EMPLOYMENT TRIBUNALS

Claimant: Mrs R Summerfield

Respondent: Milcare Ltd

Heard at: Manchester (remotely, by CVP) **On:** 28th February 2022 and 14th March 2022

Before: Employment Judge L Cowen

REPRESENTATION:

Claimant: In person
Respondent: Miss Asch-D'Souza (Legal Advocate)

JUDGMENT

(1) The respondent has made an unlawful deduction from the claimant's wages and is ordered to pay the claimant the gross sum of £100 in respect of the sum unlawfully deducted.

(2) The claimant's application for a preparation time order is dismissed.

REASONS

1. This hearing took place through CVP on 28th February 2022 and 14th March 2022. The claimant attended through CVP and was supported by her sister. The respondent attended through CVP and was represented by Miss Asch-D'Souza.

2. Evidence was given by the claimant and by Mr Daniel Mills (Director of the respondent) on behalf of the respondent. During the hearing reference was made to documents contained in an agreed bundle, as well as a screenshot showing relevant correspondence which Mr Mills produced during his evidence.

3. Oral judgment was given at the conclusion of the hearing on 14th March 2022. On 15th March 2022 the claimant requested written reasons for this judgment. This document sets out the written reasons for my judgment.

The issues

4. The claimant claims for unlawful deduction from wages. There are four areas in respect of which wages are claimed. These are:

i) payment for online training done prior to 1st July 2021;

ii) payment for online training in relation to the care of clients with Parkinson's disease ("PD") completed on 5th July 2021;

iii) payment for hours worked on 7th July 2021 and 9th July 2021;

iv) payment for hours not worked but which were anticipated to be worked on 5th July 2021.

5. The claimant also claims for preparation time for work undertaken to prepare for the hearing of her claim.

6. It is accepted that the claim was brought in time.

7. No counterclaim was brought in this case and no set-off was claimed. The Tribunal has therefore not considered whether the respondent is entitled to recover any of the costs that they incurred in paying the course fees for the claimant's online training.

8. At the hearing, the following issues were identified for the Tribunal to determine:

i. Was the claimant a worker?

ii. When did the claimant's employment start?

iii. Were any wages owed? If so, what wages were payable?

iv. What wages were paid?

v. Has there been any deduction from wages?

vi. If so, were any deductions authorised or exempt?

The Findings of Fact Relevant to the Issues

9. The respondent provides care services to those needing assistance in their homes. The claimant was employed by the respondent. Her employment commenced on 1st July 2021.

10. The claimant had applied for a job with the respondent and Mr Mills telephoned her to arrange an interview. Although she did not have experience in the care sector, Mr Mills was impressed by her attitude and readiness to learn about a new area of work. They discussed whether she would be able to work for his company, and he explained that in order to be eligible to work for the respondent, she would need to undertake relevant training.

Pre-employment training

11. The parties agreed that this training was to be done prior to the claimant commencing her employment with the respondent. The claimant undertook this training and completed the required courses between 24th and 27th June 2021. I accept the claimant's evidence that she spent 20.5 hours completing these courses.

12. The parties did not agree about who was to pay the fees for the online training courses. In the event, as no counterclaim or claim for set-off was pursued, it was

agreed that the Tribunal need make no finding of fact in relation to who was to bear the costs of the training course fees. I have therefore made no finding of fact as to this issue.

13. The parties also did not agree regarding whether the claimant should receive wages for the hours she spent undertaking this training.

14. The parties did agree that the claimant undertook this training prior to commencing her employment. The respondent's evidence was that this training was to be done prior to the claimant being given an offer of employment. The claimant's evidence was that she understood that this training was something she had to do in order to be eligible to commence employment with the respondent. The claimant was willing to complete the necessary training to enhance her prospects of employment with the respondent, and to render her eligible to undertake a care role. Her dedication to undertaking such training to enable her to perform her role with the appropriate skill and expertise was impressive.

Pre-employment shadowing

15. The claimant also undertook a day of shadowing on 23rd June 2021. A timesheet was produced showing the hours she spent shadowing on this day. The timesheet records that she spent 4.5 hours shadowing on 23rd June 2021. The claimant agrees that she worked for 4.5 hours on this day.

Further training required by the respondent

16. The claimant was also asked to undertake further online training on 29th June 2021. She was asked to undertake this training in an email sent by a member of the respondent HR team. In that email, the claimant was congratulated on the training that she had done so far, and asked to complete one more training module in relation to the care of clients with PD.

