Appeal No. UKEAT/0130/16/DA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 2 November 2016
Judgment handed down on 16 November 2016

Before

HER HONOUR JUDGE EADY QC

(SITTING ALONE)

MR L GRANGE — APPELLANT

ABELLIO LONDON LIMITED — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR PHILIP ENGELMAN (of Counsel) Direct Public Access
For the Respondent	MR STEVEN MEYERHOFF (Solicitor) Backhouse Jones Solicitors The Printworks Hey Road Clitheroe Lancashire BB7 9WD

SUMMARY

WORKING TIME REGULATIONS

Working Time Regulations 1998 *- rest breaks - Regulations 12(1) and 30(1)*

Prior to July 2012, the Claimant had an eight and a half hour working day, paid for eight hours, with the intention that he take a half hour unpaid lunch break (although the nature of his work meant that this could be difficult to fit into the working day). On 16 July 2012, the Respondent emailed the Claimant expressing its expectation (at best) or instruction (at worst) that he was to work straight through for eight hours, without the half hour break, but then to leave earlier than he would have done before. In July 2014, the Claimant lodged a grievance complaining that he had been forced to work without a break, which had contributed to a decline in his health.

Determining the Claimant's complaint that he had been denied his entitlement to a 20 minute uninterrupted rest break, as provided by Regulation 12(1) **Working Time Regulations 1998** ("the WTR"), the ET considered it was required to follow the approach laid down by the EAT in **Miles v Linkage Community Trust Ltd** [2008] IRLR 602, which had held that there had to be an actual refusal of a request to exercise the right to a rest break in order to give rise to a legal liability under the **WTR**. Adopting that approach, the ET concluded:

(1) Prior to July 2012, the Claimant's work arrangements had allowed for a half hour break, consistent with his entitlement under Regulation 12(1). Even if it was often difficult to take that break, that did not mean the Respondent had "refused" to permit the Claimant to exercise his right.

(2) By its email of 16 July 2012, the Respondent had (at best) stated its expectation or (at worst) instructed the Claimant, that he should work through for eight hours without a break. Until his grievance, however, the Claimant had not actually made a request for a break. Although his grievance had included such a

request, there was no evidence - at least by the time of the ET claim - that the Respondent had in fact refused it.

The claim was therefore dismissed. The Claimant appealed.

Held: *allowing the appeal*

There were conflicting decisions of the EAT on the approach to be taken to rights to rest under the **WTR**. As the **WTR** had been introduced to implement the **Working Time Directive** ("the WTD"), it was appropriate to consider the language and purpose of the **WTD**, as explained by the Court of Justice in **Commission v UK** C-484/04 [2006] IRLR 888. Adopting that approach, it was clear that the construction of the **WTR** allowed by the EAT in **Scottish Ambulance Service v Truslove** UKEATS/0028/11 was to be preferred to that in **Miles**. As the ET's reasoning followed the approach laid down in **Miles**, the appeal would be allowed and the case remitted for determination of the issues in the light of this Judgment.

HER HONOUR JUDGE EADY QC

Introduction

1. This case raises an important question as to the correct construction of a worker's entitlement to a rest break under Regulation 12(1) of the **Working Time Regulations 1998** ("the WTR"), in particular whether the approach laid down by the EAT (HHJ McMullen QC presiding) in **Miles v Linkage Community Trust Ltd** [2008] IRLR 602 (followed in **Carter v Prestige Nursing Ltd** UKEAT/0014/12) is correct, given the need to interpret the **WTR** so as to give effect to EC Directive 2003/88/EC (the **Working Time Directive**; "the WTD").

2. In giving this Judgment, I refer to the parties as the Claimant and Respondent, as below. The appeal is that of the Claimant, against a Judgment of the London (South) Employment Tribunal (Employment Judge Balogun, sitting with members Mrs Wickersham and Mr Henderson, on 18-19 May, and in chambers on 24 July 2015; "the ET"), sent to the parties on 3 August 2015; by which the ET dismissed the Claimant's claim that the Respondent had acted unlawfully in refusing him rest breaks under the **WTR**. The appeal was permitted to proceed after a hearing under Rule 3(10) **EAT Rules 1993** before the Hon Mrs Justice Simler DBE (President). The Respondent resists the appeal, essentially relying on the reasoning of the ET.

3. Before the ET the Claimant was represented by a trade union official but Mr Engelman of counsel has acted for him *pro bono,* both at the Rule 3(10) Hearing (then under ELAAS) and today; the Court is very grateful to him for providing his services on a voluntary basis (as, no doubt, is the Claimant). Mr Meyerhoff has acted for the Respondent throughout. Both advocates are to be commended for their helpful and focused submissions.

