Appeal No.

UKEAT/0143/16/DM

UKEAT/0244/16/DM

UKEAT/0290/16/DM

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal

On 7 & 8 March 2017

Judgment handed down on 21 April 2017

Before

THE HONOURABLE MRS JUSTICE SIMLER DBE (PRESIDENT)

(SITTING ALONE)

UKEAT/0143/16/DM

FOCUS CARE AGENCY LTD APPELLANT

MR B ROBERTS RESPONDENT

UKEAT/0244/16/DM

(1) MRS J FRUDD APPELLANTS

(2) MR I FRUDD

THE PARTINGTON GROUP LTD RESPONDENT

UKEAT/0290/16/DM

ROYAL MENCAP SOCIETY APPELLANT

MRS C TOMLINSON-BLAKE RESPONDENT

SUMMARY

NATIONAL MINIMUM WAGE

The appeals consider the proper approach to the question whether employees who sleep-in in order to carry out duties if required engage in "time work" for the full duration of the night shift or whether they are only entitled to the national minimum wage when they are awake and carrying out relevant duties.

A multifactorial evaluation is required. No single factor is determinative and the relevance and weight of particular factors will vary with and depend on the context and circumstances of the particular case.

THE HONOURABLE MRS JUSTICE SIMLER DBE (PRESIDENT)

Introduction

1. These three appeals have been heard together because they raise the same broad issue. It concerns the National Minimum Wage Act 1998 ("the NMW Act") and the Regulations made thereunder, the National Minimum Wage Regulations 1999 and 2015 ("the 1999 or 2015 Regulations"); and in particular, the question of the proper approach under the Regulations to time spent asleep during a "sleep-in" shift. The question at the heart of the appeals is whether employees who sleep-in in order to carry out duties if required, engage in 'time work' for the full duration of the sleep-in shift or whether they are working for national minimum wage payment purposes only when they are awake to carry out any relevant duties. The point is particularly significant in the care sector where sleep-in duties commonly arise. The desire for certainty in an area that carries penalties and potential criminal sanctions is also particularly acute in that sector.

2. For convenience I refer to the parties as they were before the Employment Tribunal. The facts of the individual cases are not material for deciding the common issues of principle. However, in short summary:

(a) In Royal Mencap Society v Mrs Tomlinson-Blake Employment Judge Burton held (in a judgment with reasons promulgated on 22 August 2016) applying Whittlestone, Esparon and Shannon, that the whole period of the Claimant's sleep-in shifts at the Respondent's premises constitute time work within the meaning of Regulation 30 of the 2015 Regulations irrespective of whether she is sleeping or not. The Respondent challenges that conclusion as in error of law.

(b) In Mr and Mrs Frudd v the Partington Group Limited Employment Judge Sherratt (in a judgment with reasons promulgated on 1 December 2015) dismissed claims for arrears of pay under the 2015 Regulations on the basis that Mr and Mrs Frudd's case fell on the Shannon side of the line and the exception in Regulation 32 applies. They challenge the decision as inadequately reasoned and in error of law.

(c) In Focus Care Agency Ltd v Mr Brian Roberts Employment Judge Adamson (in a judgment with reasons promulgated on 13 January 2016) upheld claims of unpaid wages based on the 2015 Regulations (and their predecessor Regulations) and a written contract. The Respondent appeals, challenging the finding based on contract in addition to the challenge to the findings under the Regulations.

3. I have been greatly assisted by the written and oral submissions of all advocates involved in this appeal. Mr Reade QC and Mr Jones QC took on the main burden of arguing the issues of principle and I am particularly grateful to them.

4. In the course of argument I was referred to many authorities including the following: British Nursing Association v Inland Revenue [2003] ICR 19 (CA); Walton v Independent Living Organisation [2003] ICR 688 (CA); Scottbridge Construction Ltd v Wright [2003] IRLR 21 (Inner House of the Court of Session); Burrow Down Support Services Ltd v Rossiter [2008] ICR 1172 (EAT); South Manchester Society Ltd v Abbeyfield Hopkins [2011] ICR 254 (EAT); Whittlestone v BJP Home Support Ltd [2014] ICR 275 (EAT); Wray v J W Lees & Co (Brewers) Ltd [2012] ICR 43 (EAT); Esparon (t/a Middle West Residential Care Home) v Slavikoska [2014] ICR 1047 (EAT); Shannon v Rampersad (t/a Clifton House Residential Home) [2015] IRLR 982 (EAT); and Governing Body of Binfield Church of England Primary School v Roll [2016] IRLR 670 (EAT).

The legislative provisions

5. The NMW Act contains the legislative framework for the national minimum wage. Section 1 (a) provides:

"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."

6. There is no dispute that all Claimants in these appeals qualify. The word 'work' is not defined as such, but for the purposes of calculation an employee's hours worked are categorised by the regulations as either salaried hours work, time work, output work or unmeasured work.

7. Section 2 provides that the Secretary of State may make regulations, the scope of which is set out in the subsections that follow. Sections 5-8 provide for the establishment of the Low Pay Commission to prepare a report to which I shall return below.

8. Regulations made pursuant to s.2 of the NMW Act make provision for determining the hourly rate of remuneration in any pay reference period. As originally enacted, these were the National Minimum Wage Regulations 1999 (the 1999 Regulations) and they were amended in the years that followed. The current Regulations are the 2015 Regulations which came into force on 6 April 2015. They revoked the 1999 Regulations, as amended. The 2015 Regulations were not intended to make substantive changes to an employer's liability under the 1999 Regulations (as amended) although the structure changed. They are not relevantly different to the 1999 Regulations and all parties to these appeals agree that I need consider only the 2015 Regulations in those circumstances.

9. The structure of the 2015 Regulations is as follows. Part 2 defines rates of pay for workers who qualify for the national minimum wage. Part 3 deals with the calculation of the hourly rate to determine whether the national minimum wage has been paid. Regulation 7 provides:

"A worker is to be treated as remunerated by the employer in a pay reference period at the hourly rate determined by the calculation –

RH

where-

R is the remuneration in the pay reference period determined in accordance with Part 4;

H is the hours of work in the pay reference period determined in accordance with Part 5."

In other words, the total remuneration in the relevant pay reference period is divided by the number of hours worked, and if this is less than the national minimum wage, any shortfall must then be made good.

10. Part 4 defines remuneration that does or does not count for national minimum wage purposes. The critical part for the purposes of these appeals is Part 5 which addresses the different types of work for national minimum wage purposes. Regulation 17 provides:

"In regulation 7 (calculation to determine whether the national minimum wage has been paid), the hours of work in the pay reference period are the hours worked or treated as worked by the worker in the pay reference period as determined -

(a) for salaried hours work, in accordance with Chapter 2;

(b) for time work, in accordance with Chapter 3;

(c) for output work, in accordance with Chapter 4;

(d) for unmeasured work, in accordance with Chapter 5."