17. The email forwarded information about the online course that appears to have been sent to other staff members. In this part of the email, it was stated of the course: "this will form part of your annual "mandatory training". The claimant viewed this training as a requirement of her employment.

18. Mr Mills explained in his evidence that at the time the correspondence was sent to the claimant, the respondent was developing their use of this course, the claimant may have been one of the first members of staff to undertake it. He did not think it formed part of the staff mandatory training at this time, but acknowledged what the email correspondence said regarding it being part of the mandatory training. He explained that the respondent paid employees for the time spent completing mandatory training.

19. I have also considered the contract of employment. At clause 5, it is stated that "throughout your time at Milcare we will support you with your mandatory training, following your first year (you will be responsible for training costs on your inception)". I consider the reference to "support" to be somewhat ambiguous.

20. Given the terms used in the email of 29th June 2021, I have concluded that the training in relation to PD was either mandatory training, or was presented as such to the claimant. Regarding whether time spent on such mandatory training would be paid by the respondent, having regard to Mr Mills' evidence that staff would

be paid for time spent completing mandatory training, I have concluded that the claimant was entitled to be paid for the training she completed during her employment.

21. The claimant states in her statement that she completed the training on 6th July 2021, however she clarified in her evidence that she completed it on 5th July 2021 and this accords with the certificate that has been produced that shows that the training was completed. I found the claimant to be a genuine and credible witness, and I am satisfied that the training was completed on 5th July 2021. The certificate confirms that the course carried a minimum requirement of 10 hours minimum learning time. Mr Mills did not dispute the time the claimant spent completing this training. I have assessed the time spent on completing this training as 10 hours.

Hours worked on 5th July 2021

22. The parties agree that the claimant had been due to undertake her first shift on 5th July 2021. She was to accompany another member of staff during this shift. The parties agree that she was not able to work that day due to the person she was due to accompany being ill, and no-one else being available to accompany the claimant.

23. The contract of employment contains provisions relevant to the issue of whether an employee's hours of work can be varied. At clause 7, which is headed "hours of work", the contract states that "there may be times when we need to vary [your hours of work]". Mr Mills' evidence was that had the claimant continued in her employment, she would have been able to make up the hours missed on 5th July 2021 by working other days that week. Having regard to the contract, which envisages some flexibility in working arrangements, I have found that the respondent was entitled to vary working arrangements, and that the need to do so arose in this case from the unavoidable illness the colleague with whom the claimant had been due to work.

Hours worked on 7th July 2021

24. The claimant started work on 7th July 2021. Her evidence was that she completed 4.5 hours of work that day. The timesheet produced for the 7th July 2021 shows that she had 4 visits scheduled that day. The timesheet records that her first visit started at 7.10am and her last visit concluded at 11.40am.

25. For her first visit, the claimant accompanied another member of staff to see the client. This visit took place between 7.10am and 8.10am. The timesheet shows that her second visit was due to commence at 8.15am, and to finish at 9.30am. The claimant was to be unaccompanied by another staff member during this visit. However, the claimant was not able to attend that visit due to unexpected problems arising with her car which meant that she was unable to travel to her scheduled appointment.

26. I accept the claimant's evidence that she spent time arranging for someone to pick up her car, spoke to Mr Mills, spoke to another member of staff who was able to pick her up, and went back to the first client's house to spend time with him while she waited to be collected by the other staff member. I accept that she used the time available to her to make arrangements to allow her to continue working, and also that she provided company to her first client.

27. The timesheet shows that the claimant's third visit was due to start at 9.35am and finish at 10:35am. She was able to complete this visit. The timesheet shows that her final visit was to commence at 10.40am and finish at 11.40am. She was able to complete this visit.

28. The parties did not agree regarding how time spent during the working day, but not specifically engaged on a client visit, was to be treated in terms of payment. The claimant's assessment of her hours worked on 7th July 2021 includes travel time. The claimant also includes time spent between her first visit of that day, and her third visit of that day, which she spent as described above.

29. In relation to travel time, the claimant's evidence was that her understanding was that travel time would be paid at the hourly rate of £10 per hour. The respondent's evidence was that travel time was not payable. Mr Mills explained that the rate of pay had been set at a rate to reflect that travel time was not included as hours worked.

30. There is no specific mention of travel time in the contract of employment. At clause 4, which is headed "where you will work", the contract states "your work base will be community based as client's houses". There is no mention of travel time in the staff handbook that has bene produced. There is no evidence that travel time was described as being payable in any discussions around the contract or the terms of employment. Having considered the evidence before me, I have concluded that travel time is not work in respect of which the contractual wage of £10 per hour is payable. I accept Mr Mills' evidence that the rate of pay reflected that travel time was not payable.

