Appeal No. UKEAT/0304/17/JOJ

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 5 & 8 October 2018

Before

THE HONOURABLE MR JUSTICE SOOLE

(SITTING ALONE)

MR L GRANGE — APPELLANT

ABELLIO LONDON LIMITED — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant

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For the Respondent

MR THOMAS CORDREY
(of Counsel)
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SUMMARY

JURISDICTIONAL POINTS

WORKING TIME REGULATIONS

The Claimant presented a claim which alleged breach of Regulation 12 of the **Working Time Regulations 1998** ("WTR"), namely the failure to provide rest breaks. The claim was dismissed, but on appeal (HHJ Eady QC) was remitted. By written submissions before the Remitted Hearing the Respondent for the first time contended that all claims of refusal to provide rest breaks before 5 July 2014 were out of time (WTR Reg.30(2)), so that the ET had no jurisdiction to that extent. The new point was entertained and upheld by the ET. The Respondent conceded breach for the residual claims, which amounted to refusal of rest breaks on 14 days between 6 July and 14 September 2014. Taking account of evidence as to the effect of the absence of rest breaks on the appellant's pre-existing medical condition which was known to the Respondent, the ET awarded compensation of £750.

On appeal the Claimant contended that the Employment Tribunal ("ET") had no jurisdiction to entertain the new point since it did not fall within the terms of the order for remission **Aparau v Iceland Frozen Foods plc (No.2)** [2000] ICR 341. The Employment Appeal Tribunal ("EAT") dismissed the appeal. An arguable point on jurisdiction having been taken, the ET was bound to consider it **Radakovits v Abbey National plc** [2010] IRLR 307.

On the cross-appeal, the Respondent contended that the compensation represented an award for injury to feelings and/or personal injury, which in either case were not permitted, citing **Santos Gomes v Higher Level Care Ltd** [2018] ICR 1571, and/or had no adequate evidential basis and was excessive. The EAT dismissed the appeal, holding that the award was for personal injury; **Santos Gomes** did not bar such an award; and that it was sufficiently supported by the evidence and not excessive.

THE HONOURABLE MR JUSTICE SOOLE

1. This is an appeal and cross appeal from the Decision of a London (South) Employment Tribunal (Employment Judge Balogun and members) sent to the parties on 18 August 2017, whereby the Tribunal held that (i) save for the period 6 July - 14 September 2014, Mr Grange's claim for breach of his entitlement to rest breaks contrary to Regulation 12(1) **Working Time Regulations 1998** (WTR) had been presented out of time with the consequence that the Tribunal had no jurisdiction to that extent; and (ii) awarded him compensation of £750 in respect of the period of claim for which it did have jurisdiction.

2. The Tribunal's Decision followed an Order of the Employment Appeal Tribunal (HH Judge Eady QC) dated 16 November 2016, whereby she remitted the matter to the Tribunal. Following that remission, the Respondent (Abellio) for the first time made the application to challenge the jurisdiction of the Tribunal.

3. Mr Grange's essential ground of appeal is that since Abellio had not previously done so and the remitted matters did not include that issue, the Tribunal should not have entertained the challenge. Abellio's cross appeal is that the award of compensation wrongly included an award for injury to feelings and/or personal injury and/or was excessive.

Background

4. Mr Grange was from September 2009 employed by Abellio as a bus driver; and from June 2011 as a relief roadside controller, known as a SQS. The further details of that position and the arrangements for rest breaks are set out in HH Judge Eady's Judgment at paragraphs 4-5.

5. On 18 November 2014, Mr Grange brought a claim alleging breach of his entitlement to rest breaks contrary to **WTR** Regulation 12. By Decision sent to the parties on 3 August 2015 the claim was dismissed on the basis of authority that there was no claim in the absence of a deliberate act of refusal by the employer: **Miles v Linkage Community Trust Limited** [2008] IRLR 602. Neither Abellio nor the Tribunal took any point that any part of the claim was out of time. Mr Grange appealed the Decision.

6. Preferring EAT authority to the contrary **Scottish Ambulance Service v Truslove** [2012] UKEATS/0028/11/1201, and taking account of European Court authority on the **Working Time Directive** ("WTD"), HH Judge Eady in her Judgment handed down on 16 November ([2017] ICR 287), held that the employer's refusal did not have to amount to an active response to a positive request but could simply be the denial of the right through the arrangement of the working day.

