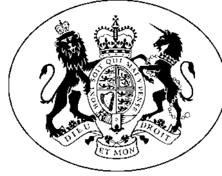

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**AND**	**Respondent**
Mr P Soanes		ISS Facility Services Limited

Heard at: London Central Employment Tribunal

On: 27-28 August 2020

Before: Employment Judge Adkin

Representations

For the Claimant : Mr P Soanes in person
For the Respondent: Ms I Egan, Counsel

JUDGMENT

The judgment of the Tribunal is that the claim brought under the Working Time Regulations 1998 is out of time pursuant to regulation 30 and is dismissed.

REASONS

1. By a claim presented on 3 April 2020 the Claimant Mr Soanes presented a claim under the Working Time Regulations 1998 that he had been denied rest breaks working as a Dock Supervisor at Peterborough Court during his employment with the Respondent between 4 April 1997 and his dismissal due to redundancy on 31 December 2019.

The Evidence

2. The Parties agreed a 394 page bundle to which an additional document was inserted during the course of the hearing.

3. For the Claimant the Tribunal heard oral evidence from:

    3.1. The Claimant himself.

    3.2. Mr Craig Powell.

4. The Claimant also relied upon witness statements from Mr Justin Lloyd, Mr Hugh Weathers, Mr A Taylor, Mr Gary Clancy, Glynwood Jose, Mr John Daines.

5. For the Respondents the Tribunal heard evidence from:

    5.1. Mr Ashaf Haque.

    5.2. Mr Phil Parker.

Submissions

6. The Claimant made oral submissions at the conclusion of the evidence. He referred to a first instance decision of the Employment Tribunal in Newcastle, Gavin Ruddick v Reliance Security. I have read a number of news reports about this decision on liability back in 2003, but have not been able to find a copy of the judgment. It would in any event not be binding on this Tribunal. I understand in general terms that the denial of toilet breaks to Mr Ruddick, a security guard, was found to amount to a breach of the Working Time Regulations.

7. The Respondent's Counsel relied upon a skeleton argument with some legal authorities which she supplemented orally.

The Facts

8. There were a number of factual disputes between the parties which in view of my findings on jurisdiction it has not been necessary to resolve. I have in some cases noted the points in dispute as part of setting out the chronology.

9. On 4 April 1997 the Claimant's started employment.

10. The Claimant's role of Dock Supervisor was essentially a security position, but with some important additional responsibilities such as fire marshal for the building and a responsibility for screening packages outside of normal office hours. During normal office hours this function was carried out by a separate contractor.

11. The dock is an area of the Peterborough Court building where deliveries were received and contractors signed in. Peterborough Court (PBC) was an office of the investment bank Goldman Sachs until the bank relocated in the later part of 2019.

12. The shifts undertaken by the Claimant were rostered to run 0700 – 1900 or alternatively 1900 – 0700. By a local arrangement at PBC, Dock Supervisors varied these hours to 0600 – 1800/1800 – 0600. He worked day shift and night shifts.

13. On 1 September 2007 the Claimant's employment transferred to ISS Facility Services Ltd under the Transfer of Undertakings (Protection of Employment) Regulations 2006.

14. It is not in dispute that at the times material to this dispute, the Dock Supervisors at PBC did not have any rostered breaks.

15. There was a dispute between the parties as to the extent to which the lack of rostering was positively wanted by the Dock Supervisors at PBC. Between 2004 and 2015 the Respondent's witness Ashaf Haque provided cover for the Dock Supervisor role at PBC. Ordinarily he carried out a similar role in River Court which was an adjacent building. His evidence was that he requested his breaks be rostered when providing cover at PBC but that this was refused and he was informed that the Claimant and other regular Dock Supervisors at PBC wanted to retain the flexibility of non-rostered breaks. This is consistent with the account he gave in an internal investigation following the Claimant's grievance.

16. The Claimant's case is that soon after ISS gained the contract in September 2007, Colin Beech, a Union Representative, raised concerns about the non-rostering of breaks at PBC. The Respondent denies this.