31. I have also found that the time spent by the claimant between the end of her 1st visit and the start of her 3rd visit was not time spent working. I accept her account regarding how she spent this time, but do not consider these activities to be work giving rise to an entitlement to wages, as they stem from the car trouble she unfortunately experienced, and do not entail the performance of the work set out in the contract of employment.

32. I have therefore found that the claimant completed 3 hours of work in respect of which wages of £10 per hour are payable on 7th July 2021.

Hours worked on 9th July 2021

33. The claimant's next day of work was the 9th July 2021. She had six visits scheduled that day. The claimant's evidence was that her first visit began at 7am, and that she was accompanied by another member of staff.

34. The timesheet produced for 9th July 2021 records that her first visit began at 7.20am. In her evidence, the claimant explained that her breakdown of her day included travel time, so I have treated her first visit as commencing at 7.20am, acknowledging that there would have been time spent from 7am travelling to that appointment. According to the timesheet, the visit finished at 8.20am. The claimant did not suggest any other time for the end of the visit.

35. The claimant was unaccompanied during her second visit. Her evidence does not give a specific time for the start of that visit, but the timesheet indicates that that visit started at 8.30am. The timesheet records that the visit ended at 9.30am. In her

evidence, the claimant explained that she was late leaving, but she does not state by how much.

36. The claimant experienced delay when travelling to her third appointment. I do not rehearse the reasons for this delay here, but wish to emphasise that these issues were not the fault of the claimant. Further delay was caused by issues relating to a neighbour's reaction to where the claimant had parked her car, and issues with the GPS system she used to find the location of her next appointment.

37. Although she arrived late to this appointment, but was able to catch up as this visit was scheduled to take just over three hours. The timesheet records that the visit started at 09:45am and ended at 12:55pm. This does not appear to reflect a late start. I will not go into detail regarding what happened during the visit, but I accept the claimant's evidence that this visit went beyond the allocated time.

38. The claimant then took a half hour lunch break, a shorter break than the hour which had been allocated, in order to make up time. The timesheet records that the claimant's 4th visit began at 14:05 and finished at 15:05. The claimant's evidence does not indicate that she ran over time with this visit.

39. The timesheet records that the claimant's 5th visit began at 15:25 and finished at 16:25. The claimant's evidence, which I accept, is that she was half an hour behind upon leaving this visit.

40. The timesheet records that the claimant's 6th visit began at 16:40 and finished at 17:40. The claimant's evidence was that she arrived an hour late for this appointment. I accept her evidence on this matter. The timesheet does not appear to reflect this late start.

41. The claimant's evidence was that she left the client later than expected (though she cannot say precisely when she left the client). She recalls that she arrived home at approximately 19.00.

42. As set out above, I have concluded that time spent travelling is not work in respect of which the contractual wage of £10 per hour is payable. The claimant's evidence was that her calculation of her hours worked differed from the timesheet produced in that her calculation included travel time.

43. The claimant also appears to have spent time in excess of her scheduled time with some of her clients. I asked whether this would normally be paid by the respondent. Mr Mills was clear that the respondent would pay for time spent with a client beyond the allocated visit time, and that to claim this, staff had to notify the person sending them their timesheet that they had worked time beyond that which was shown on the timesheet.

44. There is no evidence that the claimant did communicate this to the respondent. The claimant did explain the hours that she had worked in emails of 13th July 2021 and 11th August 2021, but these hours do not provide a breakdown of the time spent.

45. I therefore concluded that this information provided was not detailed enough to lead to an amendment of the timesheets that would be calculated. It also appears that the timesheets produced do not reflect the late starts to the client visits that the claimant has described, so it may be that the overall time spent with the client is

reflected in the time recorded on the timesheet. This would be consistent with the claimant's evidence that the difference between her breakdown of the hours worked, and the respondent's timesheets, was that her breakdown included travel time.

46. I have therefore found that the claimant completed eight hours and ten minutes of work in respect of which the contractual wage of £10 per hour was payable on 9th July 2021.

The termination of the claimant's employment and wages paid

47. The claimant was then unable to work on the 10th July due to illness. I accept that she was unhappy about how the respondent dealt with her illness. The claimant also did not believe that the rota prepared for the following week reflected the time commitment she had indicated she could make at her interview. After reflecting, the claimant decided that she did not wish to continue to work for the respondent. On 11th July 2021, she notified the respondent that she wished to terminate her employment.

