Appeal No. UKEAT/0316/16/BA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 8 November 2017

Before

HIS HONOUR JUDGE SHANKS

(SITTING ALONE)

MR D CRAWFORD — APPELLANT

NETWORK RAIL INFRASTRUCTURE LTD — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MS NAOMI LING (of Counsel) Instructed by: Thompsons Solicitors LLP Congress House Great Russell Street London WC1B 3LW
For the Respondent	MR ANDREW BURNS (One of Her Majesty's Counsel) Instructed by: Eversheds LLP Bridgewater Place Water Lane Leeds LS11 5DR

SUMMARY

WORKING TIME REGULATIONS

The Claimant/Appellant was a railway signalman working on single manned boxes on eight-hour shifts. He had no rostered breaks but was expected to take breaks when there were naturally occurring breaks in work whilst remaining "on call". Although none of the individual breaks lasted 20 minutes, in aggregate they lasted substantially more than 20 minutes.

He claimed that he was entitled to a 20 minute "rest break" under regulation 12 of the **Working Time Regulations 1998** or "compensatory rest" under regulation 24(a). The Employment Tribunal found that regulation 12 did not apply and that the arrangements were compliant with regulation 24(a).

He appealed on the basis that "an equivalent period of compensatory rest" must comprise one period lasting at least 20 minutes. The appeal succeeded in the light of **Hughes v The Corps of Commissionaires Management Ltd** [2011] EWCA Civ 1061 (in particular the judgment of Elias LJ at paragraph 54).

HIS HONOUR JUDGE SHANKS

1. The Claimant is a signaller with Network Rail. He claimed that his employers failed to provide him with "rest breaks" or alternatively "compensatory rest" under the **Working Time Regulations 1998**.

2. Those **Regulations** were brought into force to comply with EU **Directive 2003/88/EC**. I have been shown that Directive. It is not necessary to go through it in detail, but I note the following provisions. Recital 5 says:

> **"(5) All workers should have adequate rest periods. The concept of "rest" must be expressed in units of time, i.e. in days, hours and/or fractions thereof. Community workers must be granted minimum daily, weekly and annual periods of rest and adequate breaks. …"**

There were then the definitions at Article 2. Number 2 defined "rest periods" as: "*any period which is not working time*", and number 9 defined the words "adequate rest" to mean that:

> **"9. … workers have regular rest periods, the duration of which is expressed in units of time and which are sufficiently long and continuous to ensure that, as a result of fatigue or other irregular working patterns, they do not cause injury to themselves, to fellow workers or to others and that they do not damage their health, either in the short term or in the longer term."**

Article 4 says:

> **"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, failing that, by national legislation."**

Then, there is provision for derogations at Article 17(2) and it says that derogations of specific types:

> **"(2) … may be adopted by means of laws, regulations or administrative provisions or by means of collective agreements … provided that the workers concerned are afforded equivalent periods of compensatory rest or that, in exceptional cases in which it is not possible, for objective reasons, to grant such equivalent periods of compensatory rest, the workers concerned are afforded appropriate protection."**

3. The important parts of the **Working Time Regulations** for today's purposes are as follows. Regulation 12, says (1) "*Where a worker's daily working time is more than six hours, he is entitled to a rest break*", (2) need not concern us, but (3) says "*Subject to the provisions of any applicable collective 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*". I will interject here to say that the characteristics of the rest break provided by regulation 12 to which the worker is entitled are (1) that the worker is away from his workstation, (2) that the period is at least 20 continuous minutes, (3) that during that period he is not on call, (4) that the period is uninterrupted (which goes with not being on call), and (5) (it is implicit) that that break takes place during a shift when the worker would otherwise be working. It is now accepted, however, that in this case, regulation 21 meant that regulation 12 did not apply to someone doing the job that Mr Crawford was doing, specifically 21(f), which applies:

> **"(f) where the worker works in railway transport and -**
>
> **…**
>
> **(iii) his activities are linked to transport timetables and to ensuring the continuity and regularity of traffic."**

In those circumstances, regulation 24, which is headed "*Compensatory rest*", becomes of crucial importance. Regulation 24 says this:

> **"Where the application of any provision of these Regulations is excluded by regulation 21 … and a worker is accordingly required by his employer to work during a period which would otherwise be a rest period or rest break -**
>
> **(a) his employer shall wherever possible allow him to take an equivalent period of compensatory rest, and**
>
> **(b) in exceptional cases in which it is not possible, for objective reasons, to grant such a period of rest, his employer shall afford him such protection as may be appropriate in order to safeguard the worker's health and safety."**

4. The regulations are enforced by virtue of provisions in regulation 30: *"A worker may present a complaint to an employment tribunal that his employer has refused to permit him to*

exercise any right he has under …" and then, among the rights mentioned, is regulation 24. There is the usual provision for a three-month time limit to bring such a claim and provision that "*Where an employment tribunal finds a complaint … well-founded, [it] shall make a declaration to that effect*" and can award compensation.

5. The facts and background to this case are set out in the ET's Judgment, although it is fair to say it is not as clear as it might have been and some of the findings are left to be inferred rather than expressly set out, but it seems to me that one can glean the following.

6. The Claimant works as a relief cover signalman at various signal boxes in the southeast. Shifts are usually 6am to 2pm, 2pm to 10pm and 10pm to 6am. All the boxes that the Claimant works at are single manned, other than one at Lancing. The Tribunal found as fact that those signal boxes are not very busy (there are something like six trains per hour in general) and indeed there is a problem with keeping up the concentration of the signalman. However, it is clear that the job nevertheless requires the signalman to be continuously monitoring and that there may at any time be a call for him to do things in addition to the periods of activity when trains are going through.

7. The ET seems to have found that in practice the Claimant could, if he wished, take short breaks from his workstation which, counting only those that could be more than five minutes, would together over a shift amount to well in excess of 20 minutes. However, at least during daytime shifts in the week, it would not be possible to have a continuous 20-minute break of this sort and, as I have already indicated, he was always, in effect, on call if something happened that required his attention.

8. The employer has a document called "*Provision of Rest Breaks for Signallers and Crossing Keepers*" (at page 73 of my bundle) which seeks to deal with the question of rest breaks. Paragraph 4 of the guidance (at my page 74) indicates what should happen at single manned locations:

> **"4. At single manned locations breaks must be taken between periods of operational demand where there are opportunities for "naturally occurring breaks". These are times when there is no operational activity which requires immediate attention or response. At such locations the 20 minute break may be an aggregate of shorter breaks over the course of the 3rd, 4th and 5th hours. In this instance at least one of the naturally occurring breaks should be of sufficient length to allow the individual to take a personal needs break and to take refreshment (Note: 5 minutes is the recommended minimum time)."**

The ET do not expressly find that that arrangement was compliant with regulation 24(a), but it is implicit in their conclusions that that is what they found. In particular, conclusion paragraph 13.2 says in terms that the Claimant "*has been permitted (indeed, encouraged) to take compensatory rest breaks*".

9. The ET also found that the Claimant had not requested (and had therefore not been refused) any different arrangements to the ones I have described, at least not within the three months which preceded the bringing of the claims. However, in fact, he had more than three months before the starting of the ET proceedings brought a substantial grievance and then an appeal which raised the very complaint that he now raises, namely that he did not have a continuous 20-minute break. His complaint and the appeal were dismissed and no steps were taken to change the system and, although there is no express finding, it seems clear on the evidence that there must have been occasions during the three months leading up to the launch of the proceedings when he was required to work on a shift where there was no scope for a 20-minute uninterrupted break. In the circumstances, it seems to me that there is indeed but one issue raised on this appeal, namely, whether the ET were entitled to find, as a matter of law, that what was provided on such occasions amounted to compliance with regulation 24(a)?

10. Before turning to that issue I should say that regulation 24(b) was in issue before the ET but is not raised on the appeal, no doubt because of an important finding of fact at paragraph 12.23 in the Judgment which states:

> **"12.23. If we are wrong on all of the above, we find that the Respondent could introduce the facility to roster breaks as it has done elsewhere. We do not accept Mr Burns's submission that it makes no sense to provide relief for the relief signaller. When the Claimant is the relief signaller, he is the signaller for that shift. A relief signaller would then be able to move between the boxes, giving each single signaller a break, notwithstanding that we have heard this is apparently not desired by anyone in the region where the Claimant works, other than the Claimant himself."**

In other words, the ET found that it would be possible, by having someone to come and relieve the Claimant and his colleagues, to roster in a full 20-minute rest break which (presumably) would comply with the requirements of regulation 12, although that of course does not expressly apply to the Claimant.