The Relevant Background and the ET's Conclusions and Reasoning

4. The Respondent had employed the Claimant, initially, from September 2009, as a bus driver and subsequently, from June 2011, as a Relief Roadside Controller, known as an "SQS". The role of an SQS is to monitor the arrival and departure times of a bus service, regulate the frequency of the service and adjust it to traffic conditions, as necessary.

5. As a bus driver, the Claimant's rest breaks were scheduled at fixed times each day. That was not the position for him as an SQS. In that role the Claimant's working day initially lasted eight and a half hours, the half hour being unpaid and treated (at least by the Respondent) as a lunch break, albeit that - given the responsive nature of the SQS role - it could be difficult to take that break. In recognition of the practical difficulties of fitting in a break during the working day, from July 2012, the length of the working day for SQSs changed to eight hours, the idea being that they would work through without a break and finish a half hour earlier.

6. In determining whether or not the Claimant had been refused a rest break for the purposes of the **WTR**, the ET had regard to the case of **Miles v Linkage Community Trust Ltd** [2008] IRLR 602 EAT, in which it had been held that a refusal of a rest break had to be a distinct act in response to a worker's attempt to exercise his or her right, the employer's default thus arising only where there was a deliberate act of refusal; "refusal" being given its dictionary meaning, that is "*an act of refusing, a denial or a rejection of something demanded or offered*".

7. The ET found that, prior to July 2012, the half hour lunch break incorporated the 20 minute uninterrupted break required by Regulation 12(1) **WTR** (the Claimant's daily working time being more than six hours). Prior to July 2012, the Claimant might not have known of his entitlement but he was not "refused" a rest break as required by **Miles**; he had been free to take

a half hour break, as and when convenient. On the evidence, it might have been difficult to fit in a break because of the work schedule but that did not mean there was a refusal.

8. On 16 July 2012, an email was sent to the Claimant concerning a change to the working hours of SQSs, which expressed the Respondent's expectation that they would work eight hours without a break. This was described as an agreement but the ET found:

> **"20. … agreement was only sought from those SQSs who were present at the meeting. The claimant was not there and we were told that 2 SQSs dissented at the time (although they agreed subsequently) … the agreement reached with the SQSs was not a Workforce Agreement, as it did not meet the conditions of para 1 Schedule 1 WTR (it was not in writing for a start) [it] did not therefore have the effect of modifying or excluding the statutory entitlement to a rest break but that is what it purported to do. …"**

9. The ET asked itself whether the Respondent's "expectation", as communicated to the Claimant, amounted to a "refusal". It concluded it was not: it was at best an expectation, at worst an instruction. In either event, it was not a refusal of a request as envisaged by **Miles**.

10. On 14 July 2014, the Claimant submitted a grievance, complaining that, for two and a half years, he had been forced to work without a meal break, which had impacted upon his health (he was then signed off work sick in relation to an on-going condition). The grievance was heard on 30 September 2014 but ultimately rejected, the outcome letter being sent out on 23 January 2015. Meanwhile, on 18 November 2014, the Claimant had lodged his ET claim.

11. The ET accepted that implicit within the Claimant's grievance was a request for daily rest breaks. It observed, however, that the grievance outcome post-dated the commencement of the ET proceedings and was "*therefore irrelevant for our purposes*". Whilst allowing that the grievance hearing had preceded the ET claim, the ET rejected any suggestion that anything had happened at that hearing which might be construed as a refusal of the request. More generally, the ET recorded that the notes from the grievance hearing made clear:

> **"23. … the claimant had not made any requests of his line manager(s) for a rest break at any time after the 2012 email. The explanation for why he did not do [so] can be found in the notes: he thought that if he brought it to the attention of his line manager, he would be sent back to driving duties. Whilst the Claimant may not have explicitly requested a rest break, we know from the evidence of Mr Smith [the Respondent's Roadside Controller] that the Claimant told him that he was not happy working an 8 shift without a break. Mr Smith told us that breaks could be taken as and when but 30 minutes could not normally be taken in one go. … it does not appear that he made the Claimant aware of this, which is unfortunate."**

12. Having thus reached the conclusion that the Claimant's claim should be dismissed because there had never been a refusal of a rest break by the Respondent, the ET was, nevertheless, concerned about the working arrangements in place, observing:

> **"27. Notwithstanding our judgment, we are concerned that the Respondent appears to have agreed/condoned working arrangements which discourage employees from taking their statutory rest breaks. This runs contrary to the health and safety aims of the Working Time Directive upon which the Working Time Regulations are based. The Regulations do allow for flexibility in rest breaks to be achieved by means of a properly constituted Workforce Agreement. The Respondent has a recognised trade union and it seems to us that in this particular case, an agreement could have been reached which met the needs of the service but at the same time assured employees such as the Claimant that they were still entitled to take a proper rest break at a convenient point during their shift. The Respondent was aware of the Claimant's specific need for regular rest breaks and had it acted promptly in addressing his concerns we feel certain that these proceedings could have been avoided. …"**