7. As to disposal, the Judge concluded that she could not say that only one outcome was possible. She identified three separate time periods in issue in the case and concluded that the matter must be remitted. The parties were invited to make written representations on disposal and also to make such other applications arising from the Judgment as they wished.

8. The parties' representations were confined to whether the matter should be remitted to the same or a different Tribunal. Having considered those representations, HH Judge Eady made the Order that *'This matter is to be remitted to the same ET for reconsideration in the light of the EAT's Judgment herein…'*

9. By Order dated 6 April 2017, the ET gave notice of *'a Hearing to determine remedy'* on 2 May 2017 and advised that any written submissions must be submitted not less than seven days before the hearing. Despite the wording of that notice, there is no dispute that the remission extended to issues of liability.

10. Written submissions prepared by Counsel Mr Philip Engelman on behalf of Mr Grange, dated 27 March 2017 and headed *'The Claimant's submissions on the remitted issues'* identified those issues by reference to the terms of HH Judge Eady's Judgment; and in particular dealt with the three periods of time identified by the Judge, to which I refer later.

11. By Abellio's submissions dated 29 March 2017, prepared by fresh counsel Ms Jesse Crozier, it was for the first time submitted that any complaint of refusal to provide rest breaks on a date before 5 July 2014 was out of time pursuant to the provisions of Regulation 30(2) **WTR**; and that accordingly the Tribunal had no jurisdiction to that extent. That Regulation provides:

> **'(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 (or, in a case to which regulation 38(2) applies, six months) beginning with the date on which it is alleged that the exercise of the right should have been permitted (or in the case of a rest period or leave extending over more than one day, the date on which it should have been permitted to begin) or, as the case may be, the payment should have been made;**
> >
> > **(b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three or, as the case may be, six months.'**

12. As to Regulation 30(2)(b), Ms Crozier submitted that there was no evidence to show that it had not been reasonably practicable to present a claim earlier in respect of any prior breach.

13. At the Hearing on 2 May 2017 the Tribunal heard argument from both Counsel (Mr Engelman, but now Mr Cordrey for Abellio) as to jurisdiction and the time limit provisions, as well as to liability and remedy. It does not appear that any objection was taken to the Tribunal

entertaining the new point; but in any event the Tribunal concluded that *'Although the time point was not taken at either the original hearing or the appeal, as it is a matter of jurisdiction, the Tribunal is required to consider it.':* para.5.

14. The Tribunal determined that the claim should be broken down into the three periods identified by HH Judge Eady, namely (i) 16 July 2011 - 15 July 2012; (ii) 16 July 2012 - 14 July 2014; (iii) 15 July 2014 - 14 September 2014.

15. The Tribunal accepted Mr Cordrey's submission that under Regulation 30(2)(a) time runs from the date on which the Claimant should have enjoyed the relevant statutory rest period. It rejected the counter-submission that the breach of the Regulations was a continuous act and that, provided there was a complaint falling within the three-month primary period, all the breaches dating back to the beginning of the first period were in time. That latter argument is rightly no longer pursued by Counsel now appearing for Mr Grange, Ms Sally Robertson.

16. The Tribunal held that time in each case ran from the dates on which Mr Grange should have enjoyed the relevant statutory rest break. In consequence, it held all that of the first period was out of time; all of the second period, save 6-14 July 2014, was out of time; but that the third period 3 was in time: para.14.

17. The Tribunal concluded that, having taken account of absences because of sickness and annual leave during the period 6 July - 14 September 2014, there were only 14 days during that period when Mr Grange was present at work. The issue of a rest break did not arise when absent from work. Since Abellio conceded that it could not show that, during the residual 14 days,

working arrangements were in place that allowed Mr Grange to take his rest breaks, the claim under Regulation 12 in respect of those days succeeded: paras.15-16.

18. As to compensation Regulation 30(4) provides:

> **'(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, and**
> >
> > **(b) any loss sustained by the worker which is attributable to the matters complained of.'**

19. It was common ground that Mr Grange had suffered no financial loss as a result of the breach. The Tribunal rejected Abellio's submission that in consequence, and given that he had been paid his full salary throughout and had also been compensated by the provisions of a SQS agreement, which provided a shorter working day, he had suffered no loss in any form and no compensation should be awarded.

