



Case No: B2/2016/3127

Neutral Citation Number: [2018] EWCA 3045 Civ  
IN THE COURT OF APPEAL (CIVIL DIVISION)

The Royal Courts of Justice  
Strand, London, WC2A 2LL

Wednesday, 17<sup>th</sup> January 2018

**Before:**

**LORD JUSTICE UNDERHILL**

-----

**Between:**

**KAT**

**Applicant**

**- and -**

**TORBAY COUNCIL**

**Respondent**

-----

(DAR Transcript of WordWave International Ltd trading as DTI  
8<sup>th</sup> Floor, 165 Fleet Street, London EC4A 2DY  
Tel No: 020 7404 1400 Fax No: 020 704 1424  
Web: www.DTIGlobal.com Email: TTP@dtiglobal.eu  
(Official Shorthand Writers to the Court)

-----

**Mr Paul McGrath** (instructed under the **Court of Appeal Pro Bono Scheme**) appeared on behalf of the **Applicant**

The **Respondent** did not appear and was not represented

-----

**Judgment**  
(Approved)  
Crown Copyright©

**LORD JUSTICE UNDERHILL:**

1. This is a renewed application for permission to appeal against the decision of Mr Recorder Stead, sitting in the Exeter County Court, as to the quantum of a claim for arrears of pay. The Applicant was unrepresented before the Recorder and his Appellant's Notice likewise was drafted without legal assistance. I refused permission on the papers. On the renewal the Applicant has had the great benefit of representation by Mr Paul McGrath of counsel, appearing pro bono, who lodged a most useful advocate's statement and who has caused me to think very carefully about the possible basis on which this appeal might succeed.
  
2. The Appellant's Notice was filed out of time but that may have been venial on the fuller explanation which I have now received and I prefer to consider first the question whether the proposed appeal would have a realistic prospect of success.
  
3. Since this is a permission application, I can summarise the facts very briefly indeed. Between 17 March 2008 and 28 September 2012 the Applicant was party to a contract with the Respondent Council under what is described as a "Contract for Foster Care Services Agreement". The agreement was an umbrella agreement recording an expectation that the carer would provide placements for young people – essentially, foster care – on request by the Council and setting out the terms that would apply during any such placement. The Applicant pursuant to that agreement did foster young people – nearly all teenagers – for most, though not all, of the period ending in January 2012 – that is to say until some eight months before the end of the period – subject only to agreed respite weeks. During the last eight months he was not asked to undertake any placements. Quite how that came about is unclear, but it certainly did not appear to be the result of any dissatisfaction with his work: it is described, rather cryptically, as due to a Council official being ill. The numbers being fostered, if I can

use that shorthand, at any one time varied from one child to five. The Applicant had responsibility for them, as is necessarily the case for a foster parent, on a 7-day-a-week, 24-hour-a-day basis. But the actual demands would vary from placement to placement, depending, for example, on whether a child was at school during the day or how well they slept and so on.

4. It was the Applicant's case in the County Court proceedings that he was a worker within the meaning of the National Minimum Wage Act 1998 and that he had not received his entitlements under that Act and the National Minimum Wages Regulations 1999. The Council initially denied that he was a worker. That issue was determined in his favour by Mr Recorder Browne-Wilkinson QC in August 2015.
5. On that basis the Council accepted that the Applicant had been underpaid, but the amount of the under payment remained in issue; and it was that question which was decided by Mr Recorder Stead. He heard evidence from the Applicant about the demands of the job and there were reports before him from accountants for each party.
6. The Recorder's judgment, although succinct, is careful and clearly expressed. It was common ground before him, but he in any event held, that the Applicant's work was "unmeasured work" as defined in regulation 6 of the 1999 Regulations; and that accordingly the work done in a relevant reference period should be calculated in accordance with regulation 27, which provides that it should be the total of the number of hours spent by him during the pay reference period in carrying out the contractual duties required of him under his contract. It was the Applicant's case that he was carrying out such duties on a 24-hour basis, including during the eight-month period at the end during which there were no placements. The Recorder rejected that submission. He held that the Applicant was only performing such

duties during such periods as a child was actually placed with him, and – crucially – that during those periods he could not be said to have been performing contractual duties 24 hours a day. On the evidence before him he felt able only to make a finding about the hours actually worked by reference to an average for the period. The Recorder summarised the basis of his decision as follows:

“In my judgment a claimant worked when he was actively providing care services and not when he was simply available to receive placements, not when he was sleeping and not when he was not engaged in care provision and related tasks during the day even though he had children placed with him at that time”.

He found that on that basis the Applicant was working an average of 15 hours per day. When the figures had been calculated in accordance with that approach the total amount of payments came out at just over £34,000, inclusive of interest.

