



EMPLOYMENT TRIBUNALS

Claimant
Mr D Flynn

v

Respondent
The Risk Practice T/A Showmed

Heard at: Bury St Edmunds

On: 15 May 2019

Before: Employment Judge M Warren

Appearances:

For the Claimant: Mr Bunting, Counsel.

For the Respondent: Mr A Withers, Company Director.

JUDGMENT having been sent to the parties on **30 May 2019** and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013, the following reasons are provided:

REASONS

Background

1. The claimant is a trained first aider. He was retained as a worker by the respondent, who provides a first aid service to public events.
2. The claimant's claim is that the respondent was in breach of the Working Time Regulations 1998, specifically regulation 10, which relates to the requirement of an 11 hour break between shifts and regulation 12, which relates to the requirement to be provided with a twenty minute rest after 6 hours of work. The claim was issued on 3 September 2018 and is in time.
3. The claim was originally listed to be heard in Cambridge for 1 hour on 16 January 2019. There is no way this case was ever going to be dealt with in an hour. As it is, there was insufficient time for it to even start and the matter was re-listed for a day today. It has been transferred from Cambridge to here, Bury St Edmunds, due to lack of resources in Cambridge.

Evidence

4. In terms of documents before me today, the respondent has put together a joint bundle of documents, properly paginated and indexed, running to 200 pages.
5. I have also been provided with a file containing witness statements. That includes a statement for the claimant and for the respondents, witness statements from: Mr Withers, (Managing Director of the respondent company); Mrs Preston, (Resource Coordinator); a Mr Brown, (Emergency Medical Technician), and a Mrs Foulds, (Human Resources Coordinator).
6. I had a skeleton argument from Mr Bunting for the claimant, for which I am extremely grateful. That was presented to the respondent before the hearing started. I have some authorities from both sides.
7. I took a break this morning to read the witness statements and read or look at the documents referred to. I then heard sworn evidence from each of those witnesses. The evidence of Mr Brown and Mrs Foulds was unchallenged.

The issues

8. There were little in the way of disputed facts before me, or rather little in the way of disputed facts of any relevance, but the case will effectively turn on whether the respondent can rely on the provisions for compensatory rest and if so, whether in fact it provided such compensatory rest.

Findings of fact

9. The claimant lives in Warrington. He worked the following shifts for the respondent, in respect of which he complains that he did not receive the required regulation 10, 11 hour break:
 - 9.1 On 11 May 2018, he attended an event at the Ricoh Arena which is in Coventry, working between 8am and 10pm.
 - 9.2 On 12 May 2018, he attended the same venue and worked from 8am to 9pm. He therefore had a 10 hour break between the two shifts on 11 and 12 May.
 - 9.3 He next worked on 14 May 2018 at 3pm through to 9pm, see page 59.
 - 9.4 On 13 June 2018, he attended and worked at an event at Shrewsbury football club. He worked between 8am and 12.45am the following morning. I refer to page 61 where one can see he worked three back-to-back shifts that day; 8-3.30; 3.30-11.30 and then 11.30-00.45. He was asked to work those additional later hours because the respondent did not have cover in place. He agreed to do so.
 - 9.5 There was therefore a 7¼ hour break before he next worked the following day on 15 June 2018, 8am to 9pm.

- 9.6 After that, he next worked on 17 June 2018 at 8am.
- 9.7 On 9-12 June 2018, he worked four 12 hour shifts over those four days, again at an event at Shrewsbury football club. His complaint is that he had an hour and a half drive each way at the beginning and end of each shift and therefore, only had 9 hours of rest.
10. The claimant complains of a series of events at which he worked over 6 hours and in respect of which, he did not receive the required regulation 12, twenty minute break. These were as follows:
- 10.1 9 April at the Ricoh stadium, a 12 hour shift;
- 10.2 11 May at the Ricoh stadium, a 14 hour shift;
- 10.3 12 May at the Ricoh stadium, a 13 hour shift;
- 10.4 16-18 May at an event in Warrington, three 12 hour shifts;
- 10.5 22 May at the same venue in Warrington, a 12 hour shift, and
- 10.6 24-27 May at the same location in Warrington, a series of 12 hours shifts.
11. He accepted in evidence that he rarely had to deal with patients during those shifts, but he was always available to attend to somebody if they became ill or an accident occurred.

The Law

12. I refer to the Working Time Regulations 1998.
13. Regulation 10(1) reads:
- “A worker is entitled to a rest period of not less than eleven consecutive hours in each 24 hour period during which he works for his employer”.*
14. Regulation 12 (1) reads:
- “Where a workers daily working time is longer than 6 hours he is entitled to a rest break.”*
15. Regulation 12 (2) and (3) provide that absent some other agreement between the parties, the rest break should be an uninterrupted period of not less than 20 minutes and may be spent away from the work.
16. What then is a rest break? In Gallagher v Alpha Catering Services Ltd [2004] EWCA Civ 1559 the claimants worked for a company delivering catering supplies to aircraft at Gatwick airport. Part of their working day was what might be called, “down time” waiting for the next aircraft to arrive. It was never possible to know in advance how long that period of down time might be and the individuals were to remain available. Normally

during that time, they remained in their vehicles whilst they waited for the next aircraft. The Court of Appeal held that such periods of waiting could not be considered to be a rest break under regulation 12. I quote from Lord Justice Peter Gibson at paragraph 50, as has Mr Bunting in his skeleton argument, as follows:

“A period of down time cannot become a rest break only because it can be seen after it is over that it was an uninterrupted period of 20 minutes. The worker is entitled under regulation 12(1) to a rest break if his working time exceeds 6 hours, and he must know at the start of a rest break that it is such. To my mind a rest break 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.”