The Appeal

13. By his appeal, the Claimant takes issue with the ET's requirement that there needed to be some express refusal on the part of the Respondent - a requirement that flowed from the approach adopted by the EAT in **Miles**. Although initially rejected on the paper sift, at the Rule 3(10) Hearing, Simler P allowed that it was reasonably arguable that both the case of **Miles** and, subsequently, **Carter v Prestige Nursing Ltd** UKEAT/0014/12 failed to fully accord with the purpose of the **WTD** and the appeal should thus be permitted to proceed on this basis. She rejected, however, an argument that the ET had erred in failing or refusing to consider events post-dating the claim, with reference to the Claimant's grievance: although the ET held the grievance to be irrelevant because the outcome post-dated the ET proceedings, it had referred to the grievance hearing and found nothing had been said or done such as to amount to a refusal by the Respondent to permit the Claimant to have a rest break.

A

The Relevant Legislative Provisions and Discussion of the Case Law

14. By Regulation 12 **WTR** it is provided:

> **"12.** ***Rest breaks***
>
> **(1) Where a worker's daily working time is more than six hours, he is entitled to a rest break.**
>
> **(2) The details of the rest break to which a worker is entitled under paragraph (1), including its duration and the terms on which it is granted, shall be in accordance with any provisions for the purposes of this regulation which are contained in a collective agreement or a workforce agreement.**
>
> **(3) Subject to the provisions of any applicable collective agreement or workforce agreement, the rest break provided for in paragraph (1) is an uninterrupted period of not less than 20 minutes, and the worker is entitled to spend it away from his workstation if he has one.**
>
> **…."**

15. Thus, where their daily working time is more than six hours, an adult worker is entitled to an uninterrupted rest break of not less than 20 minutes, which they are entitled to spend away from any workstation. Details of the rest break, including its timing and duration and the terms on which it is granted, may be stipulated in a collective or workforce agreement, which might modify or even exclude the right (see Regulation 23(a) **WTR**). In the absence of such an exclusion or modification, the timing of the break is a matter for agreement, or may be stipulated by the employer, although the concept that it is a "break" suggests that it may not be at the very beginning or end of the working day, and:

> **"… [the worker must know] at the start of the rest break that it is such. [That is] … an uninterrupted period of at least 20 minutes which is neither a rest period nor working time and which the worker can use as he pleases."** See per Peter Gibson LJ in **Gallagher v Alpha Catering Services Ltd** [2005] IRLR 102 CA, at paragraph 50.

16. The **WTR** represents the UK's implementation into domestic law of the **EC Directive 2003/88/EC** - the **WTD**. Within the preliminary recitals of the **WTD**, it is provided that:

> **"(5) All workers should have adequate rest periods. T he concept of "rest" must be expressed in units of time, ie in days, hours and/or fractions thereof. Community workers must be granted minimum daily, weekly and annual periods of rest and adequate breaks. It is also necessary in this context to place a maximum limit on weekly working hours."**

17. By Article 4 **WTD**, it is then provided:

> **"Article 4**
>
> ***Breaks***
>
> **Member States shall take the measures necessary to ensure that, where the working day is longer than six hours, every worker is entitled to a rest break, the details of which, including duration and the terms on which it is granted, shall be laid down in collective agreements or agreements between the two sides of industry or, failing that, by national legislation."**

18. It may be observed that the language of Regulation 12 **WTR**, and Article 4 of the **WTD**, is that of entitlement rather than obligation. In particular, Regulation 12 sits under the heading to Part II of the **WTR**: "*RIGHTS AND OBLIGATIONS CONCERNING WORKING TIME*". It might, therefore, seem that "obligations" refer to the mandatory requirements made on employers, such as will arise in respect of the maximum weekly working time (Regulations 4 and 5) or the length of night work (Regulations 6 and 6A). In contrast, Regulation 12(1) provides for a "right" or entitlement; workers cannot be *required* to take daily rest periods but they have an entitlement to do so. That said, paragraph 5 of the recitals to the **WTD** addresses both rest periods *and* maximum periods of weekly working time; both are seen in the same context and rest breaks "*must be granted*" just as it is "*necessary*" to place a maximum limit on weekly working hours. Moreover, in **Commission v UK** C-484/04 [2006] IRLR 888 CJEU, Advocate General Kokott considered how the entitlement to daily rest breaks was expressed in the various different language versions of the **WTD**, observing (albeit then referring to the earlier **WTD**, Council Directive 93/104/EC):

> **"62. The wording of the different provisions of the Directive is highly inconsistent depending on language version and also within individual language versions. Admittedly, for example in its English version in Articles 3, 4, 5 and 7 the term 'entitled to' is used throughout, which could be interpreted as meaning a mere entitlement. However, in the French, Italian and Portuguese language versions of those articles the terms 'bénéficie' (French), 'benefici' (Italian) and 'beneficiem' (Portuguese) are used, which may be translated into German as 'genießen' ('enjoy') or 'zugute kommen' ('benefit') and therefore could also be interpreted as meaning an obligation of result. In other language versions again, the use of terminology is not even consistent within the various provisions on rest periods (Articles 3, 4, 5 and 7). Thus for example the German version of Articles 3, 4 and 5 contains the expression 'gewährt wird', whereas Article 7 uses 'erhält'. Articles 3 and 5 of the Spanish version use the term 'disfruten', whilst Article 4 reads 'tengan derecho a disfrutar' and Article 7 simply 'dispongan'. In a similarly inconsistent manner the Dutch version uses the word 'genieten' in Articles 3 and 5 but the word 'hebben' in Article 4, and the expression 'wordt toegekend' in Article 7.**

> **63. That general inconsistency in language use also explains the fact that the Directive does not employ the same wording in setting the maximum limits of weekly and night working time in Articles 6(2) and 8(1) as in setting minimum rest periods. Thus in those provisions the Member States are required to take the measures necessary to ensure that the weekly or night working time 'does not exceed' the relevant maximum length."**

Having thus analysed the various language versions of the **WTD**, the Advocate General took the view:

> **"64. Contrary to the view of the United Kingdom, no qualitative distinction can be derived from the respective choice of wording between the requirements of Articles 6 and 8 of the Directive [maximum weekly working time and night work], on the one hand, and Articles 3 and 5 [daily and weekly rest] at issue here, on the other. …"**

19. Turning to the question of enforcement, where a worker considers their rights under Regulation 12(1) **WTR** have been breached, they can seek a remedy from an ET, as provided by Regulation 30:

> **"30. *Remedies***
>
> **(1) A worker may present a complaint to an employment tribunal that his employer -**
>
> **(a) has refused to permit him to exercise any right he has under -**
>
> **(i) regulation 10(1) or (2), 11(1), (2) or (3), 12(1) or (4), 13 or 13A;**
>
> **…**
>
> **(2) … an employment tribunal shall not consider a complaint under this regulation unless it is presented -**
>
> **(a) before the end of the period of three months … beginning with the date on which it is alleged that the exercise of the right should have been permitted …**
>
> **(3) Where an employment tribunal finds a complaint under paragraph (1)(a) well-founded, the tribunal -**
>
> **(a) shall make a declaration to that effect, and**
>
> **(b) may make an award of compensation to be paid by the employer to the worker.**
>
> **(4) The amount of the compensation shall be such as the tribunal considers just and equitable in all the circumstances having regard to -**
>
> **(a) the employer's default in refusing to permit the worker to exercise his right, …"**

20. Thus the only permissible ground for a complaint to an ET of a breach of Regulation 12(1) **WTR** is that the employer has *refused to permit* the exercise of the relevant entitlement.

21. In the case of **MacCartney v Oversley House Management** [2006] IRLR 514, the EAT (HHJ Richardson presiding) was also concerned with a complaint concerning the right to a rest break pursuant to Regulation 12(1). Noting that the **WTR** had been enacted to give effect to the **WTD**, the EAT observed:

> **"29. … It is well established that such regulations should be construed so as to carry out the obligations of and not to be inconsistent with the underlying directive."**

22. Given that Mrs MacCartney's working pattern did not afford her an uninterrupted period of rest (see **Gallagher**, cited above), the EAT accepted that she had been denied her entitlement under Regulation 12(1):

> **"33. … On any basis, Mrs MacCartney had daily working time of more than six hours. She was therefore entitled, if reg. 12 applied, to a rest break. It was not sufficient to leave her to take such rest as she could during her working time. She was entitled to an uninterrupted period of at least 20 minutes, and she was entitled to know at the start of the rest break that it would be such.**
>
> **34. … Since it is plain that by the very method of work imposed on her, OHM refused to allow her to exercise her right to rest breaks, the appeal on this ground must be allowed, and a declaration made that Mrs MacCartney['s claim] in relation to rest breaks is well founded."**

23. The approach adopted in **MacCartney** is consistent with that adopted by the Court of Justice of the European Communities in **Commission v UK** C-484/04 (*supra*). That case involved a challenge on the part of the European Commission to guidance issued by the (then) Department of Trade and Industry ("DTI"), which - specifically in respect of rights to minimum daily and weekly rest periods (Regulations 10 and 11 **WTR**) - had stated:

> **"Employers must make sure that workers *can* take their rest, but are not required to make sure they *do* take their rest." (Original emphasis)**

24. Advocate General Kokott's Opinion recorded the Commission's concession, it would:

> **"67. … normally be excessive, if not even impossible, to demand that employers force their workers to claim the rest periods due to them. … Accordingly, … not least for practical reasons, the employer's responsibility concerning observance of rest periods cannot be without limits."**

25. That said, the Advocate General then continued:

> **"68. However, an employer may on no account withdraw into a purely passive role and grant rest periods only to those workers who expressly request them and if necessary enforce them at law. Not only the risk of losing a case, but also the risk of becoming unpopular within the business merely for claiming rest periods could distinctly hamper effective exercise of those rights to ensure protection of the health and safety of workers.**
>
> **69. Instead, it is for the employer actively to see to it that an atmosphere is created in the firm in which the minimum rest periods prescribed by Community law are also effectively observed. There is no doubt that this first presupposes that within the organisation of the firm appropriate work and rest periods are actually scheduled. …"**

26. In its Judgment, the Court also emphasised the underlying health and safety purpose of the protection afforded by the entitlement to adequate rest (see paragraph 41) and condemned the DTI guidance, holding:

> **"44. … by restricting the obligations on employers as regards the workers' right to actually benefit from the minimum rest periods provided for … [by the WTD] … and, inter alia, letting it be understood that, while they cannot prevent those rest periods from being taken by the workers, they are under no obligation to ensure that the latter are actually able to exercise such a right, the guidelines are clearly liable to render the rights [thus] enshrined … meaningless and are incompatible with the objective of that directive, in which minimum rest periods are considered to be essential for the protection of workers' health and safety …"**

27. The Court further agreed with Advocate General Kokott that there was no material distinction to be drawn between the nature of the right to adequate rest and the obligations in respect of maximum periods of working time (see paragraph 45 of the Court's Judgment and paragraph 64 of the Advocate General's Opinion, cited above). Returning to my earlier observation regarding "rights and obligations" under Part II of the **WTR** (see paragraph 18 above), it becomes apparent that any distinction between the two terms must be one without substance given the need to interpret the **WTR** consistently with the **WTD**.

28. Although the Judgment in **Commission v UK** preceded the EAT's consideration of Regulation 12(1) in **Miles v Linkage Community Trust Ltd** [2008] IRLR 602, there is no indication that reference was made in that case to the Judgment or to the Advocate General's

A Opinion. Indeed, at paragraph 27 - in addressing the arguments advanced on behalf of Mr Miles as to the purposive approach required by the **WTD** - the EAT observed:

> **"… there is nothing that gives us any guidance in the Directive. …"**

B 29. In **Miles**, the EAT was, strictly speaking, concerned only with the question of compensation, the employer having admitted its failure to provide "compensatory rest" (the entitlement in issue in that case). Having regard to the language used in Regulation 30 - C specifically at Regulation 30(1) and (4) - the EAT considered that "refusal" should be given its dictionary definition: "*an act of refusing, a denial or a rejection of something demanded or offered*" (see paragraphs 24 and 26). It concluded:

> D **"27. … this requires answers to two questions. Did the claimant exercise the right? Did the respondent refuse him permission to do so? And in those circumstances it is correct to say that the obligation is triggered when there has been an actual refusal by an employer. …"**

30. The next case to which I have been referred relating to the construction of Regulation 30 E **WTR** is **Corps of Commissionaires Management Ltd v Hughes** [2009] ICR 345 EAT. In giving the Judgment of the EAT, the Hon Mr Justice Silber noted (see paragraph 21) the importance of the **WTD** when determining how to construe domestic legislation specifically adopted for the purpose of its implementation. Turning to consider the question from when did F time begin to run for the purposes of Regulation 30(2) **WTR**, the EAT concluded:

> **"42. … the claim had to be brought within the prescribed period of the time when the claimant should have been given a compensatory rest period. …"**

G 31. The EAT was also concerned with a time limit question in **Scottish Ambulance Service v Truslove** UKEATS/0028/11, specifically, as to when time starts to run for a claim of a breach of the entitlement to daily rest afforded by Regulation 10 **WTR**. Lady Smith (sitting alone) H followed the approach of **Hughes**: time ran from the date on which the rest was not afforded, on each occasion. In the course of reaching this conclusion, Lady Smith treated **Miles** (which was

relied on by the employers to support an argument that time ran from when the employers rejected the employees' statutory grievance, regardless of whether there were subsequent denials of rest periods) as a case on remedy. She did not find it helpful in determining the question raised before her and rejected any suggestion that the employee was required to expressly request daily rest, something which the employer had "*a duty to afford him*" (see paragraph 32), further opining:

> **"29. … As the Advocate-General in the ECJ case of [*Commission v UK*] observed, an employer cannot withdraw into a passive role and grant rest periods only to those workers who ask for them (see paragraph 68). The onus is on the employer where daily rest periods are concerned. It would, accordingly, be invidious to interpret the legislation in a manner which renders the enjoyment of the right dependent on the worker asking for that which the WTR already gives to him. That would, however, seem to be inherent in the Respondent's primary approach, which places such emphasis on the need for there to have been a request and a decision to permit or refuse. …"**

32. Lady Smith went on to distinguish the employee's entitlement in respect of daily rest periods (consistent in all material respects with rest breaks under Regulation 12) with the position in relation to annual leave entitlement, which expressly requires the employee to give notice (see Regulation 15 **WTR**), a requirement absent from Regulation 10 (and Regulation 12) rights.

33. Although strictly distinguishable as concerned with different provisions under Regulation 30 **WTR** (**Miles** being concerned with the relevant period for the purposes of calculating compensation under Regulation 30(4); **Truslove** with the starting point for calculating time for Regulation 30(2) purposes), the two cases plainly adopted very different approaches to the issue whether a worker is required to make an express request for a rest period - an argument raised in both. This conflict of approach was identified in a subsequent case on rest breaks under Regulation 12 **WTR**, **Carter v Prestige Nursing Ltd** UKEAT/ 0014/12 (HHJ Richardson, sitting alone). Faced with an argument that **Miles** had been wrongly decided, HHJ Richardson considered that there were no exceptional circumstances shown such

as to warrant his departing from the earlier decision of the EAT in **Miles** (see paragraph 28). In reaching that view, HHJ Richardson took the view that the approach adopted in **Miles** accorded with the natural meaning of the words used in Regulation 30(1) and did not consider that the lacuna in the protection afforded to workers to which this gave rise was sufficient reason for departing from the earlier considered and reasoned conclusion of the EAT. More specifically, he rejected the argument that **Miles** was itself inconsistent with the earlier decision (in which he had participated) in **MacCartney**, observing that he did not recall the point being argued in that case. Although **Truslove** adopted an arguably different approach, that was seen as directed to Regulation 30(2), a different provision and the EAT in **Carter** apparently did not consider it had wider effect, notwithstanding Lady Smith's reference to the Advocate General's Opinion in **Commission v UK**.

Submissions

The Claimant's case

34. The Claimant contends, firstly, that the ET wrongly construed Regulation 30(1)(a) of the **WTR** by holding that the words "*refused to permit him to exercise [his] Regulation 12(1) right …*" meant (following **Miles**) that there had to be a request by the employee to exercise his Regulation 12(1) right to a rest break. On a proper construction of the Regulation, a refusal to permit should be construed as a failure to allow the employee to exercise his right to a rest break. The ET should, instead, have followed **Commission v UK**, **MacCartney v OHM** and **Scottish Ambulance Service v Truslove**. **Miles** had been determined in error. As was apparent from paragraphs 26 and 27 of that Judgment, the EAT had proceeded on the basis that there was no guidance as to the construction of the **WTD** in this regard but that was incorrect given the Judgment in **Commission v UK**. In truth, the reasoning in **Truslove** contradicted

Miles and should be preferred to it. The ET in the present case had failed to construe the **WTR** in accordance with the **WTD**.

35. If the EAT disagreed, the issue should be referred to the EU Court of Justice.

36. Alternatively, if a refusal was necessary to trigger Regulation 30(1)(a) then, on the true construction of the email of 16 July 2012, the instruction (see paragraph 7 ET Decision) to the workforce amounted to a refusal for the purposes of the Regulation. Alternatively, the Claimant's lodging of a grievance had amounted to a request which had been implicitly refused.

The Respondent's case

37. The Respondent contends that the ET's conclusion was correct: the Claimant had a duty to express and/or communicate his objections or protestations to the Respondent in order for a claim under Regulation 12 **WTR** to be brought. In **Miles**, the EAT had accepted that the term "refusal" ("refused" under Regulation 30) should be given its dictionary definition - *"an act of refusing, a denial or a rejection of something demanded or offered*". On that basis, it had held that a refusal is a distinct act in response to a worker's attempt to exercise her right; an employer's default therefore arises only when there is a deliberate act of refusal.