11. I have already recited the relevant **Regulations** and the background **Directive**. The only relevant authority on the meaning of regulation 24(a) is a case called **Hughes v The Corps of Commissionaires Management Ltd** [2011] EWCA Civ 1061 (8 September 2011); I have the judgments of the EAT and the Court of Appeal in my bundle. In that case the Claimant was a security guard who worked alone on site. He was allowed by his employers to take breaks from his desk in the kitchen whenever he liked, but he was always on call. It is not actually said - or at least I have not been able to find it - that the break that he was allowed to take was a 20-minute break, but it is certainly implicit in everything else that is said. If a break was interrupted, as it frequently was, the Claimant was able to deal with the problem raised by the interruption and then was allowed to go back and start his break, presumably the 20-minute break, all over again. The EAT and the Court of Appeal said that that was sufficient to comply with regulation 24(a). The crucial passage in the Court of Appeal is in the judgment of Elias LJ

A at paragraph 54, where he deals with what is required for an equivalent period of compensatory rest and says this:

> **"54. We would accept that if a period is properly to be described as an equivalent period of compensatory rest, it must have the characteristics of a rest in the sense of a break from work. Furthermore, it must so far as possible ensure that the period which is free from work is at least 20 minutes. If the break does not display those characteristics then we do not think it would meet the criteria of equivalence and compensation. In this case the arrangements plainly did meet those criteria, as the EAT found. Indeed, since the rest break begins again following any interruption, many would say that this was more beneficial than a regulation 12 *Gallagher* break would be.**
>
> **55. We would add that we do not think that it is likely to matter in practical terms which paragraph is applicable, at least in circumstances where the employer is unable to offer a *Gallagher* rest break but adopts arrangements which come as close as possible to replicating that break. Even if such an arrangement does not fall within paragraph (a), we would have thought that it is bound to fall within paragraph (b)."**

12. It is clear to me from the **Hughes** decision that the mere fact of being on call during any break cannot mean that regulation 24(a) does not apply, because it was expressly found that the worker in that case was "on call" all the time during his shift. Therefore, the fact that Mr Crawford is "on call" throughout any break would not be sufficient for him to succeed. However, as I read paragraph 54, Elias LJ *is* saying that as far as possible the compensatory rest must comprise a break from work which must last at least 20 minutes.

13. Mr Burns tried with great skill and tenacity to suggest that paragraph 54 should be read in such a way that the "period" - which is the word used in the second sentence of the paragraph - can comprise an amalgamation of different amounts of time which together amount to 20 minutes. I am afraid I just cannot read it like that. It seems to me clear that what Elias LJ was saying was that there should be a break from work and, so far as possible, that that break should last at least 20 minutes, and that otherwise it would not be "an equivalent period of compensatory rest". Given that paragraph 54 seems to me undeniably part of the reasons for the decision in the **Hughes** case, I can see no way round that conclusion.

14. Mr Burns also says that Network Rail's system in this case was actually better from a health and safety point of view than a system involving a continuous 20 minute break and that the ET must have endorsed that view. But, assuming the law is as stated by Elias LJ, I do not see that that could be relevant. The **Regulations**, as interpreted by the Court of Appeal, mean that the length of the individual break is crucial; it cannot be open to employers to decide otherwise on the basis of their views as to what health and safety requires in a particular case.

15. On the basis therefore that there were some shifts which Mr Crawford was required to work where there was no opportunity for a continuous break of 20 minutes, and that it would be possible to provide such a break by providing a relief signaller as found by the ET at paragraph 12.23, it seems clear that regulation 24(a) was not satisfied on those shifts, and that Network Rail must therefore have been in breach of their obligations under the **Regulations**.

16. In the circumstances, I will allow the appeal and remit the matter to the ET to identify such shifts and consider the question of remedies.