48. There then followed correspondence regarding payment of the claimant's wages, and whether the claimant was liable for the cost of her initial training.

49. On 18th February 2022, the respondent paid the claimant £156.57. This reflects the following hours, which are drawn from the timesheets prepared by the respondent:

i. 23rd June 2021 (shadowing): 4 hours 30 minutes

ii. 7th July 2021: 3 hours

iii. 9th July 2021: 8 hours 10 minutes

The law

50. The claimant's claim is a claim for unlawful deduction from wages. Section 13 (1) of the Employment Rights Act 1996 ("ERA") provides:

> "(1) An employer shall not make a deduction from wages of a worker employed by him unless—
>
> (a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or
>
> (b) the worker has previously signified in writing his agreement or consent to the making of the deduction.

51. The term "worker" is defined in section 230 (3) of the ERA as "an individual who has entered into or works under (or, where the employment has ceased, worked under) - (a) a contract of employment, or (b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual; and any reference to a worker's contract shall be construed accordingly".

52. The term "wages" is defined in section 27(1) of the ERA as 'any sums payable to the worker in connection with his employment'.

53. The requirements of the National Minimum Wage Act 1998 ("NMWA") also apply to this claim. Section 1 of the NMWA provides that:

"a person who qualifies for the national minimum wage shall be remunerated by his employer in respect of his work in any pay reference period at a rate which is not less than the national minimum wage.

(2) A person qualifies for the national minimum wage if he is an individual who—

(a) is a worker;

(b) is working, or ordinarily works, in the United Kingdom under his contract; and

(c) has ceased to be of compulsory school age".

54. Whether travel time constitutes hours worked for the purposes of the NMWA is set out in regulation 34 of the National Minimum Wage Regulations 2015 ("NMWR"). Regulation 34 provides that:

"(1) The hours when a worker is travelling for the purposes of time work, where the worker would otherwise be working, are treated as hours of time work unless the travelling is between—
(a) the worker's home, or a place where the worker is temporarily residing other than for the purposes of working, and
(b) a place of work or a place where an assignment is carried out.
(2) In paragraph (1), hours treated as hours when the worker would *"otherwise be working"* include—
(a) hours when the worker is travelling for the purpose of carrying out assignments to be carried out at different places between which the worker is obliged to travel, and which are not places occupied by the employer;
(b) hours when the worker is travelling where it is uncertain whether the worker would otherwise be working because the worker's hours of work vary either as to their length or in respect of the time at which they are performed"

55. The national minimum wage at the time the claimant was working for the respondent was £8.91 per hour.

The parties' submissions

56. The claimant submitted that she performed everything that was asked of her, both prior to, and during, her employment. She submitted that what she had been told in terms of what she would be paid for changed during the course of her involvement with the respondent. She submitted that she was entitled to be paid for the work she had done.

57. The respondent submitted that the online training completed in June 2021 was completed before any employment started. The respondent submitted that no wages were owed for the work scheduled, but not undertaken, on 5th July 2021. In relation to the hours worked on 7th July and 9th July 2021, the respondent submitted that the respondent's evidence was more reliable on this issue, as it relied on the rotas that had been produced. The respondent submitted that the courses the

claimant completed, both before and during her employment, were not payable by the respondent and were not to be classed as working time.

The Tribunal's Conclusions

Was the claimant a worker? When did the claimant's employment start?

58. From 1 July 2021 the claimant was employed under a contract of employment with the respondent. As regards issue (i) above, she was therefore a worker and an employee from 1st July 2021.

Were any wages owed? If so, what wages were payable?

Pre-employment training

59. Regarding the training that was undertaken by the claimant prior to her commencing her employment, I have considered the case of **Ms I Opalkova v Acquire Care Ltd [2021] 5 WLUK 579** in which one of the matters considered by the EAT was whether induction training was something in respect of which an employee was entitled to be paid the national minimum wage. In his judgment, HHJ Auerbach concluded that when considering whether such payment was due, regard should be had to whether there was a contract of employment in existence at the time the relevant training was undertaken (at para [35]). I therefore considered whether there was any contact of employment in existence at the time the claimant completed her training in June 2021.