17. The Claimant says that in approximately 2016 he raised a desire to have rostered breaks with Tassos or Steve Norton of the Respondent. The Respondent denies this.

<u>Were breaks taken at all?</u>

18. There is a substantial gulf between the parties as to whether the Claimant was able to take rest breaks on an unrostered basis. The evidence of Mr Haque is that a typical shift of 12 hours would only have just over 5 hours work to be completed. The implication is that much of the rest of the shift is time during which the Claimant could take breaks. In his analysis of a day shift on 10 May 2018, which he says is a comparatively busy day being a Thursday, in his recollection busiest day of the week, there were three "large chunks" of time totalling 4 hours and 44 minutes where there was no contract activity. By implication, the Claimant could take his break during these periods.

19. The Claimant denies that there were such long periods of inactivity in his role, certainly during the much busier day shift, but in any event maintains that he was severely constrained in his ability to take breaks because his responsibilities as Dock Supervisor, in particular his responsibilities as fire warden and for the screening of packages outside of working hours made it difficult for him to leave his station at all.

20. Mr Andrey Gorodnichev commenced working as Building Supervisor in May 2015. His evidence to the internal grievance was that over a period of four years he

provided break cover for the Claimant on numerous occasions, ranging from 5 minutes to 1.5 hours. He said that the Claimant disapproved of the minority of Dock Supervisors, who demanded time specific breaks and were not flexible. Mr Gorodnichev did not give evidence at the Tribunal. The Claimant disputes his version.

21. The Claimant says that Mr Gorodnichev did not have sufficient training to stand in for his responsibilities in order to cover for a break. He felt in order to carry out his own responsibilities properly he should not leave his post other than to use the toilet facilities which were immediately adjacent to his office, or (during the period when he smoked) to stand in the entry to the dock some 10-12 metres away from his office, or occasionally when a colleague Dave Campion (who by implication was so qualified) would stand in for him.

22. I find that on most days, the Claimant did not enjoy breaks away from his office. I accept his evidence that he typically had a sandwich lunch sitting in his office. There is evidence that colleagues would visit him at his office and have a cup of tea and a chat there. I infer that it was understood that the Claimant would to stay at his office.

23. One of the Claimant's colleagues Brian Marden, unusually for a Dock Supervisor at PBC, did enjoy rostered breaks, which were taken away from the office. This was not in dispute. One of the puzzling features of this case is that this seems to have been different to the situation regarding the Claimant's breaks.

24. The Respondent denies that there was a disparity in treatment, but maintains that colleagues other than Mr Marden preferred to take unrostered breaks at a time convenient to them. Mr Marden conversely positively wanted rostered breaks and was granted them.

25. The Claimant's explanation as to why Mr Marden was able to enjoy breaks whereas he was not was by reference to his belief that Mr Gorodnichev was not sufficiently qualified to cover for breaks. On the Claimant's view Mr Marden was taking a risk by having such breaks with inadequate break cover.

End of 2019

26. In the later part of 2019 Goldman Sachs began to vacate the PBC building.

27. On 31 December 2019 the Claimant's employment came to an end by virtue of redundancy.

28. The Claimant's oral evidence to the Tribunal was that by 3 – 4 months before his dismissal Goldman Sachs employees had vacated the site. He described it by this stage as "a shell of a building". During this time he accepted that the previous volume of deliveries and contractor arrivals had all but stopped with the result that there were long periods of his shifts were there was nothing happening and he was able to take the breaks that he was entitled to.

Grievance & Claim

29. On 18 January 2020 the Claimant's wrote a grievance to the Respondent's HR function by letter, which was received postmarked 21 January 2020. This letter said:

> I have been a loading Bay supervisor at Goldman Sachs since 4th April 1997. After being advised by ACAS, I am writing to inform you that you have been in breach of the working time directive, in respect of me having no rostered breaks for each 12 hour shift worked, I have also been advised by ACAS to allow you 10 days to reply to my letter, with a suitable solution to this matter, or they will take my case to an Industrial Tribunal.

