**INSTITUTE OF EMPLOYMENT RIGHTS SEMINAR; Public Sector cuts, Privatisation and Employment Rights: Liverpool**

**Challenges for Low Paid Workers**

**INTRODUCTION**

Good morning everyone.

My name is Craig Peel and I’m an employment lawyer with Thompsons Solicitors based at their Liverpool office. Thompsons are Unison’s appointed solicitors and I’m here today on behalf of Unison’s Kate Ewing and Matthew Egan. Kate is leading Unison’s response on the enforcement challenges for low paid workers. Kate and Matthew could not make it today as they are meeting with the Government Minister responsible for NMW enforcement today so. Instead, they have asked me to discuss the project with you.

**INTRODUCTION TO UNISON’S HOMECARE PROJECT**

Unison’s focus has been in the homecare sector because the experience of homecare workers typifies the acute problems facing low paid workers in the UK.

For those unfamiliar with the sector:

* Homecare workers provide care in people’s homes,
* It’s often to elderly or people with serious illnesses or disabilities;
* The care tends to be provided by private companies outsourced by Local Authorities;
* Workers travel between the homes of service users to provide them with assistance for every-day tasks such as cooking meals, taking medicine, personal care and domestic tasks;
* The visits are often for very short periods ranging from 15 minutes to an hour;
* A home carer will normally make many visits on each shift.

There is a genuine and real problem relating to national minimum wage compliance in the sector and often a home carer will not be paid for the time they spend travelling between assignments.

There is an estimated 500,000 home carers (80% of which are women) in the sector and approximately 220,000 receive less than the national minimum wage due to their employers failing to pay them for the time they spend travelling between assignments.

**THE LAW**

The National Minimum Wage Act 1998 provides that a worker who ordinarily works in the UK and has ceased to be of compulsory school age is entitled to be paid no less than the national minimum wage. This statutory right is incorporated into the contracts of the workers and enables them to sue their employer for the difference between what they are paid and their national minimum wage entitlement. A claim may be pursued:

* in the Employment Tribunal as:
	+ an unlawful deductions from wages claim (but any damages is capped at two years);
	+ Or as a breach of contract claim if the employment relationship has ended.
* Alternatively, a claim may be pursued in the County Court as a breach of contract claim.

A note of caution is the limitation dates that apply in these cases. They are:

* For unlawful deductions from wages; three months less one day from the date of the deduction or the last in a series of deductions in which there is not a break during the series of the deductions of three months or more;
* Breach of contract
	+ In the employment tribunal is three months less one day from the date employment ends;
	+ In the County Court it is six years from the alleged breach of contract.

More specifically to the issue of non-payment of travel time, generally the rule provided by the National Minimum Wage Regulations 2015 is that the time when a worker is travelling for the purpose of duties carried out in the course of the employment, that work should be treated as time spent doing work. It is important to note that time spent commuting, i.e. travelling to and from home to the place of work or first assignment is excluded. This principal reflects the Employment Appeals Tribunal decision in Whittlestone v BJP Home Support Ltd 2014 (before the 2015 regulations came into force). The case related to a home worker required to travel between assignments. A tribunal found that the travel time was incidental and therefore did not count as work for the purpose of calculating national minimum wage entitlement. Fortunately, the EAT disagreed and found that the homeworker was obliged to visit each service user in turn and there was inevitably travelling time between each visit, which was within the general control of the employer who arranged the assignments. Therefore it was necessary to remunerate the home worker for travel time and that time needed to be included in the calculation for national minimum wage entitlement.

**THE CHALLENGES TO ENFORCEMENT**

Despite the law being reasonably clear on the issue of travel time, there are significant barriers preventing meaningful enforcement of national minimum wage entitlement. These include:

* The nature of the workforce;
	+ the homeworkers’ employment tends to be vulnerable due to them being employed on zero hour contracts and are fearful of the employer reducing their hours or not offering hours at all if they speak up about problems.
	+ They also tend to work alone so are isolated from the work place or union representation so are not always aware are of their entitlements.
* A lack of transparency around pay;
	+ Workers are not provided with a national minimum wage compliance calculation that enables them to check this for themselves.
	+ Workers are not allowed to retain copies of their rotas to cross reference what work they’ve performed and the pay they receive. Indeed, Unison are finding that workers are being sent their work rotas electronically which are then deleted from their phones automatically on completion of an appointment. A typical shift would see them work 20-30 appointments a day so they could not possibly remember all the relevant information to evidence breaches.
* Litigation challenges:
	+ Tribunal fees (unless eligible for remission) of £390.00 would be payable to progress a claim to hearing which could represent a gamble to enforcement and mean that workers are risking the equivalent to two weeks pay to try and enforce rights.
* HM Revenue & Customs:
	+ They are the statutory body responsible for national minimum wage compliance. Whilst it may recover arrears for workers who get in contact with it, it will allow the employer to self-correct in regard to other workers at the same employer with little to no checks by HMRC to ensure compliance or that the arrears paid are accurate. It therefore relies on the trust of the employer to do this appropriately despite its previous non-compliance.

