about ten visits per day but it could of course vary. These were for visits within a smallish radius of the Chesterfield branch. This I shall refer to as zone A. If the Claimant had to travel a wider radius then she got £4.00 for each visit: I will call that zone B. These payment rates had been negotiated with the contractors ie NHS and Social Services. This was to reflect the fact that the client base which would be looked after by the Respondent out of the Chesterfield branch office would involve considerably more travelling that for example a dense urban conurbation such as Stoke.

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<sup>4</sup> Currently the Working Time Regulations 1998 as amended.

<sup>5</sup> My emphasis.

14. That the Claimant was always paid those rates is without doubt as per the schedules which are before me compiled from all the time sheets and remuneration paid in respect of which I have heard the evidence in particular of Chris Nash. I found him a conscientious and compellable witness. The overall modus operandi of the business I additionally learnt about from Elizabeth Davies-Kohler. The same observations apply. Because the facts by and large were not now in dispute Counsel for the Claimant decided he wouldn't call Mrs Lerner or her daughter. He did tender them for cross examination but there was no need for Mrs Bishop to do so given that the facts had become in effect agreed and the issue was now one of law.

15. So the modus operandi was that each day when she was at work the Claimant would undertake a series of pre-rostered visits. She would be paid pro-rata the complexity rate for each visit and she would also be paid for each of those visits the travelling rate of £1.68 and on occasion the higher rate of £4.00, although by and large it was the former. This she was paid in her weekly remuneration.

16. Turning to the payslips these show, and an example would be Bp 255, that the gross pay as set out in the payslip would be the pay for the pro-rata element of the care. The fixed additional payments to which I have referred were put under the heading travel. But they weren't for mileage and nobody says that they were. The Claimant in fact wasn't paid any mileage apart from the odd occasion when she attended somewhere for training. And so as per the addendum to the contract to which I have referred there was no contractual entitlement in terms of the normal course of her duties to be paid mileage. This was because as is clear it wasn't paid for clients via NHS and social Services and because they did not pay mileage. Thus there is no breach of contract in not paying the same.

17. But fundamental is what is the status of the fixed payments per visit as placed on the payslips under the word travel? I bear in mind that subject to the exemptions within the NMW to which I am going to refer that for the purposes of the national minimum wage it is to be determined by taking the hours worked in a week divided by the remuneration. The fact that somebody might get a lower rate during the period of the day ie if it was applicable for travelling but a higher rate when undertaking actual work matters not. It is the total remuneration. And as I have already said travel time cannot be excluded particularly in this kind of scenario where it is travelling between caring assignments as the Claimant will leave her home to start the first job and she will return to her home at the end of the last job. So what is the status of the fixed payment ie the £1.68 per visit irrespective of time spent travelling or distance travelled? I accept for the purposes of my determination that the Claimant travelled quite a lot in the course of her duties as is clear from the extrapolation in the schedules to which I have referred as prepared by Mr Nash. To give an example as to which see Bp 47 in the week commencing 22 February 2016 she undertook 34.7 hours of actual care work but in order to do so she travelled 10 hours. The total remuneration for that period that she received gross was £381.05. Thus divide the remuneration by the total hours worked ie 44.75, and if the travel pay is part of the pay for the purposes of NMW, then the Claimant's hourly rate of pay was £8.51 ie above the then prevailing national minimum wage. If on the other hand the "travel pay" cannot be included for the purposes of the national minimum wage then she falls below the same by about 22 pence per hour, pro rata increasing with the national minimum wage the following year. The example I have taken is an accurate summarisation of the working pattern and remuneration in each week .

18. Engaged therefore for the purposes of determining the status of that pay is Regulation 10 of “ the Regs”. This is headed “**Payments and benefits in kind which do not form part of a worker’s remuneration**”. That is to say remuneration for the purposes of calculating the national minimum wage. Engaged are 10 (k) and (l) and depending on the construction of those possibly (n) . Thus:

*(k) “payments paid by the employer to the worker attributable to a particular aspect of the working arrangements or to working or personal circumstances that are not **consolidated into the worker’s standard pay**<sup>6</sup> unless the payments are attributable to the performance of the worker in carrying out the work.”*

19. As to (l) it reads:

*“Payments paid by the employer to the worker in respects the worker’s expenditure in connection with the employment.”*

20. As to (n) it reads:

*“Payments paid by the employer in respects travelling expenses...”*

21. I n can eliminate (n) for the reasons I have now dealt with. As to (l) the Claimant was not paid for any other expenditure.

22. As to (k) the payments were clearly attributable to the working arrangements. She had to travel between assignments and she got the additional travelling rate whether it be £1.68 or £4 to reflect that. So although the contract may have said travelling time was not paid for, the reality is that it was. The contract was in effect amended by performance because the Respondent always paid the Claimant those sums for all those visits without any need to prove expenditure.

23. The next point to make as to this badly worded regulation is that this is not some form of additional performance related pay, bonus or something of that nature. So it becomes excludable unless, and this is the crucial point, it has been consolidated into the worker’s standard pay.

24. Well even though it may have been separately expressed in the payslip because of the limitations of the payroll software , the Respondent pays for every travel period visit as I have set out and does so week in week out. All of it subject to PAYE. In doing so it complies with the inclusion of travelling time into working time as per the amendments to the WTR 1998 and the 2015 NMW Regs which in turn reflect the jurisprudence that travelling between assignments must be remunerated. Thus I find that it was consolidated.

25. Accordingly the Claimant has not been paid below the p[revaling NMW. Thus what it means that the Claimant has not been paid below the national minimum wage.

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<sup>6</sup> My emphasis.

**Conclusion**

13. The claim is dismissed.

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Employment Judge Britton

Date: 6 February 2019

JUDGMENT SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE