Case Numbers: 3212808/2020 &
3200812/2021

EMPLOYMENT TRIBUNALS

Claimant: **Miss R Crawford**

Respondent: **Independent People Homecare Services**

Heard at: **East London Hearing Centre**

On: **10 November 2021**

Before: **Employment Judge Russell**

Representation
Claimant: **In person**
Respondent: **Ms L Hatch (Counsel)**

JUDGMENT

The Judgment of the Employment Tribunal is that:-

1. **The claim of unauthorised deduction from wages succeeds in respect of a failure to pay National Minimum Wage during the placements and the failure to pay the full day on 27 October 2020.**

2. **The claim for notice pay succeeds and the Claimant is entitled to four weeks' notice pay.**

3. **The claim of unfair dismissal and detriment because of a protected disclosure fails and is dismissed.**

4. **The claim of constructive unfair dismissal fails and is dismissed.**

5. **The holiday pay claim is dismissed upon withdrawal.**

REASONS

1 By claim form presented to the Employment Tribunal on 14 October 2020, the Claimant brought a complaint for unauthorised deduction from wages asserting that she had not been paid minimum wage for the hours worked. By a second claim form presented to the Employment Tribunal on 15 March 2021, the Claimant brought further complaints of constructive dismissal by reason of a protected disclosure and/or detriment because of a protected disclosure. The Respondent resists all claims.

2 The case was initially listed before Employment Judge Russell sitting alone. Upon reading the papers, it became apparent that there was a whistleblowing detriment claim and non-legal members were found to hear the case.

3 The Tribunal heard evidence from the Claimant on her own behalf and for the Respondent we heard from Ms Emma Charlick (HR Consultant); Ms Aimee Sanderson and Mr Simon McLean. We were provided with an agreed bundle of documents and read those pages to which were taken during the course of evidence. We resolved those disputes of fact which were necessary to decide the issues before us.

4 We had careful regard to the list of issues agreed between the parties and updated to include the protected disclosure detriment claim as follows:

Unlawful deduction of Wages – s.13 ERA 1996

4.1 Did R make an unlawful deduction from C's wages pursuant to s.13 Employment Rights Act 1996 ("ERA 1996")?

a. Did R fail to pay C from 28 August 2020 to 24 November 2020 in accordance with her Statement of Main Terms and Conditions of Employment? C claims she should have been, but was not, paid for "sleep in" or "waking nights", and also for her travel time when travelling to the clients' home;

b. Did R fail to pay C at a rate which was no less than the national minimum wage from 28 August 2020 to 24 November 2020, contrary to s.1 National Minimum Wage Act 1998;

Public Interest Disclosure

4.2 Did R make a qualifying disclosure within the meaning of s.43B ERA 1996? Did she disclose information which, in her reasonable belief was made in the public interest and tended to show a breach of a legal obligation and/or that the health and safety of an individual was being endangered? The Claimant relies upon the following:

a. A disclosure made on 30 September 2020 and 27 October 2020 to Ms Sue Coleman or Ms Sue Rose;

b. A disclosure made in December 2020 to the Care Quality Commission.

c. The information disclosed to Sue Coleman or Sue Rose was that the Claimant would be reporting the Respondent to the CQC for not sending PPE out on time, that the company was not well led and that the Claimant had been waking throughout the night and not taking responsibility to supply a night carer and expecting the family to do it or have a Willows carer come in to do the care on a night with the client ("JP").

d. That JP had been subjected to financial abuse by one of the carers and that one of the carers had to be told to leave JP's address for smoking within the client's home and she then created a scene screaming in his house before leaving and the Claimant witnessed that she had been smoking in JP's house and a family member and JP's gardener also witnessed her smoking in JP's garage.

Automatic Unfair dismissal – s.103A ERA 1996

4.3 Was the reason or principal reason for C's dismissal by resignation dated 16/11/2020 that she made a protected disclosure?

4.4 In relation to any remedy, was any protected disclosure made in good faith (s.49(6A) ERA 1996)?

Protected Disclosure detriment – s.48 ERA 1996

4.5 Did the Respondent subject the Claimant to a detriment by:

a. In an interview for the Field Supervisor role, after the Claimant said that her aunt worked for the CQC, Mr McLean said "*we won't judge you for it*";

b. Failing to act upon the Claimant's complaints that she had been working for more hours than she was being paid.

4.6 If so, was such detriment because of a protected disclosure?

Jurisdiction

4.7 Does the ET have jurisdiction to hear the claim under 103A ERA 1996 – has the claim been brought before the end of three months beginning with the effective date of termination (s.111(2) ERA 1996) ?

Constructive Unfair dismissal – s.94 ERA 1996

4.8 Does C have the requisite 2 year qualifying period to bring a claim of constructive unfair dismissal under s.94 ERA 1996?

Wrongful dismissal/ Notice pay

4.9 Did R fail to pay C notice pay to which she was entitled?

Findings of Fact

5 The Claimant was employed by the Respondent as a live-in carer from 28 August 2020. The written statement of main terms and conditions of employment provided that the Claimant worked on a zero-hours contract, paid at the rate of £8.72 per hour converted to a daily rate as detailed in the separate average hours agreement. The Claimant was responsible for covering her own travel costs to and from a customer's home. The contract could be terminated by the employee on a minimum of four weeks' notice.

6 The average hours agreement was attached to the contract. It describes live-in care as being highly valued as it enables service users to have more independence, flexibility and control over the care they required on a daily basis, stating:

> "**As the Service Users need for support and assistance can be highly variable, and will often include tasks that take just a few minutes at any time, while not working the care worker is entitled to rest and sleep and engage in other normal daily activities.**
>
> **In addition to the flexibility of agreed work, the Service Users benefit from reassurance that there is another person in the house who will be able to assist them, in case of unforeseen need or emergency. This resource may never (or rarely be called upon), but the reassurance provides the Service User with confidence to live in their own home.**"

7 The agreement relied upon the National Minimum Wage Regulations provisions which allow the calculation of pay by averaging the number of hours worked over a period of four weeks. The terms and conditions of the averaging hours of work agreement set out firstly, that the employee would complete a monthly time sheet and send it to the employer. The employer would maintain a record of the actual hours worked in each four-week cycle, commencing with the effective date which was specified as being the 1 July 2020. The employer would pay the employee at a rate of £87.20 per shift consisting of daily average hours of 10 per day, irrespective of whether the work was done in the day or during the night. The agreement was said to be in place for one year and could only be revoked with prior agreement of the employer and employee. The job description for the role of live-in carer provided that the live-in carer was employed work with male and female customers on a 24-hour basis to provide care and support as detailed in the specific care plan. The aim was to provided independence, flexibility and control over the care required by the service user with a stated aim of enabling service users to be able to remain in their own homes with as much independence as possible.

8 Ms Charlick drafted the contractual documentation for the Respondent. She accepted in evidence that the same pay clause and template average hours agreement was used for all live-in carer, although the 10-hour figure would not be in all agreements and the actual figure would be inserted internally by the Respondent. Her understanding of "unforeseen need or emergency" was where the service user may be taken suddenly critically ill or had a fall requiring emergency services. She did not expect that to happen every night or even several nights a week.

9 The Claimant had never worked as a 24-hour live-in carer previously. She believed that she had been contracted for 10 hours a day with no mention of work at nights.

10 The Claimant was assigned to care for service user JP, an elderly gentleman living alone who suffered from vascular dementia. The Claimant worked with JP between 21 September to 5 October 2020, the 12 October to 27 October 2020 and 10 November to 24 November 2020 with a two week on one week off working pattern.

11 In JP's care plan the Respondent assessed him as requiring an average of 10 hours care per day. A copy of that care plan was not included in the bundle before the Tribunal nor was there any other contemporaneous document showing how the 10-hour figure had been arrived at. The Tribunal accepts as reliable and plausible that the Claimant was told that JP's care plan envisaged that he could be left unsupervised so that she could have a two-hour break during the day to rest or carry out other normal day-to-day activities. However, the Tribunal does not find on balance that this was an accurate reflection of the actual time required to care for JP. In her evidence, when asked about how the 10 hour figure in the average hours agreement was calculated, Ms Sanderson said that this was standard practice. Carers work a 12 hour shift, allowing for a 2 hour break, the Respondent arrived at 10 hours working time as the usual figure, beyond which specific evidence would be required. In other words, there was no employee monthly time sheet or record of actual hours worked in each four-week cycle as envisaged by the average hours agreement.

12 The Tribunal does not accept as reliable the evidence of Mr McLean that there was a process of making sure that breaks were taken and that this was monitored. There is no evidence before the Tribunal of any such process in practice. The Tribunal prefers the evidence of the Claimant that even during her break she would be called upon to assist JP and was in effect working almost solidly from when he got up until when he went to bed. Including occasional working time when he woke and required assistance in the night, we find that the Claimant was working on average 14 hours a day. Ms Sanderson agreed that in addition to assistance with toileting overnight, JP's typical day was from 7:30 am to 10:30pm (15 hours). The Claimant's evidence is consistent with the content of the December 2020 CQC report which stated:

> **"Some relatives told us arrangements to enable staff to take breaks when providing 24-hour live-in care, were not formalised by the care agency and that it was often left to the relative or family member to oversee and arrange. Some staff who provided 24-hour live-in care to people told us they did not always get their breaks."**

13 On 30 September 2020, the Claimant contacted Ms Sue Coleman asking to discuss the placement. She said that the service user woke through the night and she had not been notified of this before, despite the family having advised the Respondent. The Claimant described being woken by the service user's mat alarm when he needed to go to the bathroom in the night, with the times recorded on the Birdie app. Ms Coleman forwarded the email to Ms Sanderson, the Field Care Supervisor, and asked her to look into it. The Tribunal finds on balance that there was no information provided to Ms Coleman in the email about PPE, the leadership of the company, financial abuse or smoking in JP's property tending to show a relevant breach.

14 The Birdie App is the way in which the Respondent's live-in carers record the tasks undertaken on the days of their placement. The Respondent's position is that time not recorded on Birdie was not treated as working time. The app records a check in time and a check out time when it is opened and closed on the carer's mobile telephone. There is a drop-down list of standard tasks which can be selected and space for general observations on food, mood, drinks etc. It is not an accurate record of the actual time spent caring. If, for example, the live-in carer opened the app at the very start of their shift and left it on until the very end of their shift, it would record the total period of time worked as being approximately 24 hours. Alternatively if, as the Claimant did, the carer checked in and out of the app only to select a particular task completed it would under-record the time spent. For example, on 5 October 2020, the app records suggest that within eight minutes the Claimant helped JP have a shower, dusted his home, hoovered it, made the bed, cleaned and tidied the kitchen, bathroom and bedroom, prepared and served a snack and meal with drinks, administered medication, assisted with drying skin, dressing and undressing, checked his toenails, assisted with shaving, ensured his hearing aids were in and assisted with pet care. There is no evidence of any induction training showing the Claimant how to record accurately the actual amount of working time on the Birdie app.

15 In the first two-week period of care given by the Claimant, JP woke as follows:

- 5:34am on 23 September 2020 needing to go to the bathroom;
- 5:30am on 27 September 2020;
- 1:50am and again at 5:30am on 28 September 2020;
- 12:32am on 29 September 2020 with an entry that reads: "*JP keeps waking up on the hour for the toilet*";
- 00:46 on 30 September 2020;
- 3:25am on 3 October 2020; and 6:23am on 5 October 2020.

16 On each occasion JP had a wet incontinence pad and had to be cleaned, changed and put back to bed by the Claimant. There was no record of the actual time worked by the Claimant but the Tribunal finds that such tasks were clearly not something undertaken in a matter of minutes as recorded on the Birdie record for each occasion. We find that this is consistent with the Claimant having undertaken her duties, gone back to bed, opened the app, recorded what had happened and closed it again. It is not an accurate record of the Claimant's working time.

17 The Claimant was not the only live-in carer to experience broken nights with JP. During the Claimant's week off, JP was cared for by Noreen. Noreen's practice was to open the Birdie app at the start of a day and close it when she went to bed. Her entry for 6 October 2020, which has a duration of 24 hours and 53 minutes, records that JP he woke up at 1:45, again at 4am and again at 6:30am. On two of the occasions he had a wet incontinence pad which required changing and, on one occasion the bed needed changing. Noreen was woken again on 11 October 2020 at 2am by JP's dog barking, and at 3:30am and 5:45 am when JP got up to use the bathroom.

18 In her email on 20 October 2020, Ms Sanderson confirmed that JP was getting up several times during the night and suggested that he may have a urinary tract infection and perhaps could use a urine bottle. Ms Sanderson informed JP's family who

said that, as they were paying for 24/7 care, additional night care be arranged to support the Claimant. Ms Sanderson replied that the Respondent expected carers to assist if needed through the night, although she confirmed that this was expected to be the odd occasion, and suggested instead that the Claimant was not coping and that she may be removed. When JP's daughter again suggested that night cover be arranged, Ms Sanderson attributed the restless nights to the urinary tract infection. No night cover was put in place but Ms Sanderson told the Claimant to record each time she got up. Ms Sanderson did not tell the Claimant to log the duration of the time spent working and the Claimant did not realise that Birdie only recorded the time that the app was open.

19 The Claimant returned to care for JP on 12 October 2020. In the following two week care period, JP woke as follows:

- 5:10am on 13 October 2020 to go to the bathroom and have a pad change;
- 2:13am on 14 October 2020;
- 22:45pm on 15 October 2020 and 6:43am on 16 October 2020;
- 4:58am and 5:35am on 17 October 2020, first to use the bathroom and then because his dog was barking;
- 00:30am and 02:49am on 18 October 2020, both times requiring his incontinence pad changing (on the first occasion, the Claimant recorded that he was back in bed at 00:55 but there is a further entry at 1.01am).
- 12:21am on 19 October 2020, again requiring a change of pad and clothing. He was back in bed by 12:32am. The Claimant recorded on Birdie that she was not getting enough sleep at night and asked that somebody contact her the following day.
- 03:29am and 04:27am on 23 October 2020; and
- 03:15am and 06:30am on 25 October 2020.

20 On 27 October 2020, the Claimant was due to hand over JP's care to Noreen and start her rest period. Noreen was delayed due to traffic problems. The Claimant notified the office who told her to stay until Noreen arrived. The Claimant informed them that she was unable to do this as she had to leave by 1pm. In the end, she did stay. Ms Coleman thanked her and agreed to pay the Claimant for the full day. The Claimant's evidence was that she also told Ms Coleman that a carer was smoking in JP's property in breach of the rules and that she would be reporting the Respondent to the CQC. The Respondent denies that such information was provided. There is no supporting contemporaneous evidence in support and the Tribunal does not consider that it is likely to have been said in a conversation about staying on to relieve a delayed carer. On balance, we find that there was no disclosure of information as alleged in the list of issues to Ms Rose on 27 October 2020.

21 Noreen was logged into the Birdie app for six days, six hours and 42 minutes from 27 October 2020. She logged in again continuously for eight hours and 54 minutes on 3 November 2020. The Tribunal finds that she cannot have been working for every minute of this time so, again, the Birdie app does not accurately record the actual amount of working time. There is no specific reference to night-waking by JP.

22 Ms Sanderson contacted the Claimant on 9 November 2020 to discuss her concerns about JP's night-waking. She told the Claimant that Noreen had reported that JP was sleeping through the night and had been for at least 10 days. However, notes on the Birdie app by a different carer, Sylvia, record that JP had woken at 5:30am on 7 November 2020 and at 4:30am on 10 November 2020.

23 The Claimant and Ms Sanderson spoke on 12 November 2020 as part of a planned review of her employment to date. When discussing the Claimant's use of Birdie, Ms Sanderson said that the way she had been using it up until then had been absolutely fine. There was no suggestion that she was experiencing any difficulties with time recording on Birdie. The Claimant informed Ms Sanderson that JP was still getting up very early in the morning and during the night. Ms Sanderson did not consider that waking at five or six in the morning constituted getting up in the night or was out of the ordinary, especially as she considered that JP could be easily redirected to bed. In evidence, however, Ms Sanderson accepted that night working would be seen as between 10pm and 7am. The Claimant explained that it disrupted her sleep pattern and she was not the only carer to experience the problem. Ms Sanderson maintained that JP had been more settled in recent weeks and, if broken sleep was causing an issue, whether a different placement would be more suitable for the Claimant. The Claimant told Ms Sanderson that she did not think that it was safe to be working with JP if she was tired due to broken sleep. Ms Sanderson acknowledged the Claimant was paid only to work so many hours a day and that if the Claimant was frequently working more, they would pay her extra. The Claimant said she had found a new job but would work her four weeks' notice period. She told Ms Sanderson that she had been to ACAS and was considering Tribunal proceedings. The Tribunal accepts as plausible and consistent with the notes of the discussion that the Claimant did not tell her, nor did she know, that she had complained to the CQC.

24 On 16 November 2020, the Claimant confirmed to Ms Sue Coleman that she was resigning but that she was willing to work her notice period.

25 The Claimant was interviewed by the Respondent for the position of Field Care Supervisor on 19 November 2020. Notes were taken of the interview. They do not contain any reference to CQC. Mr McLean accepts that he made the comment about not judging the Claimant because her aunt worked for the CQC. The Tribunal accepts his evidence that it was intended as a light-hearted comment to put the Claimant at ease in the interview as she appeared nervous. The comment had the opposite effect to that intended, for which Mr McLean apologised in evidence, but it was in no way whatsoever because of information which the Claimant had provided to Ms Rose or Ms Coleman about the failure to her properly, the care provided to JP or the other matters asserted to amount to a protected disclosure. The complaint to the CQC was made in December 2020 and therefore post-dated the interview. The Claimant was not successful in her application.

26 On 25 November 2020, the Claimant spoke to a member of the Respondent's administrative staff to say that she had given in her notice and was waiting for somebody to call her back. On 2 December 2020, the Claimant contacted the Respondent to say that she was not available until the following Monday but wanted advance warning for placements. The same day the Claimant was offered and accepted a placement elsewhere but it was not effective as the family asked if the

existing carer could stay on. No other placements were offered to the Claimant during her notice period. On 14 December 2020, the Claimant emailed to complain that after 24 November 2020 she was not given any option to work her notice.

27 Included within the Tribunal bundle were copies of the Claimant's timesheets. Rather unhelpfully these were extensively redacted, giving the date but not the specific times or the number of hours worked. Based upon the contemporaneous payroll data, the Tribunal rejects as implausible Mr McLean's evidence that individual carers were asked to provide the number of hours worked in a pay period for payroll purposes. The Tribunal and prefer the evidence of the Claimant and Ms Sanderson that the timesheets were completed by the Respondent for each carer as a record of the days worked. The carers were not asked to provide actual hours worked.

28 Based upon the Birdie entries, the Respondent produced what purported to be a summary of the number of times that the Claimant had been woken during her placement with JP. It allocated either ten minutes or five minutes to each time the Claimant was woken in the night and suggested that these totalled two hours and twenty minutes. The same summary recorded that Noreen and Sylvia were woken on only three occasions when caring for JP, once between 5 October and 12 October and then twice between 27 October and 10 November. This is clearly inaccurate as may be seen from Noreen's Birdie entry on 11 October 2020 when she had been up at 2am, at 3:30am and at 5:45am. It entirely omitted the 7 November 2020 occasion.

29 The bundle also included payroll data for the Claimant and other live-in carers for the period 18 September 2020 to 17 October 2020. The Tribunal finds that it is significant that all of the 140 or so live-in carers were paid on the basis of 10 hours per day. Some discretionary payments were also recorded but we find on balance that these related to expenses. The same payroll records for 18 October 2020 to 17 November 2020 and 18 November 2020 to 17 December 2020 also show that all the live-in carers were paid on the basis of an average of 10 hours per day. In other words, the average hours arrangement of 10 hours per day was applied without exception for three consecutive months as standard across the entirety of the Respondent's live-in carer workforce.

30 The Claimant's payslips record her as being 24-hour care with £50 discretionary payments. On her final payslip the Claimant was paid for six sessions and again £50 discretionary payment. Ms Sanderson accepted in evidence that the discretionary payment was in respect of travel and that, having considered the Claimant's payslips, she could not see that she had been paid for 27 October 2020. The Tribunal agrees.

Law

Protected Disclosure

31 A qualifying disclosure requires a 'disclosure of information' which in the reasonable belief of the worker tends to show, amongst other things, that the health or safety of any individual has been, is being, or is likely to be endangered, s.43B(1)(d) Employment Rights Act 1996.

32 **Williams v Michelle Brown AM** UKEAT/0044/19/OO: HHJ Auerbach five stage

approach: (1) there must be a disclosure of information; (2) the worker must believe that the disclosure is made in the public interest; (3) such a belief must be reasonably held; (4) the worker must believe that the disclosure tends to show one of the matters listed in s.43(B)(1) (a) to (f); and (5) such belief must be reasonably held.

33 The ordinary meaning of 'giving information' is conveying facts and not simply making allegations, **Cavendish Munro Professional Risks Management Ltd v Geduld** [2010] IRLR 38, EAT at paragraph 24. A disclosure can include a failure to act as well as a positive act, **Millbank Financial Services Ltd v Crawford** [2014] IRLR 18.

34 The employee must genuinely and reasonably believe that the disclosure in the public interest, **Simpson v Cantor Fitzgerald Europe** [2020] EWCA Civ 1601, applying **Chesterton Global Ltd v Nurmohamed** [2017] IRLR 837. Personal interests may also be in the public interest and the four factors set out at paragraph 34 of **Chesterton**, whilst not exhaustive, provide some helpful guidance. Firstly, the numbers in the group whose interests the disclosure served. Secondly, the nature of the interests affected and the extent to which they are affected by the wrongdoing disclosed. Thirdly, the nature of the wrongdoing disclosed (disclosure of deliberate wrongdoing is more likely to be in the public interest than the disclosure of inadvertent wrongdoing affecting the same number of people). Finally, the identity of the alleged wrongdoer.

35 A worker has the right not to be subjected to detriment because of a protected disclosure, s.47B Employment Rights Act 1996. In **Fitzmaurice v Luton Irish Forum** EA-2020-000295-RN, the EAT summarised the correct approach to causation. In a detriment case, the protected disclosure need only be *a* material cause of the Respondent's reasons for its conduct. In an unfair dismissal case, the protected disclosure must be the sole or principal reason.

36 In **Blackbay Ventures Ltd v Gahir** [2014] IRLR 416, the EAT gave helpful guidance as to the approach to be adopted by a Tribunal considering a protected disclosure claim. This emphasised the need not to adopt a rolled up approach but to consider each disclosure by date and content, identify the risk to health and safety in each case and the detriment (if any) which is caused thereby.

Breach of Contract – Notice

37 The Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 Article 3 provides "that proceedings may be brought before an employment tribunal in respect of a claim of an employee for the recovery of damages or any other sum if the claim arises or is outstanding on the termination of the employee's employment". The claims are for wages and/or notice and, therefore, fall within the scope of art.3.

Unauthorised Deduction from Wages

38 The Employment Rights Act 1996 ("ERA") s.13 provides that an employer shall not make a deduction from wages of a worker employed by him unless the deductions are required or authorised to be made by virtue of a statutory provision, a relevant

provision of the worker's contract or the worker has previously signified in writing his agreement or consent to the making of the deduction.

39 A deduction occurs when an employee or worker is paid less than the amount due on any given occasion including a failure to make any payment, s.13(3) ERA. This can be either a failure to pay the sums contractually due or to pay the amount required by the National Minimum Wage Regulations.

40 Regulation 44 of the National Minimum Wage Regulations 2015 defines "unmeasured work" as any work that is not time work, salaried hours work or output work. Regulation 45 provides that unmeasured hours in a pay reference period are either the total number of hours worked or the hours treated as worked under a daily average agreement made in accordance with regulation 50.

41 Regulations 49 and 50 provide as follows:

> **49 (1) A "daily average agreement" is an agreement between a worker and employer—**
>
> **(a)which specifies the average daily number of hours the worker is likely to spend working where the worker is available to work for the full amount of time contemplated by the contract, and**
>
> **(b)is made in writing before the beginning of the pay reference period to which it relates.**
>
> **(2) The requirement in paragraph (1)(a) is not satisfied unless the employer can show that the average daily number of hours specified is a reasonable estimate.**
>
> **(3) Unless the worker and employer agree otherwise, the daily average agreement has effect solely for the purpose of determining the amount of unmeasured work the worker is to be treated as having worked for the purposes of these Regulations.**
>
> **50. The hours treated as worked under a daily average agreement for each day on which the worker worked in the pay reference period are—**
>
> **(a)where the worker was available to work for at least the full amount of time contemplated under the contract, the average daily number of hours specified in the daily average agreement;**
>
> **(b)where the worker was available to work for only part of the time contemplated by the contract, the proportion of the average daily number of hours specified in the daily average agreement which that part bears to the full amount of time contemplated under the contract.**

42 Guidance issued by the Department for Business, Energy and Industrial Strategy gives a live-in carer staying with a client for a 24 hour period, providing tasks throughout the shift, in return for a fixed sum as an example of unmeasured work.

43 In **Royal Mencap Society v Tomlinson-Blake** [2021] UKSC 8, Lady Arden

confirmed that held at paragraph 7 that where the worker is paid by reference to the unspecified hours worked, it will be treated as unmeasured work for the purposes of the National Minimum Wage Regulations. This is consistent with the earlier judgment of the Court of Appeal in **Walton v Independent Living Organisation Limited** [2003] EWCA Civ 199. The ratio of the Supreme Court decision in **Mencap** was that time spent asleep is not unmeasured work to be taken into account when calculating whether the National Minimum Wage has been paid, only time awake and actually working will count.

44 In **Walton**, the carer was required to be continually in residence for a continuous 72-hour shift in return for a daily rate of pay, but it was agreed that there would be a fixed number of hours worked on active caring and would otherwise be available when required. This was held to be unmeasured work as the carer was not paid solely by reference to the time worked.

Conclusions

Unauthorised Deduction from Wages

45 The Claimant's contract provided that she would be paid monthly and we conclude that this was the relevant pay reference period. It was an express term of the contract of employment that she would be paid at the rate of £8.72 per hour converted to a daily rate as detailed in the separate average hours agreement. The Tribunal concludes that the average hours agreement, made in writing at the time that the employment commenced, expressly provided for a payment of £87.20 per shift irrespective of whether the work was done in the day or during the night. This was a contract for unmeasured work, not for work during the days with a supplementary night allowance. The Claimant was not contractually entitled to a separate payment for night-working and there was no failure to pay her less than she was contractually due on any given occasion.

46 There is nothing inherently wrong in paying a live-in carer by reference to an average hours agreement, indeed it will commonly be the most efficient way of calculating pay rather than requiring daily time sheets. The care company knows what its wage bill will be and the carer knows that they will receive a set amount of pay upon which they can rely when budgeting for living expenses. However, for the purposes of the National Minimum Wage Regulations, the average hours agreement will only be valid if the employer can show that the average daily number of hours specified is a reasonable estimate, see regulation 49(2). The burden of proof therefore rests on the employer. Ms Hatch submits that the Tribunal should accept the evidence of Ms Sanderson that the 10 hours was a reasonable assessment of time required to carry out the work identified in JP's care plan, especially as it would have supplemented the care provide if the Claimant had provided evidence that she was working in excess of 10 hours. The Tribunal rejects this submission.

47 As set out in our findings of fact, the consultant who drafted the template average hours agreement did not expect the same 10-hour average to be in all agreements and the actual figure would be inserted as appropriate. The Respondent's payroll records make clear, however, that the same 10 hours per day was applied without exception for three consecutive months as standard across the entirety of the

Respondent's 140 or so live-in carer workforce.

48 A copy of JP's care plan was not included in the bundle nor did the Respondent adduce any evidence beyond Ms Sanderson's assertion that there had been an assessment of the daily tasks required and a notional time allocated to them when reaching the average daily figure of 10 hours. Ms Sanderson accepted that in addition to assistance with toileting overnight, JP's typical day was 15 hours from 7:30 am to 10:30pm. However, she said that the Respondent allowed for a 12 hour shift, 2 hours of which would be taken as a break. In other words, that for five hours of the day JP would not require care from the Claimant. The Tribunal has found that the estimate of 10 hours per day was not an accurate reflection of the time spent caring for JP. Consistent with the CCQ report only two months later, there was no process to ensure that breaks were taken. The CQC report is consistent with there being issues with staff not being able to take their breaks.

49 In breach of the process envisaged by the average hours agreement, there was no employee time sheet to record actual hours worked in each four-week cycle. The Respondent's records were not robust or reliable. Whilst to some extent the Claimant could have left the house during the day, we accept that in practice she was limited in her ability to do so. We conclude that the Respondent has not proved that 10 hours per day was a realistic estimate and have found as a fact that the Claimant was working almost solidly from when JP got up until he went to bed, and on some occasions being working when he woke in the night, giving about 14 hours a day on average.

50 Whilst to some extent the Claimant did misunderstand the terms of her contract, in that she was not entitled to separate payment for night-time work, she was not being paid in accordance with the National Minimum Wage as £87.20 divided by 14 hours gives an hourly rate of pay of only £6.23. In short, there was an underpayment of four hours per day over the course of the placement.

51 Further, there was an unauthorised deduction from wages in respect of the full day of 27 October 2020. The Respondent agreed to pay the Claimant for the full day as she waited for Noreen to arrive and it failed to do so. The £50 discretionary payment was for travel and not for staying on. The Claimant is entitled to payment for the balance of the day.

Breach of Contract - Notice Pay

52 The Claimant gave notice and made it clear that she was ready and willing to work. She accepted the placement which was offered on 2 December 2020, albeit it was not effective for reasons outside of her control. On 9 December 2020, the Respondent had agreed to keep her posted with any further live-in placements during the notice period but nothing was offered. The Claimant was not rostered to work the Christmas period in any event and there was no failure to do so. We find that she is entitled to four weeks' notice pay. By our calculations, two full weeks given the working pattern.

Protected Disclosure – Detriment and Dismissal

53 Based upon our findings of fact, the Tribunal does not conclude that the Claimant disclosed information to Ms Coleman or Ms Rose to the effect that she would be reporting the Respondent to the CQC for not sending PPE out on time, that the company was not well led or that JP had been subjected to financial abuse by one of the carers and that one of the carers had to be told to leave JP's address for smoking within the client's home and she then created a scene screaming in his house before leaving and the Claimant witnessed that she had been smoking in JP's house and a family member and JP's gardener also witnessed her smoking in JP's garage. There is no information to this effect in the email sent on 30 September 2020. Nor is there any contemporaneous evidence to support disclosure of any such information on 27 October 2020 and we have found that it was not made to Ms Rose during their conversation which was about the Claimant staying later to relieve the incoming carer.

54 In her email to Ms Coleman on 30 September 2020, the Claimant did disclose information that JP woke through the night when he needed to go to the bathroom and that she had not been notified of this before. The Tribunal concludes that such information could not reasonably be believed to tend to show a relevant breach or to be made in the public interest. It relates to the circumstances in which the Claimant was working and her personal unhappiness but there was no further information which could reasonably tend to show that there was a breach of legal obligation and/or a health and safety issue. On the facts of the case, the Tribunal concludes that the Claimant did not make any protected disclosure.

55 Furthermore, even if the Claimant's complaint about night waking were a protected disclosure (and we have concluded that it was not), it was in no sense a material cause either of Mr McLean's comment in the Field Supervisor interview. The subject of her complaint about night working was essentially about requiring extra pay or extra care provision, the failure to act upon that complaint was because the Respondent disagreed that there was evidence to support it. It was not in any sense because of the fact that the Claimant had made the complaint. The Claimant was not subjected to a detriment because of her complaint in any event.

56 The Respondent's failure to act upon the complaint was the reason why the Claimant resigned and, for the same reason, was not because of any protected disclosure. Even if there had been a protected disclosure (and again we have concluded that there was not), it was not the principal reason for the Claimant's resignation. She was not automatically unfairly dismissed. As the Claimant does not have two years' continuous service, the Tribunal does not have jurisdiction to hear a complaint of ordinary unfair dismissal.

Employment Judge Russell

25 May 2022