60. In my assessment, there was no contract in existence at this time. The parties were both clear that this training was to be done prior to the contract being entered into, and in order to render the claimant eligible to enter a contract of employment with the respondent. I therefore conclude that at the time the training was undertaken, the claimant was not a worker for the purposes of s.230 of the ERA, and that, applying section 27 (1) of the ERA, the time spent training prior to entering the contract of employment was not work in respect of which wages are payable.

Time spent shadowing on 23rd June 2021

61. Regarding the time spent shadowing on 23rd June 2021, the claimant and respondent agree on the number of hours spent working, and payment has been made in respect of these hours. There is therefore no unlawful deduction of wages claimed in relation to this work, and I make no finding in relation to it.

Further training required by the respondent

62. In respect of the training in relation to caring for clients with Parkinson's Disease that was undertaken after she commenced her employment, and was so a "worker" within section 230 of the ERA, I have concluded that that training is work that does result in an entitlement to wages. It was either part of mandatory training, or described in terms as to give impression was part of mandatory training. It was clearly within the scope of her employment. Mandatory training is something for which the respondent's employees are paid.

63. I have therefore concluded that, applying s. 34 of the ERA, the claimant is entitled to be paid wages for the time spent undertaking this training, which I have assessed to be ten hours.

The hours worked on 7th July 2021 and 9th July 2021

64. Turning to the payment for the hours worked on 7th July 2021 and 9th July 2021, I have concluded that having regard to the contract, and the lack of any agreement regarding payment of travel time, travel time is not to be treated as paid work to which the contractual rate of £10 per hour applies.

65. I have also determined that the claimant is not entitled to wages for the cancelled visit due to her car problems on 7th July 2021 as she did not undertake work at this time.

66. I have adopted the times shown on the timesheet as reflecting the time spent with clients for the reasons described above. The claimant is therefore entitled to be paid £10 per hour for the 15 hours and 40 minutes worked. As she has already been paid £156.67 on 18th February 2022, there has been no unlawful deduction from wages in respect of these hours worked.

67. I have also considered the requirements of the NMWA, and regulation 34 of the NMWR when considering whether not paying wages in respect of travel time means that the claimant has been paid less than the minimum wage for the time she spent travelling as part of her employment.

68. I have assessed this by considering the total time between the start of the first visit of each day worked and the end of the last visit of the day (applying regulation 34 (1), which excludes from the hours spent travelling time spent travelling between the worker's home and the place of work where an assignment is carried out). I have not treated the time between the end of the first visit and the start of the 3rd visit on 7th July 2021 as work, for the reasons described above.

69. For this calculation, it is necessary to consider when the claimant finished the visit with her last client of the day on 9th July 2021. Although I accept the claimant's evidence that she left this visit late, and arrived home around 7pm, as the time when the visit ended cannot conclusively be determined from the evidence I have considered, I have adopted the time shown on the timesheet of 17.40 as the time when she left her last client. This also reflects my finding above that errors in the timesheet do fall to be corrected by the employee.

70. Adopting the timings from the timesheet produced, and factoring in the claimant's allocated one hour lunchbreak, I conclude that, for the purposes of the NMW Regs, the claimant worked a total of 4 hrs and 55 minutes on 23rd June, 3 hours and 5 minutes on 7th July and 9 hours and 20 minutes on 9th July.

71. The claimant was paid £156.57 on 18th February 2022. This gives an hourly rate of approximately £9.05. This was not below the national minimum wage of £8.91 per hour, and so no further sum falls to be paid to comply with the requirements of the NMWA.

Hours scheduled on 5th July 2021

72. Finally, turning to the payment for the hours not worked but which were expected to be worked on 5 July 2021, I have determined that no wages are payable for this part of the claim as no work was in fact undertaken.

Has there been any deduction from wages?

73. The claimant has not been paid for the 10 hours she spent undertaking training in relation to PD during her employment. This deduction was not authorised or exempt. There has therefore been an unlawful deduction from wages in respect of this work.

The claimant's application for a preparation time order

74. The claimant has also claimed a sum reflecting the time she spent preparing her claim. The circumstances in which a Tribunal may make a preparation time order are set out in Rule 76 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013. The circumstances in which an order may be made are very limited, and do not, in my judgment, apply in this case. I have not found that the respondent acted vexatiously, abusively, disruptively or otherwise unreasonably in their conduct of the case, and I do not conclude that the response to the claim had no reasonable prospects of success. I have therefore made no preparation time order.

Employment Judge L Cowen

Date: 19 April 2022

JUDGMENT AND REASONS SENT TO THE PARTIES ON

Date: 22 April 2022

FOR THE TRIBUNAL OFFICE