Accordingly there are four types of work. These are not dependent on the duties carried out by the worker but depend on the way in which the worker's pay is calculated.

11. The starting point is to ask whether the work is 'salaried hours work' within Chapter 2, Regulation 21. Work done under a worker's contract will be 'salaried hours work' if four specified conditions are met. It is unnecessary to set these out in full since none of the disputed hours in these appeals involve 'salaried hours work'. Nevertheless, I note that the second condition (Regulation 21(3)) requires that the worker is entitled under their contract to be paid salary for a number of hours in a year that are specified or ascertained in accordance with their contract, and this is referred to as 'their basic hours'.

12. Regulations 26 and 27 deal with additional hours worked by a worker outside his or her basic hours and whether they should count in the calculation year. This includes (see Regulation 26(1)(d)) hours treated as worked in accordance with Regulation 27 to the extent that there is no separate element of pay for those hours beyond annual salary (with or without a performance bonus). Those hours include (pursuant to Regulation 27(1)(b)):

"hours a worker is available at or near a place of work for the purposes of working, unless the worker is at home;…"

But Regulation 27(2) provides:

In paragraph (1) (b), hours when a worker is available only includes hours when the worker is awake for the purposes of working, even if a worker is required to sleep at or near a place of work and the employer provides suitable facilities for sleeping.

13. If the work is not 'salaried hours work' the next question is whether it is 'time work'. This is central to these appeals. Time work is defined by Chapter 3, Regulation 30 (which replaced Regulation 3 of the 1999 Regulations) as follows:

"Time work is work, other than salaried hours work, in respect of which a worker is entitled under their contract to be paid –

(a) by reference to the time worked by the worker;

(b) by reference to a measure of output in a period of time where the worker is required to work for the whole of that period; or

(c) for work that would fall within sub-paragraph (b) but for the worker having an entitlement to be paid by reference to the period of time alone when the output does not exceed a particular level."

Accordingly, time work is work that is paid for under a worker's contract by reference to set or varying hours or periods of time but which is not salaried. It also includes work paid for by reference to a measure of output which is produced during set hours (for example pieceworkers required to work producing certain items during a set shift). If payment is made by reference to something other than time worked or output in a period of time the whole of which is worked (and subject to Regulation 30(c) which is not material for these purposes), then it is not time work.

14. Once the type of work has been identified, the hours that count towards the national minimum wage calculation must be determined. For time work purposes, Regulation 31 provides that the "hours of time work in a pay reference period are the total number of hours of time work worked by the worker or treated… as hours of time work in that period." Regulation 30 governs hours when the worker is working. Regulations 32 to 35 deal with hours that are treated as hours of time work in the pay reference period.

15. Regulation 32 (which replaced Regulation 15(1) of the 1999 Regulations) treats as time work time when the worker "is available and required to be available" at or near his place of work for the purposes of working. However such time is not counted if it is time during which the worker is entitled to be at home at or near his place of work; or permitted to sleep at or near the place of work and suitable facilities for sleeping are provided. Regulation 32 reads as follows:

"Time work where worker is available at or near a place of work

(1) Time work includes hours when a worker is available, and required to be available, at or near a place of work for the purposes of working unless the worker is at home.

(2) In paragraph (1), hours when a worker is "available" only includes hours when the worker is awake for the purposes of working, even if a worker by arrangement sleeps at or near a place of work and the employer provides suitable facilities for sleeping."

16. If work is neither salaried nor time work (and is not output work within the meaning of Regulation 36) there is also the concept of 'unmeasured work' in Chapter 5, Regulation 44. This provides:

"The meaning of unmeasured work

Unmeasured work is any other work that is not time work, salaried hours work or output work."

Accordingly, a period of working cannot be unmeasured if it is 'time work'. But if it is unmeasured, Regulation 45 provides for determining the number of hours of unmeasured work in a pay reference period and allows this to be pre-determined by a written daily average agreement specifying the average daily number of hours the worker is likely to spend working (provided this is a reasonable pre-estimate): see Regulation 45 (b) and Regulations 49 and 50. The provisions dealing with unmeasured work do not draw the distinction between periods of working and periods of being available for work that is drawn for salaried and time work.

The proper construction of Regulations 30 and 32

17. As already indicated, s.5 of the NMW Act required the Secretary of State to refer certain matters to the Low Pay Commission before making regulations, including coverage and the initial level of the national minimum wage. The Secretary of State was required to respond to recommendations made by the Commission, and report any decision to Parliament not to implement the Commission's recommendations. In the event, all recommendations made by the First Report of the Low Pay Commission were accepted (Hansard 1997/98, 18 June 1998, page 507).

18. Mr Reade QC invites consideration of the recommendations made in the First Report of the Low Pay Commission which were implemented by the 1999 Regulations, as an aid to construction of the 2015 Regulations, relying on the exception in Pepper v Hart [1993] ICR 291 (permitting, in certain limited circumstances, reference to Parliamentary material solely for the purpose of ascertaining the mischief the legislation is intended to cure) on the basis that they are ambiguous, obscure or lead to absurdity. He submits that the mischief clearly identified includes a desire to avoid time spent sleeping but on call being treated as working time.

19. He relies particularly on paragraphs 4.33 and 4.34 which contain Recommendations 11 and 12 (they are the emboldened parts below):

"4.33 We recommend that the actual working time definition should define what constitutes working time for the purposes of the national minimum wage. The national minimum wage should also apply to all working time when a worker is required by the employer to be at the place of work and available for work, even if no work is available for certain periods. This definition has the advantage of covering agreed 'downtime' hours when workers are on-site but unable to work (e.g. because of machine breakdowns or lack of materials). It includes all agreed overtime hours, including call-out hours for emergencies, but it does not include standby or on-call periods away from the employer's workplace or agreed rest periods.

4.34 Certain workers, such as those who are required to be on-call and sleep on their employer's premises (e.g. in residential homes or youth hostels), need special treatment. For hours when workers are paid to sleep on the premises, we recommend that workers and employers should agree their allowance, as they do now. But workers should be entitled to the national minimum wage for all times when they are awake and required to be available for work."

Mr Reade submits that those passages reflected existing practice and that it was not the intention of the Low Pay Commission to require payment of the national minimum wage when a person is sleeping but available for work should that be necessary.

20. The Recommendations relied on, so far as concerns time work, are enacted in Regulations 30 and 32 of the 2015 Regulations (formerly Regulations 3 and 15 of the 1999 Regulations) and these can be taken to embrace fully the Recommendations made by the Low Pay Commission given the Secretary of State's response to them. However, for reasons which appear below, I do not consider that the 2015 Regulations are ambiguous or obscure. Moreover, like the Court of Appeal in Walton I can find nothing in the Secretary of State's report setting out the Recommendations and the responses to them, nor in the First Report which solves the issues raised in this appeal. Paragraph 4.33 recommends that what constitutes working time should be defined and extend to time required to be at a workplace and available, even if no work is available for certain periods. Paragraph 4.34 recommends leaving it to parties to agree what should be paid for sleep-in periods while making it clear that time spent awake and required to be available to work should qualify for the national minimum wage. These Recommendations do not therefore assist in resolving what 'time work' is for the purposes of this appeal.