30. On 3 February 2020 the Claimant notified ACAS under the early conciliation procedure.

31. On 17 March 2020 ACAS issued a certificate indicating the end of the early conciliation period.

32. On 20 March 2020 a grievance hearing took place.

33. On 3 April 2020 the claim (ET1) was presented citing "breach of working time directive".

34. On 12 June 2020 the Respondent rejected the Claimant's grievance by letter. The Claimant's contentions that he had never had the opportunity to have a break and his concern that other supervisors and could not cover his break due to the absence of training were rejected.

35. On 3 July 2020 a grievance appeal meeting took place. It became clear in this meeting that the Claimant considered that in order to be a rest break he would have to be out of his office and that he would not leave the office unattended with nobody to cover it because of in particular the risk of a suspect package coming in or a fire alarm activation.

36. On 31 July 2020 the Respondent rejected the Claimant's grievance appeal by letter.

The Law

37. The Working Time Regulations 1998 contain the following provisions

> Rest breaks
>
> 12.—(1) Where an adult 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 an adult 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.

Other special cases

21. Subject to regulation 24, regulations 6(1), (2) and (7), 10(1), 11(1) and (2) and 12(1) do not apply in relation to a worker—

(b) where the worker is engaged in security and surveillance activities requiring a permanent presence in order to protect property and persons, as may be the case for security guards and caretakers or security firms;

Compensatory rest

24. Where the application of any provision of these Regulations is excluded by regulation 21 or 22, or is modified or excluded by means of a collective agreement or a workforce agreement under regulation 23(a), 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

Remedies

30.—(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) or 13(1); [or]

(ii) regulation 24, in so far as it applies where regulation 10(1), 11(1) or (2) or 12(1) is modified or excluded;

….

(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.

30B Extension of time limit to facilitate conciliation before institution of proceedings]

(1) In this regulation—

(a) Day A is the day on which the worker concerned complies with the requirement in subsection (1) of section 18A of the Employment Tribunals Act 1996 (requirement to contact ACAS before instituting proceedings) in relation to the matter in respect of which the proceedings are brought, and

(b) Day B is the day on which the worker concerned receives or, if earlier, is treated as receiving (by virtue of regulations made under subsection (11) of that section) the certificate issued under subsection (4) of that section.

(2) In working out when the time limit set by regulation 30(2)(a) expires the period beginning with the day after Day A and ending with Day B is not to be counted.

(3) If the time limit set by regulation 30(2)(a) would (if not extended by this paragraph) expire during the period beginning with Day A and ending one month after Day B, the time limit expires instead at the end of that period.

(4) The power conferred on the employment tribunal by regulation 30(2)(b) to extend the time limit set by paragraph (2)(a) of that regulation is exercisable in relation to that time limit as extended by this regulation.

38. There is no ability for a claimant to bring a claim for breaches extending over time. As per para 232 of Issue 283 (August 2020) of *Harvey on Industrial Relations and Employment Law*:

> There is no equivalent in reg 30 to the 'series of deductions' provision in ERA 1996 s 23 which would allow a claimant to claim for breaches extending back to a date more than three months before the presentation of the claim, and no equivalent of the 'continuing act' concept in discrimination cases a clear practical example of the limitation this imposes on claims made under reg 30 is *Grange v Abellio London Ltd (No 2)* UKEAT/0304/18 (7 March 2019, unreported).

39. In *Grange (no 2)* at paragraph 15-16 & 44, Soole J said:

> 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.

…

> 44. 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.

40. The Court of Appeal recently gave a useful summary of principles relating to claims brought out of time in *Lowri Beck Services Ltd v Patrick Brophy* [2019] EWCA Civ 2490. At paragraph 12 Underhill J set out the following:

> 12. There has been a good deal of case law about the correct approach to the test of reasonable practicability. The essential points for our purposes can be summarised as follows:
>
> (1) The test should be given "a liberal interpretation in favour of the employee (Marks and Spencer plc v Williams-Ryan [2005] EWCA Civ 470, [2005] ICR 1293 , which reaffirms the older case

law going back to Dedman v British Building & Engineering Appliances Ltd [1974] ICR 53).