20. The Tribunal referred to its finding in the Liability Judgment that Abellio was aware of Mr Grange's specific need for regular rest breaks; and concluded that compelling him to work to the agreed working pattern without adjustments was unreasonable. It continued:

> **'21. Whilst there is no medical evidence before us linking the Claimant's sickness absences to the lack of rest breaks, given his medical condition and the symptoms he described in evidence, we are satisfied that the lack of rest breaks would have had some adverse impact, even if this were limited to discomfort.**
>
> **22. For these reasons, we consider that this is a case where some compensation is due'**

21. As to the assessment of compensation, the Tribunal considered and rejected the possibility of comparative guidance from the provisions of section 57XE of the **Employment Rights Act 1996**, concerning right to time off to accompany a person to an antenatal appointment. It noted that the entitlement under **WTR** Regulation 30 was engaged every day that the worker was at work and was *'therefore a more substantial right.*' Furthermore, as a health and safety measure

it justified greater compensation than would result from the formula in respect of antenatal appointments.

22. The Tribunal concluded:

> **'25. The refusal of the rest breaks was more than a minor inconvenience to the claimant. He told us that because of his underlying medical condition, he needed to regulate his food intake to ensure regular bowel movement otherwise he would have to use laxatives to prevent bleeding. He said that not having a rest break meant that he did not have an opportunity to eat properly, which caused him some discomfort and stress.**
>
> **26. Taking all of these matters into account, we could consider that a just and equitable award would be £750.'**

Jurisdiction and Remission

23. It is common ground that satisfaction of the time issue in Regulation 30(2) goes to the jurisdiction of the ET, just as much as the time limits for a claim of unfair dismissal.

24. However, Ms Robertson submits that the Tribunal exceeded the scope of its jurisdiction by entertaining the application that the claims were out of time. The Tribunal was not entitled to consider any matters beyond those which were remitted to it by the decision of HH Judge Eady. Those matters did not include the question of whether or not the claims were out of time.

25. She placed particular reliance on the decision of the Court of Appeal in **Aparau v Iceland Frozen Foods Plc (No.2)** [2000] ICR 341. This held that an ET has exhausted its jurisdiction once it has delivered a final decision disposing of all the issues before it. Thereafter, apart from the limited power of review given by the ET rules of procedure, a Tribunal has no right to reopen proceedings or reconsider its decision unless the matter is remitted to it for that purpose by the EAT.

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26. The extent of revival of the Tribunal's jurisdiction depends on the scope of the remission. Likewise, the parties cannot consent to give the Tribunal jurisdiction to determine a matter beyond that afforded by the remission. To do so would be to clothe it with a jurisdiction, which it would not otherwise possess: [23-26].

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27. In the present case, HH Judge Eady's invitation for further representations had included the invitation to *'make any other applications arising from my judgment'* before she gave further directions. Ms Robertson submitted that this was the moment for Abellio to raise an issue on time limits if it wished to do so. If it had done so, it would have been a matter for the Judge, in the exercise of her discretion, to consider whether that issue should be remitted.

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28. Abellio made no such application and the moment passed. In consequence the Judge's Order was for *'This matter to be remitted to the same Employment Tribunal for reconsideration in the light of the Employment Appeal Tribunal's judgment herein'*. That was the full scope of the revival of the ET's otherwise exhausted jurisdiction. It did not include the time issue. Thus, the Tribunal had no jurisdiction to consider that point when it was raised in the subsequent written submissions of new Counsel. Alternately, if there was a discretion for the Tribunal to consider the point, it had not considered whether or not to exercise that discretion but had simply concluded it was *'required to consider it':* para.5.

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29. As to the exercise of any discretion (whether by the EAT or the ET), Ms Robertson cited the summary of principles by HH Judge McMullen QC in **Secretary of State for Health v Rance** [2007] IRLR 665 at [50], which included that *'(5) Where the new point relates to jurisdiction, this is not a trump card requiring the point to be taken... It remains discretionary.'* In support of

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A that proposition HH Judge McMullen cited **Barber v Thames Television Plc** [1991] ICR 253, as approved in **Jones v Governing Body of Burdett Coutts School** [1999] ICR 38.

B 30. Furthermore, it was not a good reason to exercise such a discretion where the issue had arisen as a result of lack of skill by a represented party: **Rance** at [50(7)(b)]. In this case the point had been there to take, but had been missed by Abellio's previous legal representatives.