21. It is interesting to note that (as Mr Reade points out in his Skeleton Argument) in its Fourth Report of March 2003, the Low Pay Commission recommended that consideration be given to addressing uncertainty over the treatment of 'sleepovers' by revised guidance or changes to the Regulations if so required (paragraph 3.59). Nevertheless, no change in substance was made to the Regulations on this issue, as all parties agree.

22. However, revised guidance by the responsible department has been issued from time to time. The guidance is not an aid to construing the 2015 Regulations, but was relied on by both sides in these appeals as follows:

(a) Mr Reade referred to September 2008 Guidance which states under the heading 'Sleeping between Duties':

"if a worker arranges with his employer to sleep at or near the place of work, and he is provided with suitable facilities for doing so the time when he is permitted to sleep and is not working will not be treated as time when the national minimum wage is payable, but if he has to get up and do some work during the night, the time spent awake and working will count as time when the national minimum wage is payable"….

(b) Mr Ohringer referred to October 2016 Guidance which states in section 3 under the heading 'Sleeping between duties':

"Employers must ascertain whether a worker is still subject to certain work-related responsibilities whilst asleep, to the extent that they could be deemed to be 'working'

A worker, who is found to be working, even though they are asleep, is entitled to the national minimum or national living wage for the entire time they are at work. Workers may be found to be 'working' whilst asleep if, for example, there is a statutory requirement for them to be present or they would face disciplinary action if they left the workplace. They would then be entitled to the national minimum or national living wage rate.

There can be situations, however, where a worker is only available for work and is permitted to sleep and suitable sleeping facilities are provided at the workplace. In those cases, the individual will not be 'working' and the minimum wage will not be payable. However, the individual must be paid the national minimum or national living wage for any time they are awake for the purpose of working.

Under these situations it will depend on the nature of the work-related obligations to which the worker is subject while they are asleep. We have provided two examples that illustrate where the national minimum wage is likely to apply and where it is not.

Example 1 – where the minimum wage is lively to apply

A person works in a care home and is required to work overnight shifts where they sleep on the premises. The person's employer is required by statute to have someone on premises for health and safety purposes. The person would be disciplined if they left the premises at any stage during the night.

It is likely that the person would be considered to be 'working' for the whole of the overnight shift even when they are sleeping.

Example 2 – where the national minimum wage is unlikely to apply

A person works in a pub and lives in flat above the pub. The employer requires the person to sleep there. However the person can come and go as they please during the night as long as they do sleep there. There are no specific responsibilities during the evening rather the person sleeps there so the flat is occupied i.e. to reduce the likelihood of the premises being burgled.

The person is likely only to be entitled to the minimum wage when they are awake and dealing with any emergencies in the night."

In the circumstances, I do not consider that Mr Reade's argument is advanced by reference to the Guidance.

23. Mr Reade's principal submission is that Regulation 32 informs and explains what Regulation 30 means, and the two must be read and given effect together. Regulation 32 demonstrates that it was not contemplated that standby arrangements should be 'time work' since a worker who is available for work (provided he or she is not at home) is only deemed to be working when awake. Regulation 32 qualifies the time during which a worker would otherwise be regarded as working, so that during the hours when the worker is permitted to sleep he or she is treated as engaged in time work only when awake for the purposes of working. The very existence of the deeming provision in Regulation 32 shows that it was not contemplated that being available to work was itself working for the purposes of the definition of time work. He contends that read together, the two Regulations make clear that if a worker is sleeping at his or her place of work, he or she is not engaged in time work and it was never intended that he or she would be treated as engaged in time work.

24. I do not accept this analysis because I do not accept that the acknowledged deeming provision in Regulation 32, which treats as time work periods when a worker is not in fact working but merely available for work, has either the impact contended for by Mr Reade or any impact on periods of actual work.

25. The first question that must be determined by reference to Regulation 30 is whether, even in periods where a worker is permitted to sleep, he or she is nevertheless working by being present at the workplace. If he or she is working within Regulation 30, the deeming provision in Regulation 32 is not engaged at all. It is only if the worker cannot be said to be working that consideration is to be given to Regulation 32. This was the analysis of the 1999 Regulations in British Nursing Association

at [14] and in Scottbridge at [12] (both binding decisions on me; and in both of which arguments similar to those advanced by Mr Reade were rejected). Given Mr Reade's acceptance that the amendment to the Regulations was not intended to alter in any fundamental way the previous law, the analysis by the Court of Appeal and Court of Session in these two cases applies equally to the 2015 Regulations (see to similar effect, Burrow Down Support Services where a similar argument was rejected at [23] to [25]).

26. This approach does not render Regulation 32 redundant or deprive it of meaning or effect, as Mr Reade contends. On the contrary, it has clear application to cases where a worker is obliged to make himself or herself available for work but does not otherwise qualify as actually working within the meaning of Regulation 30. The example of a person who works in a pub and lives in a flat above the pub, coming and going as he/she pleases, but required to sleep there, is a good example of a case where Regulation 32 is likely to apply, as was found in Wray & J W Lees. In those circumstances, Regulation 32 applies to treat time when a worker is available and required to be available at or near the place of work (but not at home) as 'time work' only when the worker is awake, perhaps dealing with emergencies in the night.

27. Furthermore, I agree with Mr Jones QC that inherent in Mr Reade's argument is the proposition that, by virtue of reading Regulations 30 and 32 together, whenever a worker is sleeping or allowed to sleep at the workplace, that period cannot be time work for national minimum wage purposes. Mr Reade submits that a bright line distinction along these lines, that can easily be drawn, is particularly desirable in an area where criminal sanctions and penalties apply for breach of the 2015 Regulations, and would achieve the clarity and certainty employers desire.

28. However, Mr Reade's construction would have the result that a night watchman with no day-time duties or other purely night workers permitted to sleep, would not qualify for the national minimum wage at all. Recognising this difficulty, Mr Reade sought to ameliorate the effect of his argument by submitting that there is a distinction to be drawn between jobs that have 'core' working hours together with additional responsibilities to be performed at night where the national minimum wage is payable for the core hours worked, but no national minimum wage is payable for the additional responsibilities on the nightshift; and jobs where the totality of the duties are performed during the night where the national minimum wage applies. I do not consider that any proper distinction can be made between core hours and other hours as Mr Reade submits. The 2015 Regulations themselves draw no such distinction. The reference to basic hours in the context of salaried hours work is different and does not introduce the distinction advanced by Mr Reade. Further, the distinction between core and other hours would have the effect that by dint of labelling the protection afforded by the Regulations could be avoided and would drive a coach and horses through the national minimum wage system.