**THE ACTION BEING TAKEN BY UNISON**

* Under the premise of its Homecare Project it is pursuing a parliamentary campaign to call for regulations to be made for greater transparency in wage slips so as to improve workers ability to identify and ensure national minimum wage compliance.
* Through advocacy including submitting evidence to the Low Pay Commission and UN Expert Committee for Economic, Social and Cultural Rights.
* By organising; officers organising members, recruiting members and supporting them collectively to raise these issues with the employer so that one individual is not singled out as a consequence of raising it. A successful example of this occurred in Wales and where action by members supported by UNISON lead the employer to undertake its own audit to avoid litigation. The audit identified that approximately 100 workers were affected who were reimbursed for non-compliance. The average award in this case was £2500 per individual.
* And finally, through litigation funded by Unison and this leads to a case I ran for a Unison Member, Judith Montgomery against Sevacare UK Limited. The case was first identified by Unison’s Bolton branch who progressed the matter through the legal assistance scheme and it landing on my desk. Discuss case:

**JUDITH MONTGOMERY**

* The basis of the claim was
	+ Non-payment of travel time between assignments
	+ As employment had ended, it was possible to pursue the claim as a breach of contract in the employment tribunal. This had the benefit of avoiding the cap on unlawful deductions from wages claims and recover up to 6 years losses.
* There was limited evidence available which was
	+ A contract
	+ Two work rotas; and
	+ Wage slips for a limited period
* Our advice
	+ Based on the two rotas we were would able to positively advise in principal subject to disclosure of complete work rotas and wage slips by the employer.
	+ Whilst we were able to evidence a failure to pay the national minimum wage on the work rotas, we did not have a full set of rotas for the relevant pay cycle to clarify whether average pay in the cycle was less than the national minimum wage.
	+ For those not aware, NMW calculation is complex for the employee to perform as it is on the basis of average pay in the pay cycle or pay reference period. It is not difficult for the employer as this information should be easily available to it. Simply NMW entitlement is determined by all hours worked, inclusive of overtime, divided by pay in the period which includes overtime and relevant enhancements.
* Our first step was to; put the employer on notice of the claim and request necessary disclosure.
	+ We also triggered early conciliation to promote settlement
	+ Sevacare’s response was simply that its pay systems ensure compliance, without any explanation as to how, and partial disclosure that excluded the most crucial evidence - the work rotas that included travel time.
	+ Despite further requests for disclosure, the correspondence was ignored.
* Therefore our next step was to; issue proceedings and request necessary disclosure
	+ The above conduct left us with no alternative;
	+ The employment tribunal had power to order disclosure and penalise Sevacare if it failed to comply.
	+ Sevacare failed to submit an ET3 or respond to our application for disclosure, we were still therefore prevented from calculating the value of the claim and determining prospects i.e. was Judith in actual fact paid less than the NMW in a pay reference period?
* Step 3; The hearing
	+ As a consequence of the above, the claim was listed for a preliminary hearing to consider default judgement and our disclosure request (the tribunal has the power to order disclosure from Sevacare despite it not submitting a defence).
	+ Risks - we were still not able to make out our case and calculate whether Judith did in fact receive pay less than her NMW entitlement.
* Step 4; Settlement & the assistance of ACAS
	+ Throughout the above, ACAS made efforts to obtain the required disclosure but it was not forthcoming. Sevacare were making offers to settle but they were very low. Their starting position was that their calculations indicated that if there was a breach, it would be for no more than £71.50 but that they were prepared to offer £500. The offers rose slowly and on each occasion we requested disclosure to assess the reasonableness of the offer.
	+ The day before the preliminary hearing, Sevacare increased its offer to £1750.
	+ By this stage we had performed a very basic calculation based on the two work rotas providing an approximate value of the claim.
	+ Due to Judith being daunted by the process and the forthcoming hearing as she may have been required to give evidence, she indicating her acceptance of the offer despite (a) us not being able to accurately assess the reasonableness of the offer and (b) the offer being less than 50% of our estimated value of the claim.
	+ I would have been dissatisfied with this outcome so agreed with Judith that I should try and negotiate for more. That day (the day before the hearing) we agreed a net value of £3250.00 which was approximately 90% of the estimated value of the claim. Bearing in mind that the value of the claim could have easily been less or we may not have been able to make out the claim at all, this was an excellent outcome for this member.
	+ For the avoidance of doubt, we are able to discuss this case as despite it being settled by way of a COT3, I negotiated the wording to be without confidentiality provisions. I also negotiated the wording so that Sevacare did not deny liability.
* My reflections: there are a number of elements of good fortune in Judith’s case which could have resulted with a different outcome:
	+ Her mistakenly retaining the work-rotas. She was not allowed and understood that she could have been disciplined for doing so - without these we could not have positively assessed the claim in principal or estimate the value of the claim
	+ If she was not a Unison member, the issue may not have been highlighted to her (as it was by the Bolton branch).
	+ If she was not a Unison member, she may not have been able to obtain legal assistance.
	+ If Sevacare had provided the disclosure, it may have turned out that there was no breach as asserted by them in the initial correspondence
	+ Had Sevacare not failed to file its ET3 and disbarred from participating at the preliminary hearing, they may not have been so keen to negotiate a settlement much greater than what they asserted was the true value of the claim. Presumably this was to avoid the possible fines or the public shaming that may have resulted from an adverse NMW Judgement.

**SUMMARY**

In summary, the difficulties faced by homecare workers enforcing national minimum wage entitlement, the minimum pay legislation allows, typifies the challenges faced by low paid workers in the UK. Unison are hoping to change this through their Homecare Project and encourages its branches, both locally and regionally to assist its campaign by identifying employers in breach of its NMW obligations, organising and recruiting members and assisting them with the enforcement of their rights.

Thank you for your time.