38. Allowing (as the ET found) that the Claimant might not have known of his entitlement to rest breaks prior to July 2012, he was free to take a 30 minute break as and when convenient; although there may sometimes have been practical difficulties in this regard, there could not be said to have been a refusal as envisaged in **Miles**. As for the position post July 2012, whilst the Respondent had sent an email communicating its expectation of an agreement that SQSs would work eight hours without a break, that again did not amount to a refusal: the Claimant could, at

any time, have requested clarification of the email (and, the Respondent contends, had he done, he would have been told he could take breaks throughout the shift, as and when needed) but there was no evidence that he had done so. The Claimant had, instead, worked for over two years on those arrangements, enjoying the benefit of leaving early without complaint. He had not been able to discharge the burden upon him of showing that he had been refused rest breaks for the purposes of his **WTR** claim.

39. As for the **WTD** and recital paragraph 5, that made clear that workers must be "granted" rest breaks; it did not require that workers actually take such breaks.

40. Turning to the case law, the Judgment in **MacCartney** was not on point: in that case the workers were simply unable to take the breaks in issue; that was not the position here. As for **Commission v UK**, it was important to note that the Court had not stated that employees *had* to take such breaks (and see paragraph 67 of the Advocate-General's Opinion). If the Claimant had not taken breaks when it was (on the evidence before the ET) possible for him to choose to do so, then the ET was right: there had been no refusal of the right. The Judgment in **Hughes** related to Regulations 21 and 24 so was also not strictly on point. Similarly **Truslove** related to the time bar point and so was distinguishable and not as relevant as **Miles** and **Carter**.

41. **Miles** made clear (see paragraph 26) that there were two stages required: (1) the exercise of the right and (2) the refusal of permission to do so. The exercise of the right (stage (1)) must be referring back to Regulation 12(1), accepting (as Mr Meyerhoff did in oral submissions) that this could only make sense if taken to mean that the right was to request a break or to give notice of an intention to take a break (albeit that was not required by Regulation 12(1) itself). In any event, as the EAT had observed in **Carter v Prestige Nursing**

Ltd, the EAT should not depart from an earlier decision save in exceptional circumstances; there were no exceptional circumstances: at this level, **Miles** should be followed. **Carter** was then the most recent authority and expressly considered the most relevant part of the report of the Advocate General's Opinion in **Commission v UK** so far as the Claimant's case was concerned (albeit through a reference to the reasoning of the EAT in **Truslove**, see paragraph 26 **Carter**). The EAT in **Carter** did not simply blindly follow **Miles** but itself took the view that - notwithstanding the reference to **Commission v UK** in the **Truslove** case - that was the correct construction to be given to Regulation 30; see paragraph 29 **Carter**.

Discussion and Conclusions

42. I start by considering whether the answer to this appeal is simply that I should follow (as the ET did) the earlier decision in **Miles**? Respecting, as I do, HHJ Richardson's concern for legal certainty, I am not, however, persuaded that is an accurate characterisation of the current position. Whilst it is possible to read each authority as strictly addressing the specific Regulation with which it was directly concerned, I do not consider that does justice to the substance of the Judgments concerned. In **Truslove**, Lady Smith may have distinguished **Miles** as a case concerned with the calculation of compensation but I cannot reconcile her characterisation of an employer having "*a duty to afford*" a worker's right to rest, regardless whether it has been requested, with HHJ McMullen QC's requirement of an "actual refusal", an approach that assumes the worker has to take some positive step in order to exercise the right.

43. Allowing that the existing case law of the EAT provides for alternative approaches to rest break entitlement under the **WTR**, I turn to the language and purpose of the **WTD**. Doing so, I note the guidance provided in **Commission v UK** and the Court of Justice's condemnation of the earlier DTI guidance stating that employers were under no obligation to ensure that

A workers were actually able to exercise such a right. I further observe that, in terms of the nature of the right, the Court saw no distinction between a worker's *entitlement* to rest and an employer's *obligation* to ensure maximum hours of working time. Given that guidance, I consider it clear the **WTD** entitlement to a rest break is intended to be actively respected by employers. It is required not merely that employers permit the taking of rest breaks (in accordance with **WTD** provision) but - allowing that workers cannot be forced to take rest breaks - that they proactively ensure working arrangements allow for workers to take those breaks (see paragraphs 68 and 69 of the Advocate-General's Opinion in **Commission v UK**).

44. Following that guidance, I consider it equally clear that the approach adopted in **Truslove** is to be preferred to that in **Miles**. It seems that the EAT in **Miles** was not referred to the **Commission v UK**, hence HHJ McMullen QC's observation that "*there is nothing that gives us any guidance in the Directive*"; in contrast, the guidance provided by the **WTD** (as explained in **Commission v UK**) plainly underpinned the reasoning in **Truslove**.