C 31. In anticipation of Abellio's reliance on the Court of Appeal decision in **Radakovits v Abbey National Plc** [2010] IRLR 307, Ms Robertson submitted that it was distinguishable. In **Radakovits** the employee brought a claim for unfair dismissal one day outside the primary three-
D month period. The employer initially took the view that the Tribunal did not have jurisdiction because the claim was out of time. The Tribunal directed that there should be a pre-hearing review to consider the effective date of termination and whether the Tribunal had jurisdiction to
E consider the claim. The employer subsequently wrote a letter to the Tribunal stating it did not contest the time issue. The Tribunal vacated the hearing and made case management decisions for a hearing of the substantive claim.

F 32. However, at the start of that hearing the Tribunal of its own motion took the question of jurisdiction as a preliminary issue. It concluded that the time limit had expired and that it had no jurisdiction in the matter. That decision was affirmed on appeal to the EAT. In the Court of
G Appeal, the employee argued that the Tribunal had not been entitled to reopen jurisdiction, given the employer's concession and the Tribunal's previous decision to vacate the pre-hearing review on that issue. He also argued that the employer was estopped from changing its position.

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33. The appeal was dismissed. In the Judgment of Elias LJ the Court reaffirmed that time limits in the context of unfair dismissal claims go to jurisdiction and that jurisdiction cannot be conferred on a Tribunal by agreement or waiver. It followed that the fact that the employers initially accepted that the Tribunal had jurisdiction was not sufficient to confer jurisdiction on it [16-17]. Nor was the employee in any way estopped or barred from changing its position and arguing the jurisdictional point. Thus at [21]:

> **'If that case were ever to have any merit, I think it would only have been on the basis that the employers themselves were seeking to initiate a reconsideration of the jurisdiction question. Even then, it would have been a difficult argument to sustain if the tribunal felt that the explanation given on its face for accepting jurisdiction in May 2006 was misconceived.'**

34. Elias LJ added that, whilst it was true that the Tribunal in an appropriate case was obliged to raise the issue of jurisdiction even though it had not been identified by the employers, **'...they are not bloodhounds who have to sniff out potential grounds on which jurisdiction can be refused… It does not have to explore fully every case where a jurisdictional issue could potentially arise':** [22].

35. Ms Robertson rightly did not suggest that Abellio was estopped by its failure to take the point at an earlier stage. However, she sought to distinguish **Radakovits** on the basis that the Tribunal had taken the point before it had exhausted its jurisdiction in the matter. By contrast, the present case was one where the Tribunal had exhausted its jurisdiction by delivery of a final decision disposing of all the issues before it. Accordingly, the case fell within the principles of **Aparau** and the Tribunal had no jurisdiction to go beyond the matters remitted by the Order HH Judge Eady.

36. Mr Cordrey responded that, the issue having been raised by Abellio, the Tribunal was bound to consider it. The appeal derived no assistance from the cited decisions on the exercise of the jurisdiction to allow a new point of law to be taken on appeal, including a new point on jurisdiction. The position was different where an arguable point arose before a Tribunal as to

whether it had jurisdiction to entertain the claim. Whether raised by a party or the Tribunal, once raised the Tribunal was bound to consider it.

37. That was confirmed by the Court of Appeal in **Radakovits** and was also demonstrated by the decision of the National Industrial Relations Court (NIRC) in **Rogers v Bodfari (Transport) Ltd** [1973] ICR 325. In that case the employer, having been found liable for unfair dismissal, took the point on jurisdiction for the first time at the hearing on compensation. The Tribunal upheld the submission and dismissed the claim. With evident lack of enthusiasm, the NIRC dismissed the appeal, Sir John Donaldson P citing previous authority to the effect that '**…the time limit must be regarded and interpreted as a jurisdictional provision – which, of course, the parties cannot waive, and not as a limitation provision which they can waive or may be estopped from taking'** (at p.329FG).

38. As to **Aparau**, Mr Cordrey submitted that its authority was for the proposition that the Tribunal's jurisdiction is restrained by the terms of a remission, not for the proposition that a Tribunal's jurisdiction can be exceeded by the terms of a remission. If there is no jurisdiction to hear a claim because it is out of time, nothing in the terms of a remission can confer jurisdiction on the Tribunal to hear the claim. This point of principle was further reinforced by the terms of s.35 **Employment Tribunals Act 1996**.