29. Moreover, this approach produces illogical results. To take the hypothetical example given by Mr Jones in the hearing of a night watchman working night duties only and therefore qualifying for national minimum wage protection on Mr Reade's case: why should his national minimum wage entitlement fall away if he starts to work one or two day shifts as well; what is the logic of his

national minimum wage protection depending upon working more nightshifts than day shifts, or on the way in which the different shifts are characterised. That is an illogical and irrational approach to this basic protection.

30. As Buxton LJ held in British Nursing Association at [12] and [13]:

"12. No one would say that an employee sitting at the employer's premises during the day waiting for phone calls was only working, in the sense of only being entitled to be remunerated, during the periods when he or she was actually on the phone. Exactly the same consideration seems to me to apply if the employer chooses to operate the very same service during the night-time, not by bringing the employees into his office (which would no doubt impose substantial overhead costs on the employer and lead to significant difficulties of recruitment), but by diverting calls from the central switch board to employees sitting waiting at home. ……."

"13. That in the event there may during the middle period of the night be few calls to field is nothing to the point. It is for the employer to decide whether it is economic and necessary to his business to make the facility available on a 24-hour basis. If he does so decide, it is the availability of the facility, not its actual use, that is important to him; and that is what he achieves by the working arrangements described in this case."

I note that this bright line approach advanced by Mr Reade was not adopted by the other employer-parties to this appeal.

31. The authorities identify a "clear dichotomy" between "those cases where an employee is working merely by being present at the employer's premises… whether or not provided with sleeping accommodation and those where the employee is provided with sleeping accommodation and is simply on-call" (or as I would prefer to describe it, available, rather than 'on-call'): see South Manchester Abbeyfield Society (at [38]). The distinction between these two types of case is easy to state but can be difficult to identify and apply in every case, and the reasons for a particular case falling on one side rather than the other side of the line can sometimes be difficult to discern. I agree with Ms Del Priore, adopting the approach of HH Judge Hand QC in Governing Body of Binfield Church of England Primary School that it is not a good basis for the jurisprudence on this issue to proceed by analogy (see [37]).

32. Much as I can see how desirable it would be for the sake of clarity and certainty, I do not consider that there is a bright line or single key (that has eluded the judges in all the cases in this area to date) with which to unlock the words of the Regulations in every case. This is a particularly fact sensitive area and in applying the words of Regulation 30, it seems to me, as Mr Jones submits, there is a necessarily multifactorial evaluation to be conducted.

33. Having regard to the authorities to which I have been referred, it is well established that an individual can be "working merely by being present" even if they have "little or nothing to do during certain hours": see Scottbridge at [11]. Indeed as Langstaff P observed at [15] in Whittlestone "work is not to be equated with any particular level of activity". Moreover, an individual may be working merely by being present if he or she is simply required to deal with anything untoward that might arise in the course of the shift but is otherwise entitled to sleep, however artificial that might sound: see Burrow Down Support Services at [24] and [25].

34. On the other hand, there are cases that fall on the other side of the line. Examples are South Manchester Abbeyfield Society where nights spent by a housekeeper and deputy housekeeper at sheltered accommodation were found to fall on the other side of the line; and nights spent by the temporary pub manager required to reside and sleep on the premises in accommodation provided above the pub in Wray & J W Lees also fell on the other side of the line.

35. Walton is yet another such example. Since it was particularly relied on by Mr Reade, it is necessary to say a little more about Walton. Miss Walton worked as a carer providing 24-hour residential care. She worked three days on, four days off and was paid per day. There was a written agreement recording that on average it took six hours fifty minutes to carry out the tasks that she was required to perform for the personal care and bathing supervision of Miss Jones who suffered from epilepsy, and when not providing a service to Miss Jones, Miss Walton could please herself as to what she would do but she was required to be on the premises in case Miss Jones required assistance. It was agreed that Miss Walton did not carry out salaried work or output work. She argued that she carried out time work whereas the employer submitted that she carried out unmeasured work. The Tribunal rejected Miss Walton's case and found that she was not paid by reference to the time for which she worked. It followed that she carried out unmeasured work. Both the EAT and Court of Appeal upheld that decision.

36. Mr Reade submits that the focus of the courts in Walton was on the actual performance of duties by Miss Walton within the 24 hour period rather than on the fact that she was available to deliver care if needed. He contends that the same logic applies in Royal Mencap's case.

37. I do not consider that Walton lays down any bright line principle. It does not say that there cannot be cases where simply being present is working. Nor did the Court of Appeal consider that British Nursing Association and Scottbridge were wrongly decided: those cases were found to be distinguishable or not analogous. Instead Aldous LJ held that the correct approach is to look at all the facts including the type of work that is involved and then to ascertain whether the worker is paid by reference to the time for which the worker works or by reference to something else. The answer must depend upon the facts of the particular case and analogies and illustrations are not necessarily useful.

38. Moreover as is made clear in the judgment of Arden LJ at [40] of Walton, a clear distinction was made in Regulations 3 and 15 of the 1999 Regulations between "working" and being "available

for work". She observed that this distinction is not drawn in the context of unmeasured work, which has no equivalent of Regulation 15. So far as unmeasured work is concerned, she held by reference to the Tribunal's finding of fact that when not performing her specified tasks, Miss Walton was not required to give Miss Jones her full attention, and that in view of that finding, she could not be said to be continuously performing her contractual duties for 24 hours each day for the purpose of Regulation 28. She observed that this was a question of fact.

39. Mr Reade contends that even if it is difficult or impossible to identify a bright line test that distinguishes between the cases where mere presence is working and those on the other side of the line, irrelevant considerations were wrongly brought into play in the cases of Whittlestone and Esparon:

(a) First, in relation to Whittlestone, Mr Reade is critical of paragraph 16 where he submits the EAT wrongly articulated two (almost) binary positions by reference to a requirement to be present at a place of work on pain of discipline and a case where it is not necessary for the worker to be present during designated hours. He submits there is in fact a third intermediate position, where an employee is required to be at or near their workplace and available to perform their duties. They are there for a period of time, time being the unit of account for which they are paid, but this is not time work because, looking at the duties under the contract, these are carried out when, and only when, the employee is called upon to perform them. Moreover, he submits that the approach of the EAT here appears to render Regulation 32 redundant.

(b) Secondly, in relation to Esparon, Mr Reade is critical of the EAT's strong reliance as a factor in concluding that mere presence was working, on the employer's statutory obligation to have a suitable person on the premises "just in case" and the fact that the employee was therefore required to undertake nightshifts in pursuance of the obligations placed on the employer, it being essential that she was there even if she did nothing. He contends (relying on the observation of HH Judge Clark in Shannon) that the issue is the application of the statutory test and not the application or requirements of other obligations, statutory or otherwise, on the employer. He submits that Regulation 32 uses the language of obligation and itself refers to the worker being "required" to be at their place of work. It expressly provides that even if the worker is required to be on the premises available to work, the worker is not working if permitted to sleep in suitable facilities: Regulation 32(2). Thus even if the employer itself is subject to an obligation which means that it requires a worker to be on standby, the worker is still not working when asleep.