7. Originally, the Applicant advanced five grounds of appeal against the Recorder’s reasoning and conclusion, but Mr McGrath in his advocate’s statement and oral submissions only seeks to pursue one of those grounds, though in fact he breaks it down to more than one part.
8. First, he addressed the period during which the Applicant was undertaking placements – that is, up to January 2012. As to that, he takes a preliminary point to the effect that the Recorder was wrong to treat the Applicant as doing unmeasured work and that he should have been held to be doing salaried hours work within the meaning of regulation 24, and in accordance therefore with the calculation required at regulation 21, in which case the “hours worked” for the purpose of the relevant calculation would have been “the basic number of hours in a year in respect of which a worker is entitled under his contract to his annual salary”. He refers to

condition 3.3 of the Agreement which says that “the carer(s) will be expected to provide a placement for a young person on a 52-week, 24 hour per day basis but will be entitled to rest periods as outlined later in the agreement”. He also refers to condition 8.1, which provides, under the heading “Fee”, that “the carer(s) will receive a weekly fee of £420.21 paid on a 52 week per year basis during the period of placement of a young person and during the period of notice”. He says that the basic number of hours for the purpose of regulation 21 is the 24-hour period referred to in condition 3.3. However, he says in the alternative that even if this was unmeasured work the Recorder should have found that the Applicant carried out his contractual duties 24 hours per day, relying again on the same provision, that is to say condition 3.3.

9. Strictly, the point about the work being salaried hours work is not open to the Applicant because, as I have said, it was common ground below that this was an unmeasured hours case. However, I appreciate that the Applicant was unrepresented and these are highly technical provisions. So, I think I should say that in any event I do not believe that this was a salaried hours case. The Recorder dealt with this point briefly by saying “It is not salaried hours work because he was not paid by reference to an ascertainable basic number of hours in a year”. I agree with that, but the point has perhaps to be slightly fleshed out. Regulation 4 defines salaried hours work. At paragraph 1(a) it is said that it means work “done under a contract to do salaried hours work”. Paragraph 2 says

“A contract to do salaried hours work is a contract under which a worker

- (a) is entitled to be paid for an ascertainable basic number of hours in a year (referred to in this regulation as “basic hours”) and
- (b) is entitled in respect of hours that consist of or include the basic hours to be paid an annual salary (i) by equal weekly or monthly instalments of wages or (ii) by monthly instalments of wages that

vary but have the result that the worker is entitled to be paid an equal amount in each quarter regardless of the number of hours in respect of which the worker is entitled to the annual salary that are actually worked by him if any, in any particular week or month”.

This case plainly does not fall within that definition, both because the contract did not provide for the Applicant to be paid an annual salary and because it did not provide for him to be paid for an ascertainable number of hours. The underlying point is the same in both, namely that he was only entitled to be paid when taking placements and there was no contractual obligation to offer such placements. There may be a further point about whether the figure of £421.20 being expressed in weekly terms could be described as an annual salary at all, but that is not the essence of the matter. I therefore do not believe that even if the applicant were entitled now to take this point, it would have any realistic prospect of success.

10. That leaves Mr McGrath’s fallback point based on regulation 27. The question is whether the Recorder was at least arguably wrong not to treat the contract as requiring the Applicant to carry out contractual duties every minute of the day. I do not believe that that is arguable. No doubt, as I have acknowledged, he had quasi-parental responsibilities on a 24-hour basis, and nothing I say should be taken as meaning that I do not recognise that that is an onerous responsibility and that foster carers undertake a very valuable service for what many might think to be a modest return. But it remains necessary to analyse the position in the terms of the Regulations, and I believe the Recorder was essentially right to say that there were substantial periods of the day when the Applicant could not reasonably be said to have been providing contractual duties – essentially, though not only, when he was asleep and when the children were at school or otherwise involved in a way which did not require any active care or supervision by him.

11. Mr McGrath understandably pressed me with the cases about care home managers and people whose job consist of “sleeping in” in a care home so as to be ready to provide help to the residents if a problem arises. The case on which he primarily relied was *McCartney*. That is, strictly speaking, not directly applicable because it is a salaried hours case. But, more generally, I freely accept that there are classes of case in which someone is held to be working even when asleep. But there are also cases where the opposite has been held, for example *Wray v Lees* and *Walton*. In such cases the worker is held only to have been working – or, in the language of regulation 27 where it applies, carrying out contractual duties – when in a particular case they have actually to perform some specific caring duties. It is clear from the recent analysis of all these cases by the EAT in the *Focus* case that some nice distinctions may have to be made, and I have thought carefully about whether it is indeed possible to say in this case that there is no realistic prospect of success in a case where so much may depend on the detail. But there are two answers to that. The first is that the primary judge of the position must be the Recorder, and I can see no arguable error of law in his assessment. But, further, this is a case significantly different from any of the cases where “sleepers in” they have been held to be working while asleep. This is a case where the Applicant was living in what was in practice his own home (he had another home but he did not use it when performing his caring functions) and where the result, if he were right, would be that he would be held to be performing contractual duties 24 hours a day, 7 days a week, subject only to the limited respite arrangements. I do not believe that there is any realistic prospect that this court would disagree with the Recorder that that was not a realistic analysis of the nature of the arrangement in this case.
12. I can deal much more briefly with the second period. During that period it is frankly impossible to see what contractual duties the Applicant could be said to have been carrying

out. It is true that at least on one reading of the agreement, he was obliged to accept a placement if offered and to be “available” to do so. But that is not in itself the performance of any contractual duty and I do not see any basis on which the claim could be brought within regulation 27.

13. For those reasons, I do not believe the appeal has any realistic prospect of success. In those circumstances the question of an extension of time does not arise. It remains for me to express my gratitude to Mr McGrath for taking me on this case pro bono and to the assistance which he has given me.

**ORDER:** Application refused.