39. He also pointed to Court of Appeal authority that the Tribunal could on remission, unless precluded by its terms and in exceptional circumstances, permit a new point of law to be raised if it was just to do so: **Hooper v British Railways Board** [1988] IRLR 517 at [67].

40. He added that, even where there was a discretion for a new point of jurisdiction to be raised on appeal, the authorities demonstrated that such matters were treated differently from other points of law. Thus in **Aparau** itself, the point was taken for the first time in Court of

Appeal and succeeded: [28, 34]. He also submitted that, on a proper analysis of HH Judge Eady's Judgment and the terms of her Order, the remission on liability and remedy had no 'closed list' and thus in any event extended to the issue of jurisdiction.

Conclusion on jurisdiction

41. In my judgment, the decisions in **Radakovits** and **Rogers** are decisive on the matter and cannot be distinguished. Their effect is that, once an arguable point has been raised before the ET as to whether it has jurisdiction to entertain the claims before it, the Tribunal is bound to consider that question. Likewise, if the Tribunal itself notes the point. If, having considered the matter, the Tribunal is satisfied that it has no jurisdiction, that is the end of the claim. It is immaterial that the Respondent has previously overlooked the point, whether through error or otherwise. There is no basis for an argument of waiver or estoppel or consent to the jurisdiction.

42. For this reason, no assistance is derived from the authorities on the terms of the remission or on the taking of a new point on appeal. As to the former, the EAT cannot by the terms of its remission confer jurisdiction on the ET which it does not have. As to the latter, the cited authorities have no application to the position of the original Tribunal which is faced with an issue as to whether it has jurisdiction in the matter. In any event, even on appeal, the authorities show a distinct willingness to allow a new point on jurisdiction to be taken, at least in circumstances where no new evidence is required to resolve the point: see **Barber** in the passage cited, also **Aparau** at [28, 34].

43. It is of course highly regrettable that the point was not noted and taken by those acting for Abellio at an earlier stage. It needs no imagination to understand the resulting disappointment and frustration for Mr Grange following his success before HH Judge Eady. However, that is the

consequence for a point which goes to the jurisdiction of the Tribunal. In these circumstances, it is unnecessary to give further consideration to the precise ambit of the Order for remission in this case.

44. In the event that the appeal failed on this central point, Ms Robertson rightly acknowledged that there could be no appeal on the decision that the identified claims were out of time. In particular, given the terms of Regulation 30(2), the argument below that the breaches constituted a continuing act could not be pursued. Nor could it be suggested that it had not been reasonably practicable to present the relevant complaints within the three-month period.

Compensation of £750

45. Ms Robertson also made clear that, in the event that the appeal on jurisdiction failed, the appeal on the amount of compensation was not pursued. I turn to the cross appeal.

46. As was common ground below in the light of the decision of Slade J in **Santos Gomes v Higher Level Care Ltd** [2016] ICR 926, the claim for compensation for breach of the Reg.30(4) **WTR** did not allow an award for injury to feelings. By its subsequent decision handed down on 13 March 2018 ([2018] ICR 1571), the Court of Appeal upheld that decision. Ms Robertson reserved her position for argument at any higher level.

47. Abellio's first ground of appeal is that the Tribunal's award of £750 nonetheless amounted to an award for injury to feelings, or at least took account of injured feelings when determining the level of compensation. For this purpose, Mr Cordrey focused on the word 'distress' in paragraph 25 of the Judgment.

48. The second ground of appeal is that, in taking account of Mr Grange's physical discomfort, the Tribunal made an award of compensation for personal injury; and that such an award was also barred by the decision of the Court of Appeal in **Santos Gomes**.

49. The third ground of appeal was that, even if such award could be made, the evidence (and in particular as to causation) provided no basis for such an award and represented little more than the 'palm tree' assessment abjured by authority. In any event the figure was manifestly excessive for discomfort resulting from the short period of breach.

50. As to the first ground, Mr Cordrey submitted that the reference to 'distress' must either be to injury to feelings or to psychiatric injury. Neither category of injury was recoverable in law; and, as is undisputed, there was no evidence of psychiatric injury.

51. I do not accept this analysis of the reference to distress. The Tribunal had been cited the decision of Slade J in **Santos Gomes** and did not make an award of injury to feelings. Its reference to distress in paragraph 25 was within the phrase *'discomfort and distress'*. Insofar as the award included the element of distress, it was not freestanding but was directly linked to the physical discomfort which Mr Grange had suffered.