40. Forcefully as these points were advanced by Mr Reade, I do not consider that the approach of the EAT in either case was in error; nor was there reliance on irrelevant considerations as Mr Reade contends. Looking at Whittlestone first, at [16,] the EAT held:

"Thus the cases, as I shall show, note that where a person's presence at a place is part of their work the hours spent there irrespective of the level of activity are classed as time work. Difficult cases may arise where a worker is obliged to be present at a particular place. That presence may amount

to their working. Conversely it may not. An example of the latter might typically be where a requirement is imposed on an employee to live at or near a particular place but it is not necessary for that employee to spend designated hours there for the better performance of the contractual duties. This is unlikely to be time work: presence facilitates work but it is not itself work. Conversely where specific hours at a particular place are required, on the pain of discipline if they are not spent at that place, and the worker is at the disposal of the employer during that period, it will normally constitute time work."

I do not read that as identifying a binary approach and do not consider that the EAT was saying that provided the employee is required or obliged to be at their place of work, mere presence there will be working. Rather the EAT referred to difficult cases on either side of the line that may arise, and expressly recognised that in some cases, even where a worker is obliged to be present, their presence may not amount to working. It may be, as Mr Jones submits that the last sentence of [16] goes too far in saying that "where specific hours at a particular place are required, on the pain of discipline… it will normally constitute time work". This can only be a factor and cannot be determinative. Nor do I accept Mr Reade's argument from redundancy in relation to Regulation 32. This regulation has application in cases where a person is found not to be working. In those cases, it has an obvious role to play, in treating availability to work as work in certain circumstances but not others. Again, there will be cases on either side of the line.

41. So far as Mr Reade's criticism of Esparon is concerned, it seems to me that a regulatory or other requirement to have the worker present is an obviously relevant factor in circumstances where the employer's obligations are likely to inform what work the employee might be required to do. The acknowledgement that this is a relevant factor does not mean that it is determinative. It is not, and there may be cases where it is simply not relevant, or its weight is slight given the factual matrix of the case in question.

42. Having rejected Mr Reade's contentions in favour of a multifactorial evaluation, the question remains how is the multifactorial evaluation to be applied and the line between the cases to be drawn? It seems to me that the proper approach is to start by considering whether the individual is working during the period for which he or she claims. Work, as Langstaff P explained is to be determined on a realistic appraisal of the circumstances in the light of the contract and the context within which it is made (Whittlestone at [57]). So, the contract must be considered together with the nature of the engagement and the work required to be carried out. Tribunals should consider whether the contract provides for the period in question to be part of the employee's working hours as a matter of construction (whether the terms are written and/or oral) and in light of the factual matrix and any relevant and admissible material that might supplement them. Depending on the facts it may be relevant to consider whether the contract provides for pay to be calculated by reference to a shift or by reference to something else, and if so, to what; or to whether an identifiable period is specified during which work is to be done.

43. The fact that an employee has little or nothing to do during certain hours (see Scottbridge at [11]) does not mean that he or she is not working. Regulation 30 is not to be equated with any particular level of activity (see Whittlestone at [15]). An employee can be working merely by being present even if they are simply required to deal with something untoward that might arise, but are otherwise entitled to sleep and even where an employee has never had to wake and deal with an untoward matter (see Burrow Down Support Services at [24 and 25]).

44. The authorities identify a number of potentially relevant factors. No single factor is determinative and the weight each factor carries (if any) will vary according to the facts of the particular case. The following are potentially relevant factors in determining whether a person is working by being present:

(i) The employer's particular purpose in engaging the worker may be relevant to the extent that it informs what the worker might be expected or required to do: for example, if the employer is subject to a regulatory or contractual requirement to have someone present during the particular period the worker is engaged to be present, that might indicate whether and the extent to which the worker is working by simply being present.

(ii) The extent to which the worker's activities are restricted by the requirement to be present and at the disposal of the employer may be relevant. This may include considering the extent to which the worker is required to remain on the premises throughout the shift on pain of discipline if he or she slips away to do something else.

(iii) The degree of responsibility undertaken by the worker may be relevant: see Wray & J W Lees at [13] where the EAT distinguished between the limited degree of responsibility in sleeping in at the premises to call out the emergency services in case of a break-in or a fire on the one hand, and a night sleeper in a home for the disabled where a heavier personal responsibility is placed on the worker in relation to duties that might have to be performed during the night.

(iv) The immediacy of the requirement to provide services if something untoward occurs or an emergency arises may also be relevant. In this regard, it may be relevant to determine whether the worker is the person who decides whether to intervene and then intervenes when necessary, or whether the worker is woken as and when needed by another worker with immediate responsibility for intervening.

45. Regulation 32 is only relevant and to be considered if the tribunal decides, having considered the terms of the relevant contract and the nature of the engagement against the factual matrix that the worker is not working by being present during the period for which he claims.

46. Each case is likely to turn on the consideration of its own particular facts. There will be cases where the line is a difficult one to draw and the current cases are a good example of difficult factual situations in which these Regulations must be applied. I recognise that the certainty sought, in particular by Mr Reade, is sacrificed by the multifactorial approach I have endorsed, but I do not consider that the resolution of this issue can be achieved by a bright line drawn in relation to core duties.

The individual cases

Royal Mencap Society v Tomlinson-Blake

47. The facts here were largely agreed, and as found by Employment Judge Burton, can be summarised shortly. East Riding Yorkshire Council ("the Council") has responsibility for providing support and care for vulnerable adults including those with learning difficulties. It contracts with the Royal Mencap Society ("Mencap") to provide some of that support and care. The Claimant (employed by Mencap since 2004) is a highly qualified and extensively trained care support worker. She performs her role at two properties although, as the situation at these properties was said to be indistinguishable, the Employment Judge referred only to one of these in his summary of the facts and I will do the same. She provides care and support to two men, both of whom have autism and substantial learning disabilities making them vulnerable adults within the Council's responsibility. The Council carried out a care and needs assessment for them, leading to a care and support plan which the Council contracted out to Mencap to deliver. The two men live in a privately owned property (not a care home) and their care and support plan, directed at enabling them to lead as independent a life as possible, requires 24-hour support. The support is provided by a 24-hour team of care support workers in their home at all times. The workers work either a day shift or a sleep-in shift.

48. The Claimant's usual work pattern involved working a dayshift at the men's house either from 10am to 10pm or 3pm to 10pm. She would then work the following morning shift, either from 7am to 10am or from 7am to 4pm. Those hours were part of her salaried hours and she received appropriate remuneration in relation to them. In addition, the Claimant was required to carry out a sleeping shift between 10pm and 7am for which she received a flat rate of £22.35 together with one hour's pay of £6.70 making a total payment for that nine hour sleep-in, of £29.05.