(2) The statutory language is not to be taken as referring only to physical impracticability and for that reason might be paraphrased as whether it was “reasonably feasible” for the claimant to present his or her claim in time: see Palmer and Saunders v Southend-on-Sea Borough Council [1984] IRLR 119 . (I am bound to say that the reference to “feasibility” does not seem to me to be a particularly apt way of making the point that the test is not concerned only with physical impracticability, but I mention it because the Employment Judge uses it in a passage of her Reasons to which I will be coming.)

(3) If an employee misses the time limit because he or she is ignorant about the existence of a time limit, or mistaken about when it expires in their case, the question is whether that ignorance or mistake is reasonable. If it is, then it will have been reasonably practicable for them to bring the claim in time (see Wall’s Meat Co Ltd v Khan [1979] ICR 52);but it is important to note that in assessing whether ignorance or mistake are reasonable it is necessary to take into account any enquiries which the claimant or their adviser should have made.

(4) If the employee retains a skilled adviser, any unreasonable ignorance or mistake on the part of the adviser is attributed to the employee (Dedman). I make that point not because there is any suggestion in this case that the Claimant’s brother was a skilled adviser but, again, because the point is referred to by the Employment Judge.

(5) The test of reasonable practicability is one of fact and not of law (Palmer).

41. In *Wall’s Meat Co Ltd v Khan* [1979] ICR 52, Lord Denning MR said:

> ''It is simply to ask this question: Had the man just cause or excuse for not presenting his complaint within the prescribed time? Ignorance of his rights—or ignorance of the time limit—is not just cause or excuse unless it appears that he or his advisers could not reasonably be expected to have been aware of them. If he or his advisers could reasonably have been so expected, it was his or their fault, and he must take the consequences'

In the same case Brandon LJ stated:

> “where a person is reasonably ignorant of the existence of the right at all, he can hardly be found to have been acting unreasonably in not making inquiries as to how, and within

> what period, he should exercise it. By contrast, if he does know of the existence of the right, it may in many cases at least, though not necessarily all, be difficult for him to satisfy an [employment] tribunal that he behaved reasonably in not making such inquiries.
>
> To that extent, therefore, it may, in general, be easier for a complainant to avail himself of the "escape clause" on the ground that he was reasonably ignorant of his having a right at all, than on the ground that, knowing of the right, he was reasonably ignorant of the method by which, or the time limit within which, he ought to exercise it."

CONCLUSIONS

Jurisdiction

42. It became clear from the Claimant's evidence that a substantial delay had elapsed between the last date on which he alleges he did not receive a rest break and the presentation of his claim. Accordingly the question of jurisdiction needed to be addressed.

43. The Claimant's evidence was that the 3 ½ months before his dismissal on 31 December 2019 the site was no longer occupied by Goldman Sachs, his workload was very significantly diminished and there was no dispute that although there were no rostered breaks he was able to take compensatory breaks satisfying the requirement of regulation 24.

44. The Claimant's case is that it was the period before this (i.e. before mid-September 2019) when his responsibilities made it impossible for him to leave his position and take adequate breaks. I have not received detailed evidence from either party about the point at which it could be said that Goldman Sachs was no longer in occupation. The best I can do is take 16 September 2019 as the relevant date based on the Claimant's evidence that it was 3 ½ month before his employment came to an end.

45. If 15 September 2019 is the last date in time that the Claimant is complaining of, he needed to present his claim within 3 months (or at start the ACAS Early Conciliation process to 'stop the clock') by 14 December 2019. In fact he started the ACAS process on 3 February 2020, by which stage the claim was already out of time by 51 days.

46. The ACAS certificate was issued on 17 March 2020. A further 17 days elapsed before the claim was presented on 3 April 2020.