52. As to personal injury, Mr Cordrey acknowledged that Slade J had allowed for the possibility of a personal injury award in such claims and had distinguished these from awards for injury to feelings. Thus, she had stated:

> **'70 …. Mr Pascall rightly recognised without formally conceding that breach of the obligation to grant rest breaks may lead to non-financial loss. If an employer repeatedly refused rest breaks, an employee may become exhausted and ill. In my judgment it may be argued that the loss to which an employment judge may have regard under WTR reg 30(4)(b) in awarding compensation could include compensation for injury to health caused by the employer's default. Further, in certain circumstances the employee may be able to pursue a remedy in tort for such injury in the courts. However, in this case Ms**

Churchhouse has made clear that the Claimant's claim was not for injury to health but for injury to feelings…'

53. Whilst the Court of Appeal had not commented on that passage, he submitted that its reasoning was consistent only with the rejection of any award for non-pecuniary loss under Regulation 30(4), thus excluding compensation akin to awards of general damages for pain suffering and loss of amenity. Although the Court of Appeal has not said this expressly, it was the necessary implication of the analogy which it had repeatedly drawn with the decision of the House of Lords in **Dunnachie v Kingston Upon Hull City Council** [2005] 1 AC 226. **Dunnachie** was a case of unfair dismissal, compensation for which was governed by s. 123(1) of the **ERA,** which provided:

'(1) …the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.'

54. In his leading Judgment in **Santos Gomes**, Singh LJ noted the similarity in wording between s. 123 **ERA** and **WTR** Regulation 30(4)(b); and that the House of Lords in **Dunnachie** had held 'loss' not to include non-pecuniary loss: [33]. At [38] he noted that the **WTR** jurisdiction was statutory and stated that the question in the case was *'… at its root therefore one of statutory interpretation. In particular it turns on the correct interpretation of Reg 30(4).'*

55. At [59] Singh LJ noted that the words *'just and equitable in all the circumstances'* appeared both in s.123 and Reg. 30(4). In **Dunnachie** those words did not allow for an award of non-economic loss, nor for a general award fashioned by *'palm tree justice'*. At [61] he distinguished a line of authority, in other areas of statutory employment law, which allowed awards for injury to feelings. He added that in his view the reasoning in this line *'… is difficult to reconcile with what was said by the House of Lords in **Dunnachie**.'*

56. In his conclusions at [62-70] Singh LJ in particular stated that:

(i) citing **Dunnachie**, the phrase 'just and equitable' did not confer a general power on tribunals to award what they think ought to be awarded in a form of palm tree justice; nor to award compensation for injury to feelings.

(ii) again citing **Dunnachie**, some importance should be attached to the fact that in the context of discrimination legislation Parliament had expressly conferred jurisdiction on tribunals to award compensation for injury to feelings, whereas in the context of unfair dismissal it had not.

(iii) the cited authorities where such awards have been made were analogous to discrimination cases. By contrast, in agreement with Slade J, the present case was akin to a breach of contract.

(iv) the natural remedy for this wrong was to make a payment of compensation, based on the rate of pay, for the extra time the employee was required to work.

(v) the case did not fall within the exceptional category of contractual claims, including the 'holiday cases,' which allowed such awards.

(vi) having regard to the EU law principle of equivalence, there was equivalence with domestic law rights, namely the right not to be unfairly dismissed and claims for breach of contract, which normally did not allow awards for injury to feelings.

57. Mr Cordrey submitted that these observations all led to the implicit conclusion of the Court of Appeal that 'loss' in Reg. 30(4) was for all purposes to be equated with loss under s. 123(1) **ERA** and thus to exclude all non-pecuniary loss. He of course acknowledged that an ordinary claim for breach of contract could attract, on appropriate evidence, an award of damages for personal injury.

58. I asked Mr Cordrey about the significance to be attached to those parts of the Judgment of Singh LJ which referred to the law of contract, in particular where he (i) accepted that breach of Reg. 30(4) was akin to a breach of contract; (ii) distinguished this sort of contractual claim from the 'holiday cases'; and (iii) tested the principle of equivalence against claims for breach of contract, as well as against statutory claims of unfair dismissal.