49. The precise scope of the Claimant's duties during a sleep-in shift was considered by the Tribunal. No specific tasks are allocated to the Claimant to perform during that shift, but she was obliged to remain at the house throughout this shift and to keep a listening ear out during the night in case her support is needed. She is expected to intervene where necessary to deal with incidents that might require her intervention (for example if one of the men is unwell or distressed) or to respond to requests for help; and she is obviously expected to respond to and deal with emergencies that might arise.

50. The need to intervene is real but infrequent and the Tribunal found that there were only six occasions over the preceding 16 months when the Claimant had to get up to intervene during the sleep-in hours. If nothing needs to be done during her sleep-in shift, the Claimant is entitled to sleep throughout. She is provided with her own bedroom in the house where she can sleep, together with

shared bathing and washing facilities. If her sleep is disturbed and she needs to provide direct support to one of the men during the night, the first hour is not additionally remunerated. If the Claimant is required to provide care for longer than an hour, she is entitled to additional payments.

51. It was the Claimant's case that she works simply by being present in the house throughout her sleep-in shift whether or not she is awake. The whole sleep-in shift should have been treated as "time work" within the meaning of Regulation 30 and accordingly she had not received the pay required by the Regulations. The Respondent on the other hand, contended that the obligation on the Claimant during her sleep-in shift was to be "available" at her place of work for the purposes of working and that, as a result of Regulation 32(2) time spent asleep does not count as time work.

52. The Tribunal accepted the Claimant's case. Having reviewed the Regulations and the authorities, including in particular Whittlestone, Esparon and Shannon, the Tribunal observed that the fact that the Claimant may have had little or nothing to do during sleep-in shifts and that she was entitled to sleep did not detract from the fact that she was required to be there and to deal with such situations as might require her attention or intervention. Further, it was not sufficient that the Claimant was on-call to attend if required, she had to be there both for the proper performance of her duties and to enable the Respondent to comply with the legal obligation placed upon it, to provide an appropriate level of care for the service users. The Claimant had responsibilities to undertake even though the frequency of actual activity might have been low and even though she was entitled to sleep. This situation was far removed in the Tribunal's view from a situation of a person being on call where that individual could do whatever he or she wished provided that they remained capable of being contacted and capable of responding to contact. The Claimant was required to be present and would have been disciplined if she left the house, putting Mencap in breach of its legal obligations too. The Tribunal continued:

"More importantly, to me, is the fact that whilst performing that sleep-in shift the onus was constantly upon her to use her professional judgement and to use the detailed knowledge that she had of the needs of these residents to decide when she should intervene in order to meet their needs and when she should not in order to respect their right to privacy and autonomy. That epitomises her role as a carer which, it seems to me, she was performing either during a day time shift or whilst keeping a "listening ear" whilst in bed, asleep or not."

53. My conclusions on the proper approach to the 2015 Regulations mean that the Employment Judge was entitled to adopt the approach he did. The Tribunal identified correctly the question to be determined, namely, whether the Claimant's status was not that of someone who was available for work but rather that of someone actually working (paragraph 21).

54. In answering that question the Tribunal first considered the Claimant's contractual obligations: her day shift is salaried work and not in issue. For the sleep-in shift timed to last nine hours, she is not allocated any specific tasks, and can sleep but there is a continuing obligation throughout the night during which the Claimant has sole responsibility for keeping a listening ear

and using her "professional judgment and …. detailed knowledge … to decide when she should intervene.." She receives an allowance for the whole nine hour sleep-in shift together with one hour's pay.

55. The Employment Tribunal carried out a multifactorial evaluation to decide whether she was doing time work for the whole of the shift and did not treat any particular factor as determinative: see paragraph 41 where the Employment Judge held:

"All those are factors that lead me to the conclusion that during the sleep-in shift the claimant was performing time work…".

The factors relied on were all relevant factors to consider, and the weight to be attributed to each in the context of the case was a matter for the Employment Judge. The factors included: Mencap's regulatory obligation to have someone on the premises as a result of the Health and Social Care Act 2009 (regulated activities) Regulations 2014, Regulation 12; Mencap's obligation to have someone present at a service user's home (away from their own home, family or friends) in order to fulfil its own contract with the Council; the responsibility on the Claimant throughout the sleeping shift both to be and remain present throughout (whether asleep or not) and to keep a listening ear and exercise her professional judgment to determine whether or not to intervene, and if intervention was necessary to do so straightaway. On the basis of the facts found by the Employment Tribunal, it was amply entitled to conclude that the Claimant was performing the role of a carer during the sleep-in shift, whether asleep or not and I can detect no error of law or approach in that conclusion.

56. Mencap's appeal accordingly fails and is dismissed.

Mr and Mrs Frudd v The Partington Group Limited

57. Janet and Ian Frudd were employed by way of a joint appointment as a receptionist/warden team at the Respondent's Broadwater Caravan Park. They had a written contract which required them to reside on the premises in caravan accommodation provided by the Respondent (clause 6). The contract dealt with their hours of work, with normal working hours set each week. In addition, by clause 10.4 they were also:

"required to enter your name on a rota for the purpose of being on call to deal with customers enquiries or requests for assistance after completion of your shift whether the shift in question finishes at 4:30pm, 5 pm or 8 pm. You will be on call until 8 am the next day.

"Whilst on call you will also be required to cover the alarm pager and attend the relevant caravan. You will be paid for emergency callouts in the open season from 10 pm until 7 am and in the closed season from 5 pm until 8 am at the rate of £7.50 per person per call out." (That figure was subsequently increased to £8.50)".

58. Employment Judge Sherratt found that the Respondent "required the Claimants to remain on the park for the duration of the period in which they were on call so that somebody was present to respond to any emergencies or enquiries." They carried out their work and duties conscientiously and remained on site during their on-call hours. The rota involved a three-week repeating pattern of two nights on call for two weeks and three nights on call in the third week. When on call, the Claimants had a mobile phone and pager to receive calls. People knew the number for the phone or pager and the Claimants were the first port of call for anyone wanting to make an enquiry or to have them assist with an emergency after the reception closed.

59. The core of Employment Judge Sherratt's reasoning appears at paragraph 21, where having set out Regulations 30 to 32 and considered the case of Shannon he held:

"Having considered the Regulations and the authorities it seems to me that Mr and Mrs Frudd come on the Shannon side of the line and that the exception in Rule 32(1), "unless the worker is at home", applies to them. They were at home and, in my judgment, therefore, only entitled to be paid the national minimum wage at times when they were actually working. On the facts before me I find, in the absence of any evidence to the contrary, that the call out payment of £8.50 was sufficient to cover the minimum wage element of each recorded call, and if that were not the case then because they were paid in excess of the national minimum wage for the hours actually worked a calculation would, I am sure, find that overall, for their hours of time work, they were paid the amount of the minimum wage at the very least"

60. There are five grounds of appeal pursued by the Claimants in relation to that decision. Taking the first two grounds and ground 4 together, it is said that the Employment Judge did not identify the legal test to be applied and if he did, it was the wrong test or wrongly applied, and without reasons for why the test was not met being given.