45. Having considered the language and purpose of the **WTD**, I return to the terminology of the **WTR**. In **Miles**, it was considered key that Regulation 30(1) requires that any complaint in respect of rest periods or compensatory rest be founded upon an employer's refusal of the entitlement, where "refused" is understood to be a positive act in response to a demand made. Regulation 30(1) is equally the gateway for enforcement of a Regulation 12(1) entitlement to a rest break. Where I part company with the reasoning in **Miles**, however, is in its requirement that the employer's refusal has to amount to an active response to some positive request, rather than (for example) simply the denial of a right through the arrangement of the working day - the *de facto* refusal of the entitlement to a rest break even if not expressly demanded by the worker.

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46. Adopting, instead, the **Truslove** approach not only enables a real world protection of rights to rest breaks (see the concerns raised by the Advocate General in **Commission v UK** on this point, at paragraph 68; apposite given the Claimant's concerns in the present case, see paragraph 23 of the ET's Decision), but also provides for a straightforward construction of the phrase "*exercise any right*" that appears in the second part of Regulation 30(1). In **Miles**, the EAT stated that the language of Regulation 30(1) required "*two positive steps*", the first being "*exercise of the right*" and the second "*refusal of permission to do so*". Thus, the first step envisaged in **Miles** would not be the actual exercise of the right in question (in the present case, the entitlement to take a 20 minute rest break) but a demand by the worker to be able to exercise that right. That, however, is not the entitlement allowed by Regulation 12(1). Had the right to a rest break been made subject to the equivalent conditionality as the right to annual leave - requiring the prior giving of notice, see Regulation 15 **WTR** - the position might have been different: there would have been some basis for seeing the making of the request as the first step, per **Miles**. That, however, is not the case; the first step required in **Miles** adds a condition to the right to rest that is no part of the relevant Regulations.

47. Adopting an approach that both allows for a common sense construction of Regulation 30(1), read together with Regulation 12(1), and still meets the purpose of the **WTD**, I consider the answer is thus to be found in the EAT's Judgment in **Truslove**: the employer has an obligation ("*duty*") to afford the worker the entitlement to take a rest break (paragraph 32 **Truslove**). That entitlement will be "*refused*" by the employer if it puts into place working arrangements that fail to allow the taking of 20 minute rest breaks (**MacCartney**). If, however, the employer has taken active steps to ensure working arrangements that enable the worker to take the requisite rest break, it will have met the obligation upon it: workers cannot be forced to take the rest breaks but they are to be positively enabled to do so.

48. On that basis, I return to the ET's conclusion in the present case. The ET clearly considered it was bound by the reasoning in **Miles** and thus (notwithstanding its misgivings, see paragraph 27) did not allow for a refusal of the entitlement other than where there had been both a request on the part of the worker and a specific refusal of that request by the employer. For the reasons I have provided, I consider that gave rise to an error of approach, which renders the ET's conclusions unsafe and I allow the appeal on this basis.

49. The question then arises as to the disposal of the appeal. Given the findings of the ET, adopting the approach that I have concluded is correct, can I say that only one outcome is possible? I do not consider that I can. There were three separate periods in issue in this case and it is worth considering the possible outcomes in respect of each.

> 49.1. Prior to July 2012, the Respondent facilitated the taking of the requisite rest break by virtue of the incorporation of the half-hour lunch break into the working day (ET paragraph 17). Equally, however, it seems that many SQSs were simply too busy to take that break each day (paragraph 6) - did that, in fact, amount to a failure to allow the Claimant to exercise his entitlement?
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> 49.2. The position initially seems clearer after July 2012: the Respondent might be seen to have denied the entitlement to a rest break given its expectation or instruction that SQSs were to work through, without a break, for eight hours (paragraph 21). That said, there was evidence at the grievance hearing that, even after the July 2012 email, the Claimant had been advised "*to take a meal break if he wanted one*" (paragraph 11). If that is right, was the Claimant in fact denied his entitlement?

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49.3. Lastly, the ET accepted that the Claimant had protested against his working arrangements when he lodged his grievance in July 2014, and had, thereby, made a request that he be afforded his right to a 20 minute rest break (paragraph 22). Although Mr Engelman says the Respondent's refusal of that request can be implied, I am not sure that is correct, not least as I understand that the Claimant was off work on sick leave at that time. As for the position after the grievance had been determined, that was neither considered by the ET nor is it a matter that I understand to be before me (given the constraints on the permission given by Simler P when allowing this appeal to proceed).

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50. I therefore consider that this matter must be remitted to the ET. I have not heard from the parties on the issue of disposal in this eventuality and therefore allow that they should have the right to make further representations in writing on this question (or to say if they are in agreement) within 14 days of the date this Judgment is handed down. Should either party wish to make any other applications arising from my Judgment, those too should be made in writing within the same time-frame. Adopting a proportionate view, and subject to any further representations made, I would then anticipate being able to address all remaining issues on the papers or to give further directions as appropriate.

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