59. Mr Cordrey submitted that, whilst these references to contract provided further support for the decision that breach of the **WTR** provide permitted no award of compensation for injury to feelings, they did not diminish the essential conclusion that the meaning of 'loss 'in Reg. 30 (4) should accord with the decision in **Dunnachie** on the similar language of s.123(1) **ERA**.

60. For the reasons advanced by Ms Robertson, I am not persuaded that the Court of Appeal in **Santos Gomes** held that the decision in **Dunnachie** was determinative of the interpretation of Regulation 30(4) in all respects and thus to exclude an award for personal injury.

61. First, the Court of Appeal decision in **Santos Gomes** was focused on the claim for award of compensation for injury to feelings. It did not need to address the possibility of an award for personal injury.

62. Secondly, the decision made clear that the refusal of an award for injury to feelings was supported both by **Dunnachie** and its context of unfair dismissal and by the general law on recovery of damages for breach of contract. Thus, the decision acknowledged that a claim for failure to provide rest breaks was akin to a claim for breach of contract. It then tested the refusal of an award for injured feelings against (i) the exceptional category of contractual claims which allowed such awards of damages and (ii) the principle of equivalence, having regard to claims in contract as well as to claims of unfair dismissal. There would have been no need to consider these additional comparisons if the decision were solely governed by **Dunnachie**.

63. Thirdly, I do not read the reference to the 'natural remedy' for the wrong as a statement that compensation was necessarily confined to an award calculated on the basis of an hourly rate for the additional time worked.

64. Fourthly, the Court did not express disagreement with the observations of Slade J on potential awards for personal injury. While its focus was on awards for injuries to feelings, it might have been expected to take issue with that passage if its ratio was that compensation for breach of the **WTR** was entirely confined to pecuniary loss.

65. Fifthly, as European Court authority makes clear, the object of the WTD is to ensure effective protection of the worker's health and safety; see **Commission of the European Communities v. United Kingdom** C-484/04 [2007] ICR 592 at [46]. In that context it would be natural for a claim for breach of the **WTR** to allow such awards.

66. Thus, in my judgment the decision of the Court of Appeal does not exclude compensation for personal injury suffered in consequence of breach of the rest break provisions of the **WTR**.

67. If so, Abellio then challenges the award on the basis that a claim for compensation for personal injury must be subject to the full rigours of the approach that will be taken in a contractual claim. In the present case there was no sufficient medical evidence to establish causation; no consideration of remoteness; and no reference to the Judicial College Guidelines or to any authorities on quantum. The Tribunal had in effect made a 'palm tree' award.

68. I agree with Ms Robertson that the observations of Simler P in **Hampshire County Council v Wyatt** (UKEAT/0013/16) have relevance to this case. In that disability discrimination case, Counsel for the employer had submitted that it was wrong to make an award for personal injury in the absence of expert medical evidence on causation or quantum. Whilst accepting that in a low value case proportionality might drive the parties and the Tribunal to deal with such issues without medical evidence on a common sense basis and to the best of its ability, it was submitted that in any other case medical evidence must be obtained.

69. The President, sitting with members, did not accept the argument, stating *'…we would be concerned to see such a principle established, bearing in mind in particular the financial cost involved in obtaining medical evidence…'* [29]. See added, in respect of pecuniary loss, *'…tribunals are expected to deal with compensation for unfair dismissal in a rough and ready way, applying common sense and their best judgment to what is just and equitable in the particular case…'* [42].

70. This was a low value claim. Mr Grange's case at the remitted hearing was supported by his witness statement in which he gave evidence as to his underlying medical condition, Abellio's knowledge thereof and the effect of the absence of rest breaks on his health. He was cross-

examined about the effect on his health. Resorts to Judicial College Guidelines or authority would have been a little assistance in the context of a modest level of award.

71. I should add that, whilst it was submitted to the Tribunal that there should be a nil award of compensation that there could be no injury to feelings, it is not clear to me that there was a direct challenge to the principle of an award for personal injury. At any rate the Tribunal evidently did not understand there to have been such a challenge.

72. In my judgment and in the context of a modest claim for this limited period, the Tribunal had sufficient evidence to reach the conclusion which it did. I am not persuaded that the resulting award is to be stigmatised as a palm tree assessment and see no basis to interfere with the figure of £750.

73. For all these reasons the appeal and cross appeal must be dismissed.