47. In view of the short time limits in Employment Tribunal claims (i.e. 3 months) the delays in presentation of the claim are significant.

Not reasonably practicable test

48. Was it 'not reasonably practicable' for the Claimant to present his claim in time?

49. His evidence was that he was unaware of the right to bring a claim until he spoke to his brother in early January. He did not identify a specific date on which this conversation took place. He wrote the grievance letter on 18 January which referred to a discussion with ACAS. I infer that this discussion took place following on from the discussion that the Claimant had with his brother.

50. The Claimant appears to have misunderstood that ACAS would take his case to an "Industrial Tribunal". While I do not know what ACAS told him, it seems somewhat unlikely that they would have told them that since it is not the function of ACAS to present claims on behalf of prospective claimants using the conciliation process.

51. No other explanation was given for the further delay between early January and the commencement of the ACAS early conciliation process on 3 February and then the further delay before the presentation of the claim on 3 April 2020.

52. Following the *Wall's Meat* case ignorance of a right to bring a claim may, in some circumstances, be reasonable. In this case I find it was reasonable of the Claimant to be ignorant of the right to bring a claim until early January. In my assessment certain rights, such as the right not to be unfairly dismissed or discriminated against on the grounds of sex or race are very well known. I consider it unlikely that the Claimant could have satisfied me that he was reasonably ignorance of such rights. Claims relating to working time breaches I am prepared to accept are more esoteric and less well-known. I find that it was reasonable to be ignorant of the right to claim until early January when the Claimant had a conversation with his brother.

53. The Claimant did not give direct evidence on the subsequent delay, but I infer from the circumstances that he was seeking resolution of the matter through the Respondent's grievance procedure. I have considered whether this might have made it not reasonably practicable to present the claim. Unfortunately for the Claimant while it might have been reasonable for him to seek resolution through an internal grievance process and entirely understandable that he did this, the legal authorities on this point (from *Palmer v Southend-on-Sea Borough Council* [1984] IRLR 119, [1984] ICR 372, CA onward) make it clear that the fact of invoking an internal process does not by itself make it not reasonably practicable to present a claim.

54. I find that by 18 January 2020 it was reasonably practicable for the Claimant to present a claim. He was aware of the right to bring a claim relating to working time. There was an onus on him to investigate his right to bring a claim and time limits promptly and present a claim even if there was an internal process ongoing. It follows that he cannot avail himself of the "escape clause" contained within regulation 30.

55. The claim is out of time and there is no extension and the claim is dismissed.

Other findings

56. It is not strictly necessary for me to make any further determinations, given that the claim is dismissed for want of jurisdiction arising from a time point.

57. I accepted the Claimant's evidence in respect of his contention that for the period from May 2015 to September 2019 (i.e. during Mr Gorodnichev's tenure as Building Supervisor), other than brief use of the toilet facility or cigarette breaks stood in the entrance of the dock area and the odd occasion where Mr Campion provided relief he did not take breaks away from the dock supervisor office. I find that such relief was the exception rather than the rule. I accept that Claimant felt a personal responsibility as Dock Supervisor (and Fire Marshall) to remain on site and that he genuinely felt that Andrey Gorodnichev was not suitably qualified to cover for him and did not cover for him on any routine basis.

58. If I am wrong about the time point going to jurisdiction, it would be necessary to consider, among other points, first could the "breaks" taken in the Dock Supervisor's office amount to compensatory breaks for statutory purposes in the circumstances of this case? Second, whether the Claimant's apparent personal decision that colleagues were not qualified to cover for him amounted to a breach of regulation 30(a).

59. I considered it would not be a good use of time resolving these disputed points of fact and law given the absence of jurisdiction and dismissal of the claim.

Employment Judge - Adkin

Date : 04/09/2020

WRITTEN REASONS SENT TO THE PARTIES ON

08/09/2020

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FOR THE TRIBUNAL OFFICE

Notes

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the Claimant (s) and respondent(s) in a case.