61. There was no dispute that the Claimants performed "time work" defined by Regulation 30. The critical question was whether the time work included those hours when the Claimants were present (and required to be present) during the night shift or whether that time was not working time unless it came within the meaning of Regulation 32 and was not excluded by Regulation 32(2).

62. The Employment Judge set out the relevant regulations and although he did not then identify the test to be applied, having referred to Shannon, at paragraph 19 he referred to the dichotomy recognised by the authorities as described by the EAT in Shannon. In particular he expressly recognised cases on one side of the line as involving workers who were "working simply by being present" and the passage he referred to made express reference to the cases of British Nursing Association and Scottbridge. Reading the judgment generously, and accepting that the Employment

Judge's identification of the legal test could have been clearer, it seems to me that he made no obvious error here.

63. However, having identified the test, the Employment Judge decided this claim by analogy with previous cases, rather than by applying any legal test or principle. He decided that the Claimants' case fell on the Shannon side of the line but gave no reasons or explanation for that decision and I am not confident that he applied the multifactorial approach required. This is not simply a question of succinct reasoning as Ms Del Priore submits. Nor do I accept that any real weight can be attached to the label used in the contract between these parties to describe the rota: "on call". This label cannot be determinative. It is not a term of art and is a label that has been applied in the authorities to cases on either side of the line. I do not consider it to be a handy descriptor, or an important consideration as Ms Del Priore submits. It is particularly important in the employment sphere, not to be side-tracked by such labels when construing contracts between employer and worker, given in particular the potential inequality of bargaining power between these parties, especially where standard terms are used by employers on a take it or leave it basis.

64. Here, the Employment Judge identified no particular factors that emerged from his findings of fact as to the contract and the nature of the engagement the Claimants undertook that led to his conclusion. Moreover, he did not expressly address the Respondent's purpose in employing the Claimants and whether they were required to be present throughout the shift to fulfil an obligation of the Respondent to provide services to its customers on a 24/7 basis, and if so whether this was a relevant factor in the context of this case. Nor did he expressly address the extent of their responsibilities during the sleep-in shift, and if so how and to what extent this factor was weighed in the context of this case; or if not relevant, why that was so. For all these reasons and notwithstanding the persuasive submissions made by Ms Del Priore, the Employment Judge's decision cannot stand and the appeal must be allowed.

65. It is unnecessary to deal with the remaining grounds in those circumstances. However, it seems to me that in addition to the above failings, and as Ms Del Priore accepts, the Employment Judge did not make express findings on all aspects of the evidence, including, importantly the extent of the Claimants' obligation to remain at the caravan site throughout the shift. There are other matters identified by Mr Ohringer in the course of argument that are not expressly addressed in the findings. In these circumstances it is likely that further evidence would have to be called if this case is remitted.

66. I do not agree with Mr Ohringer's submission that applying the correct legal test to the facts found by the Employment Judge necessarily leads to the conclusion that the Claimants were entitled to be paid the minimum wage throughout any period when on the night shift rota. Cases involving sleep-in duties give rise to difficult, fact sensitive questions and I do not think that only one answer is available. The case will have to be remitted. Given that evidence will need to be heard afresh because of the Employment Judge's failure to deal with important aspects of the evidence, and given the extent of the failings, the better approach is to remit the case to a fresh tribunal for a rehearing.

Focus Care Agency Ltd v Brian Roberts

67. In this case Employment Judge Adamson found that Focus Care Agency Ltd ("Focus") provides a supported living service to its users whose fees are paid either by local authorities or privately. Its activities are regulated by the Care Quality Commission and it is required to deploy enough suitably qualified, competent and experienced staff to meet its obligations. Often it does that by providing two members of staff to look after a service user during the day and two during the night. The nightshift worker is allocated to a "waking night worker" and a "sleep-in night worker". The waking night worker has the primary responsibility for the service user and is required to be awake at all times to support the service user and if necessary to perform other household duties and is paid at the contracted rate of pay. The sleep-in night worker is employed to assist with any emergency that might arise but is not required to be awake and is provided with facilities for sleeping.

68. The Employment Judge referred to the written contract of employment which does not require the sleep-in night worker to be on the service user's premises at all times, but found that the Claimant understood that he did have such a requirement and that Focus expected the sleep-in worker to be on the premises for the whole of the time spent on the sleep-in duty. The Employment Judge found accordingly that it was a requirement for the sleep-in worker to be on the premises at all times during the sleep-in shift.

69. As for the contract, the Employment Judge found that the written terms entered into at the outset applied throughout and that there was no subsequent agreed variation. Those terms provided (among other things) for normal working hours of 36 hours a week with hours set in accordance with a weekly roster. Further by clause 5.2 the contract provides:

"You may be required to work such additional hours in excess of your contractual hours of work as are reasonably necessary for the proper performance of your duties and to meet the needs of the Company's business. Any overtime worked by you at the request of the Company will be paid at the rate of £7.15 per hour."

The Claimant's job description requires him to:

"8. Provide a safe, comfortable and supportive home for the individuals we support by: …

Participate in rotas, which may include day, evening, weekend and bank holiday working and sleeping-in duties at night.

…"

70. Focus' case before the Employment Tribunal was that at interview before his employment began, the Claimant would have been told that his pay for sleep-in shifts would be by way of an allowance of £25 per night. The Claimant was paid on that basis during his employment and did not raise any queries about the rate of pay he received. However following his dismissal and having sought advice, he claimed that he had suffered unlawful deductions from wages and that there was a breach of contract in relation to (among other things) his pay for sleep-in shifts.

71. The Employment Judge found at paragraph 18 that the Claimant who was paid by the hour, was employed on time work within the meaning of the 2015 Regulations. He continued:

"Indeed the Respondent was required to provide two people to be on its client's premises during the night time in order to provide the necessary service. There was also nothing within the documentation to suggest that the rate of pay for the sleep in shifts was less than that stated within the documentation."

The Employment Judge concluded that although Focus may have intended to enter into a contract on the terms as to allowance it asserted, the terms entered into did not in fact reflect the allowance contended for by Focus.

72. At paragraphs 20 and 21, the Employment Judge concluded:

"As referred to before, the Claimant carried out his duties and it was only following the ending of his employment and the receipt of advice that he realised that he had not been paid in accordance with the terms of his contract. I thus find that the Claimant, being unaware of the breach of those terms, had not waived any breach. There was no suggestion that the Claimant and Respondent had agreed any variation to the terms of the contract, and certainly no consideration had passed between the parties pursuant to any variation. I thus find that: at the termination of the Claimant's employment he remained employed on the terms as set out in the written documentation; thee was a series of deductions in respect of the underpayment of the Claimant's wages for the sleep-in duties throughout the employment such the Claimant did not receive the wages properly payable to him as required by Part 2 Employment Rights Act 1996 and the parties' contract and this sum was outstanding at the termination of the employment.

