AMERICAN ARBITRATION ASSOCIATION
Employment and Class Action Tribunal

Re: 18-160-001431-12

In the Matter of the Arbitration between

Elizabeth Frisari, individually and on behalf of all others similarly situated

(Claimants)

and

Dish Network, LLC.

(Respondent)

INTERIM ORDER ON CROSS-MOTIONS FOR PARTIAL SUMMARY JUDGMENTS

After full briefing and earlier oral arguments, the parties' cross-motions for summary judgment were heard by the Arbitrator, Hon. William A. Dreier, on October 28, 2015, with a supplemental argument on October 29, 2015, Jonathan I. Nirenberg, Esq. (Rabner, Allcorn, Baumgart & Ben-Asher, P.C., attorneys) and Ryan F. Stephan, Esq. (Stephan Zouras, LLP, attorneys) appeared for Claimants; and Christian C. Anitkowiak, Esq. and David J. Laurent, Esq. (Buchanan, Ingersoll & Rooney, attorneys), appeared for Respondents. Jonathan Weed, Manager of ADR Services, supervised the conference for AAA.

OVERVIEW

The parties agreed that there are no factual disputes concerning the single issue to which their cross-motions are addressed, namely, whether the method of payment for overtime satisfied the Federal Fair Labor Standards Act ("FLSA") and the

New Jersey Wage and Hours Law (NJWHL) requiring the payment of one and one-half times the employees' regular rate for hours worked over forty hours in a week. Some of these issues were considered and discussed in the Arbitrator's Opinion and Award dated August 18, 2014.

Respondent contends here that it met the Fair Labor Act standards either on an absolute basis or by application of the federal statute authorizing the use of Fluctuating Work Week method of payment. Claimants assert that the Fluctuating Work Week Regulation, 29 CFR § 778.114(a), exception has no basis in New Jersey law, which may be used to interpret the FLSA but not the NJWHL, and that there are numerous examples shown in Respondents' accounting records demonstrating that the employees did not receive a true time and one-half payment when they worked over forty hours in a week. Respondent counters with the argument that nearly all of Claimants' examples relate to work weeks that were either the employees' first or last week on the job and thus are specifically exempted for the provisions of the FLSA, or that the smattering of additional items are so small as to constitute nothing but individual mistakes that can be corrected without upsetting the general method of payment employed by Respondent.

For the following reasons, the Arbitrator determines that the method employed by Respondent violates the NJWHL in that although Respondent may have intended to employ a Fluctuating Work Week method of calculation, this method is unauthorized for New Jersey payments governed by the NJWHL. As to these claims, therefore, Claimants may proceed to a quantification of their losses on a class basis. The Arbitrator attributes no bad faith to Respondent, but only legal error.

Left open by this decision, is Claimants' assertion that the login and logoff times that allegedly had not been properly compensated by Respondent, is a proper subject for additional claims, including but not limited to the defense that the times involved are *de minimis*. These issues are clearly factual in nature and must await final hearing.

DISCUSSION

Claimants are or were Inside Sale Associates (ISAs) employed by Respondent, which has acknowledged that they were not exempt from the overtime provisions of both the FLSA and NJWHL. Under both state and federal law, they were required to be paid an overtime premium so that they receive "not less than one and one-half times the regular rate at which [the employee] is employed.." 29 U.S.C. § 207(a)1. The NJWHL requires the payment of the regular hourly wage for forty hours of working time in any week "and 1 ½ times such employee's regular hourly wage for each hour of working time in excess of forty hours in any week." N.J.S.A. 34:11-56(a)4. This formula is reiterated in N.J.A.C. 12:56-6.1.

The difference in Claimants' and Respondent's positions can be exemplified as follows: If the normal work week for an ISA was forty hours, but the employee worked fifty hours in the particular week, the base pay for the forty hours would be $400.00 (exclusive of commission adjustments which increase the employee's pay). According to Respondent, and using the variant of the Fluctuating Work Week (discussed in detail later), if the employee worked fifty hours in the particular week, one could calculate the overtime pay by first determining how much pay the employee received without the overtime bonus by dividing the fifty hours by the forty

hour contract pay of $400.00 (which would equal $8.00 per hour), and then give the employee the overtime bonus for the extra ten hours at one-half that rate of $4.00, making the total pay **$440.00** for that week. According to Claimants, the pay would be computed by the employee being paid $400.00 for the fifty hours, thus a pay level of $8.00 per hour and the ten overtime hours at one and one-half times the base rate ($12.00 per hour) with a total pay of **$520.00**. Claimants contend that Respondent employed the former method, but was required by state and federal law to use the latter method.

The statutes and regulations view the employee's "regular hourly rate," which is required to take into effect the fixed rate divided into the total hours worked. Thus, the longer the employee works, the lower the base rate becomes and the lower the overtime rate becomes.[1]

In this summary judgment motion, the Arbitrator is not reaching the issues of the actual pay each employee may have received when adjusted by commission pay, holiday pay or bonuses or any charges that the employee may have encountered for disciplinary deductions, willful absences, tardiness or infraction of work rules. Nor is the Arbitrator considering questions arising from the employee being paid from sub-accounts because there was a paid vacation day, paid holiday, sick day or other adjustment. In such cases, the base forty hours might be made up of time actually worked and time credited to the employee, but appearing on a different account

[1] A variant of this calculation was discussed by the Arbitrator with Claimants and Respondent in a supplementary argument. It would provide for pay for forty hours be $400.00, the base weekly rate, or $10.00 per hour, and then provide for a bonus for the extra ten hours of one and one-half times this rate, or $15.00 per hour, making a total of **$550.00** for the week. This calculation is, of course, acceptable to Claimants, but it was not argued, nor is it based on the case law interpreting the federal or state statutes.

within Respondents' accounting system. Again, these numbers will be adjusted in any final award when final schedules are presented concerning the pay, if any, due to each member of the class of Claimants. The limited issue before the Arbitrator is the proper method of computing the pay when there were overtime hours and whether a schedule of adjusted pay need be created that conforms to this decision.