That approach was quoted with approved in a later court of appeal case, Hughes v Corporation of Commissionaires Management Ltd (2) [2011] EWCA Civ 1061.

17. The respondent relies upon regulations 21 and 24. Those are the provisions as to compensatory rest. Regulation 21(c), reads as follows:

“Subject to regulation 24, regulation 6(1), (2) & (7), 10(1), 11(1) & (2) and 12(1) do not apply in relation to a worker –

.....

(c) where the worker’s activities involve the need for continuity of service or production, as may be the case in relation to –

(i) services relating to the reception, treatment or care provided by hospitals or similar establishments (including the activities of doctors in training), residential institutions and prisons.”

18. Regulation 24 provides:

“Where the application of any provision of these regulations is excluded by regulation 21 or 22, 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 ...”

19. Note then the application of the concept of compensatory rest is contingent upon regulation 21 applying. What does regulation 21(c) mean when it refers to the workers activities involving the need for continuity of service or production? Assistance on this is gained from the case of Gallagher cited above. There the Court of Appeal held that the opening words of regulation 21(c) focused directly on the workers activities and not those of the employer’s business. Whilst there were time pressures requiring the employers to deliver continuity of service, it did not follow that the workers working time could not be so organised that they could have rest breaks. Gibson LJ commented at paragraph 40 that:

“... any other interpretation would allow an employer to avoid the duty imposed by the regulations by the simple expedient of not employing enough staff to cover rest breaks”.

20. As for remedy if there is a breach of these regulations, regulations 30(3) and (4) provide:

(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, and

(b) any loss sustained by the worker which is attributable to the matters complained of.

Conclusions

21. Dealing first with regulation 10:

21.1 On 9 to 12 June 2018, the claimant worked four 12 hour shifts. Driving time to and from work is not working time. There was a 12 hour gap between his shifts and there was therefore no breach of the Working Time Regulations 1998.

21.2 Between 11 and 12 May there was a 10 hour break between shifts only and there was therefore a breach of Regulation 10.

21.3 Between 13 and 14 June there was a 7¼ hour break between shifts and there was therefore a breach of regulation 10.

22. Is the respondent able to rely upon the provision of compensatory rest? Regulation 21(c) does not apply. There is no need for the worker, Mr Flynn, to work continuously; the respondent could provide other cover or arrange shorter shifts and therefore regulation 24 and the question of compensatory rest does not arise.

23. As for the regulation 12 complaint, on each of the dates complained about, the claimant worked for more than 6 hours. It is fair to say that the claimant was not working particularly hard, because he was rarely required and he had plenty of opportunities to take refreshment and eat. The provision of refreshments and food though, is irrelevant to regulation 12.

24. Could it be said that the claimant has his 20 minute break when he is not called upon? What is required, is that he knows in advance that he will have 20 minutes without being called upon by someone being taken ill or an accident occurring which causes injury. The answer is, he had no such 20 minute period.

25. The question of compensatory rest does not arise, because for reasons which I have already explained, regulation 21(c) does not apply and therefore regulation 24 is not engaged. There was therefore a breach of regulation 12 on each occasion complained of.

Remedy

26. The claimant is entitled to and shall receive a declaration that the respondent was in breach of Regulation 10 of the Working Time Regulations 1998 on 11 to 12 May and 13 to 14 June 2018, and that there was a breach of regulation 12 by the respondent on the dates complained of, which for the avoidance of doubt does not include 21 to 22 April 2018.

27. What of compensation? First of all, considering the regulation 10 breaches:

27.1 In respect of the absence of an 11 hour break between 11 and 12 May 2018, in evidence the claimant acknowledged that he had signed up for those shifts, he had volunteered for them. In those circumstances, I do not consider it just and equitable to award compensation.

27.2 In respect of the 7¼ hour break between the shifts on 13 and 14 June, that is a more serious matter. He did not sign up for that length of period of work. The respondent's organisation had failed on that occasion to ensure there was adequate cover. The claimant was asked to help out and cover the last few hours. He agreed, but he did so on the premise that he would be given the next day off. That did not happen. This all occurred on a day when a director of the respondent company, Mr Withers, was on site. I personally would not want to be attended by a first aider who the day before, had worked 16¾ hours and had only had 7 hours off in the intervening period. I consider it just and equitable to award compensation in the sum £28.71, representing the Airbnb accommodation that the claimant had paid for but was unable to use because he had to be in the accommodation by midnight and the extended shift meant that he could not comply with that requirement. I also consider it just and equitable to award him the hourly rate for the hours in respect of which the respondent was in breach, as suggested by Mr Bunting in his skeleton argument: that is 3.75 hours at £8.78 which is £32.81. The total compensation I award in respect of the breach of regulation 10 on 13 and 14 June is £61.52.

28. Turning now to the breach of regulation 12. Technically, the claimant was not provided with his 20 minute break, but as I have observed, he could not say that he was working particularly hard as in truth, he had considerable down time. There is no criticism of the claimant when I say that, it is the nature of the job. However, in those circumstances, I do not think it is just and equitable to award any compensation in addition to the declaration he has succeeded in obtaining.

29. Next, I am asked to order a penalty under s.12(A) of the Employment Tribunals Act 1996. This employer is a smallish employer, it speaks of about 220 employees, most of whom I think are actually workers. There was one serious incident. There are in my view no aggravating features. There was a misunderstanding on the part of respondent in relation to regulation 12 and the applicability of compensatory rest. I find that there was no deliberate breach of the Working Time Regulations and certainly find there was no malice on behalf of the respondent. I therefore decline to make any penalty award.

Employment Judge Warren

Date: 4 July 2019

Judgment sent to the parties on

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For the Tribunal office