In addition, as the Claimant was employed on the sleep-in shifts on Time Work and is entitled to be paid at the national minimum wage for those duties. As the national minimum wage is less than the contractual rate of pay the Claimant is entitled to a judgment calculated in accordance with the contract rate of pay, that being the higher."

73. Those conclusions are challenged by Focus. There are three grounds of appeal. The first and second grounds challenge the findings and conclusions in relation to the terms of the contract of employment that governed the relationship between these parties, on the basis that the findings of fact made are inadequate and insufficient reasons are provided; and the Tribunal determined what the contractual terms were by reference only to the written contract of employment and without considering whether there was any oral agreement that amounted to a variation of those terms. It is also said in relation to this ground, that the Tribunal failed to make factual findings to support its conclusion that the Claimant did not waive any breach of contract because he was unaware of the breach until he took legal advice following his dismissal.

74. The third ground challenges the Tribunal's finding in relation to the national minimum wage on the basis that the Tribunal misapplied the law and failed to make proper findings of fact. In particular, Ms Reece on behalf of Focus contends that the Tribunal relied only on the fact that the Claimant was required to remain on the Respondent's premises to reach its conclusion that the whole of the nightshift counted as time work for which he was entitled to be paid, to the exclusion of all other relevant factors. Focus argued that the waking night staff member satisfied the requirement for minimum staffing and the sleeping night worker was present simply to assist in the event of an emergency. The Tribunal made no findings as to whether just one or two staff members were required and failed to carry out the multifactorial evaluation necessary in determining whether the Claimant was carrying out time work throughout the shift even when sleeping, or only when he was awake and actually performing duties.

Grounds 1 and 2: the contractual arguments

75 The Employment Tribunal had the offer of employment letter dated 16 January 2014 which was sent to the Claimant after his recent interview, together with the job description, and the contract of employment signed by Focus and dated 6 February 2014. Whatever may have been said or discussed at interview between these parties (and here it is noted that the ET3 said "it would have been explained" and not "it was explained" that an allowance was payable), the written contract expressly provides that it "supersedes any earlier written or oral arrangement between you and the Company". At clause 1.1 the contract provides for the Claimant to "undertake such duties and responsibilities as may be determined by the company from time to time as set out in your job description". That plainly includes the sleeping in duty identified at paragraph 8 of the job description. There is nothing in the contract or the job description that provides for payment of an allowance for that duty and the only provision made in respect of payment for additional hours outside the normal 36 hour working week is at clause 5.2 of the contract which deals with overtime.

76. In those circumstances, it seems to me that the Employment Judge was entitled to conclude that there was no contractual agreement for payment of the allowance at the outset and to rely on the written contract as reflecting the initial agreement between the parties. This is not because the Employment Judge applied an incorrect proposition of law that a contract of employment is only

based on what is written. The contract here was expressly stated to supersede any earlier "oral arrangement". No error of law has been demonstrated here.

77. So far as what happened subsequently, and whether there was any agreed change to the terms of the contract, although the ET3 made no reference to an argument based on an agreed variation of the contract, at paragraph 4.3 of the judgment the Employment Judge identified as an issue to be determined in the case: "whether the Claimant agreed to a variation of the written contract or waived any breach of it". Mr MacPhail submits that Focus did not contend that there was an agreed or implied variation. Indeed, he contends that Focus made submissions to the effect that the sleep-in shifts were not working time and that as such "no variation was required". Mr MacPhail submits that it is unsurprising in those circumstances that the Employment Judge did not address the question of variation but stated instead (at paragraph 20) that there was no suggestion that the Claimant and Focus agreed any variation to the terms of the contract.

78. Employment tribunals are adversarial tribunals and are not obliged to address arguments not advanced by the parties by way of evidence and submissions. Although the Employment Judge identified as a possible issue the question of variation, it is clear from paragraph 20 that no evidence or argument to this effect was addressed to him.

79. In any event, as Mr MacPhail submits, there is no suggestion that the Claimant expressly agreed a variation to his contract. So far as implied agreement by conduct is concerned, the first point to make is that it is not suggested that any variation to the terms of the contract was ever actually proposed by Focus, perhaps because of their expectation that the allowance was discussed in interview. What is said by Focus instead is that the Claimant received payslips reflecting payment of the £25 allowance per sleep-in, and raised no complaint. If this by itself amounted to a proposed variation (rather than simply a possible under-payment, which is how I view it) the fact that the variation was in this form and (on the facts found) wholly to the Claimant's disadvantage would have been highly relevant considerations. The Tribunal would have been entitled to consider whether the Claimant's conduct in continuing to work was only referable to his having accepted the variation in pay imposed by Focus, or whether it was referable to his lack of understanding and appreciation of his contractual entitlement as appears implicit from the judgment. Silence on its own does not amount to consent to a variation. The Employment Tribunal expressly found that the Claimant was unaware of his rights to be paid in accordance with the contractual rate for the sleep-in shifts until after his employment came to an end.

80. So far as waiver is concerned, although the word waiver is not used anywhere in the ET3, Ms Reece submits that the factual basis for this argument is pleaded. She relies in particular on paragraphs 4 and 14. Reading those paragraphs as generously as I can, there is nothing to indicate that Focus was arguing that the Claimant waived any breach of contract. Nevertheless this was identified as a potential issue in dispute (paragraph 4.3), and the Employment Judge found that it was not until after his employment terminated that the Claimant was aware of his asserted contractual right to be paid for sleep-in shifts at the rate of £7.15 per hour. On the basis of that finding, it necessarily followed that he was unaware of any ongoing breach of that right and it was

therefore unsurprising that he failed to complain about the rate of pay and equally unsurprising that the Tribunal concluded that he did not waive any breach.

81. In circumstances where the point was pursued in the way it was by Focus it seems to me that the Tribunal dealt adequately with the question of waiver at paragraph 20 and that the findings and conclusions reached were both open to it on the facts and in law.

Ground 3

82. That conclusion resolves the appeal, and renders it unnecessary to address the third ground of appeal in relation to the national minimum wage. Had it been necessary to do so because grounds 1 and/or 2 succeeded, I would not have felt able to uphold the Employment Judge's decision at paragraph 21. In the absence of any explanation for his conclusion I am far from confident that the Employment Judge carried out the multifactorial evaluation necessary. I agree with Ms Reece that he appeared to proceed on the assumption that the requirement to be present throughout the sleep-in shift is determinative (see paragraph 18). Such a requirement is not and cannot be determinative when Regulation 32(1) itself makes clear that Regulation 32(2) can apply if the worker is required to be on the premises.

Conclusion

83. In the result, the appeals of Mencap and Focus fail and are dismissed. The appeal of Mr and Mrs Frudd succeeds, and their claims are remitted to a fresh tribunal for rehearing.