Insofar as the Fluctuating Work Week method of computation is available for application in this case, one of the prerequisites is that the employee must receive a fixed salary that does not vary with the number of hours worked in each work week. *See* 29 C.F.R. § 778.114(a). The parties' agreement so provides, but, in practice, there are frequent and substantial adjustments. As Claimants' counsel have noted in both their opposition to Respondent's motion and in support of their own motion for this partial summary judgment, the various adjustments made to the ISAs' pay both by way of the deductions and additions noted above (*e.g.*, disciplinary deductions and commission, holiday pay and bonuses), indicated that the ISAs maye not really be paid fixed salaries. Employees are also told that the commission structure will usually override the minimum weekly salary.

These factors may or may not affect a decision on the use of a Fluctuating Work Week under the FLSA, and the cases are split on this issue. But the analysis under the NJWHL claim avoids a decision on the federal issue. There is no provision in the NJWHL or New Jersey regulations under which the Fluctuating Work Week payment rules could be authorized. The Arbitrator makes this finding with full knowledge of the February 21, 2006 letter from Michael P. McCarthy, the Director of the Division of Wage and Hour Compliance, New Jersey Department of Labor, which

was never implemented by a proposed or actual regulation, favoring the Fluctuating Work Week computations. As is noted in Claimant's opposing memorandum to Respondent's motion, for the Arbitrator to give effect to this letter would be to create and enforce a regulation that was never promulgated.

The Fluctuating Work Week method permits a one-half pay bonus for overtime after a fixed pay weekly payment where the employee's job conditions meet the five standards for application of the rule. *See* 29 C.F.R. § 778.114 and the general discussion in *Aiken v. County of Hampton*, 172 F.3d 43, at *2-*3 (4th Cir. 1998) and the more extensive discussion in *Verderame v. RadioShack Corporation*, 31 F. Supp. 3rd 702, 703-05 (E.D. Pa. 2014). As noted above, there is no New Jersey authority on this subject, and states have taken various positions whether the Fluctuating Work Week will be applied to their own state statutes and regulations. The authorities on this point have been collected in an article by John F. Lomax, Jr. entitled "The Attack on the Fluctuating Work Week Method," 30 ABA J. Lab. & Emp. L., 347 (2015), in which the author notes that on the state level, six states have determined that the method could be used under their state laws (Illinois, Massachusetts, Michigan, Ohio, Washington, and Connecticut) and four states have found the method to be incompatible with their state laws (Alaska, California, New Mexico and Pennsylvania).

The Arbitrator determines that the nature of the Fluctuating Work Week computation, with its half-time work week adjustment, effectively reduces the benefit of overtime pay to the individual worker, especially for longer overtime periods. The worker receives only a fixed benefit no matter how many hours he or she works and then only a half-time bonus, which is reduced for each extra hour because the hourly

rate is determined by dividing the fixed pay by the total hours worked. The worker gets very little for substantial benefits conferred on the employer. The worker certainly does not receive one and one-half times his or her usual pay for these extra efforts.

The New Jersey Supreme Court has noted the remedial purpose of the NJWHL and has dictated that this law "should be given a liberal construction." *New Jersey Dep't of Labor v. Pepsi-Cola Co.*, 170 N.J. 59, 62 (2001).[2] By engrafting this Fluctuating Work Week exception, the Arbitrator would not be giving this liberal construction to the law. If the Legislature or the Department of Labor through its regulatory powers had determined that the Fluctuating Work Week standard should apply, it could have amended the statute or promulgated a regulation in the many years that this rule has been applicable to the FLSA. As the New Jersey authorities have not done so, the Arbitrator will not make this extension here. The Arbitrator finds the Pennsylvania approach in *Verderame*, measured against the liberal construction required by the New Jersey courts, to be the correct application to apply in this case.

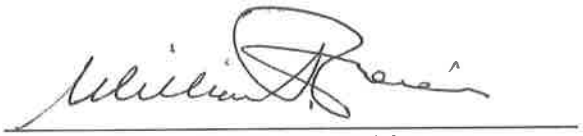
Based upon the foregoing, the Arbitrator determines that Claimants' interim motion for a partial summary judgment will be **GRANTED** and Respondent's interim motion for a partial summary judgment will be **DENIED**. The method of overtime compensation for the ISAs will be by a determination of the hourly rate, dividing their

[2] *See* also, *New Jersey Dep't of Labor v. Pepsi-Cola Co.*, (2002) W.L. 187400 at *95 - *96 (N.J. Sup. Ct. App. Div. January 31, 2002) noting that the Commissioner's rejection of the Fluctuating Work Week method of calculating overtime was inapplicable under the facts of that case and the Commissioner's use of the base forty hour week was reasonable and would be accepted by the court. Given the complex factual nature of the *Pepsi-Cola* case, and the fact that the opinion is not approved for publication, it cannot be taken as either an approval or disapproval of the use of the Fluctuating Work Week under the NJWHL.

base compensation by the total hours worked in the week and multiplying this figure by 1.5, as required by the NJWHL. As this computation will subsume any claim under the FLSA, calculations under that act need not be made.

IT IS SO ORDERED.

Date: October 30, 2015



Hon. William A. Dreier, Arbitrator