EMPLOYMENT TRIBUNALS

Claimant	**Respondent**
Mr Michael Adejare	**NSC 365 Ltd t/a National Security**

Heard at: Watford by Cloud Video Platform **On**: 5 May 2021

Before: Employment Judge Bedeau

Representation
For the Claimant: Ms R Vince, FRU Representative
For the Respondents Mr M Stephens, Counsel

RESERVED JUDGMENT

1. Nationwide Security Ltd is dismissed from these proceedings.
2. The claim under section 100 Employment Rights Act 1996, is dismissed upon withdrawal by the claimant.
3. The claim of unfair dismissal under section 101A Employment Rights Act 1996, is not well-founded and is dismissed.
4. The claim of unfair dismissal under section 104 Employment Rights Act 1996, is not well-founded and is dismissed.
5. The provisional remedy hearing listed on Monday 13 September 2021 is hereby vacated.

REASONS

1. In the claim form presented to the tribunal on 8 November 2018, the claimant made claims of automatic unfair dismissal under sections 101A, 103A, 104A, Employment Rights and 1996; and detriments under sections 44(1)(c), 100(1)(c), 45A.

2. His claims were, initially, against two respondents, Nationwide Security Ltd, and NSC 365 Ltd trading as Nationwide Security.

3. In the response presented by NSC 365 Ltd, on 10 July 2020, it avers that it was the claimant's employer and the correct respondent. Nationwide Security being a trading name. It denies the claims and asserts that the claimant was dismissed for gross misconduct, in that, he was found asleep while on duty; failed to carry out Active Guard patrols; and did not wear personal protective equipment.

The issues

4. The parties have helpfully narrowed down the issues by agreement. They are as follows:

5. "**Automatic unfair dismissal**

1. Was the reason or principal reason) for the claimant's dismissal automatically unfair?

1.1 The claimant contends that he was dismissed for refusing to comply with a requirement imposed by the respondent in contravention of the working Time regulations 1998 ("WTR 1998") or for refusing to forego such a right.

To resolve this issue, the Tribunal will need to decide:

(a) Did the respondent impose a requirement in contravention of the WTR 1998 by denying the claimant to break and/or disciplining the claimant for taking a break?

(b) Did the claimant assert a right to a break during his shifts at the disciplinary meeting on 13 August 2018?

(c) If the claimant did assert a right to a break at the disciplinary meeting on 13 August 2018, was this a refusal to comply with a requirement in contravention of the WTR 1998 or to forego a right under the WTR 1998 for the purposes of section 101A Employment Rights Act 1996 ("ERA")?

1.2 In the alternative, claimant contends that he was dismissed because he alleged that the respondent had infringed the relevant statutory right (which would be an automatically unfair reason under section 104 ERA 1996).

To resolve this issue, the Tribunal will need to decide:

(a) Did the claimant make an allegation on 13 August 2018 that the respondent had infringed a legal right for the purposes of section 104(1)(b) ERA 1996?

(b) If so, did he allege that the respondent had infringed the relevant statutory right for the purposes of section 104(1)(b) ERA 1996?

Holiday pay

2. Has the claimant been paid in full for all accrued but an taken holiday?

3. If not,

(i) How many days unused holiday entitlement remain unpaid?

(ii) At what rate should they be paid?

Notice pay

4. Did the claimant commit a fundamental breach of his employment contract?

To resolve this issue, the tribunal will need to consider:

4.1 Was the claimant to sleep while on duty?

(a) Was the claimant taking a contractually entitled break when he was photographed allegedly asleep?

(b) if the claimant was staking a contractually entitled break, was resting his eyes or being asleep while taking break fundamental breach of the claimant's employment contract?

4.2 Did the claimant failed to carry out required patrols against instructions and, if so, was this a fundamental breach of the claimant's employment contract?

4.3 Is a failure to wear PPE boots a fundamental breach of the claimant's employment contract?

Remedy Issues

5. If the claimant was unfairly dismissed:

5.1 Is it just and equitable for him to receive an award of compensation, and

5.2 If so, should any deduction be made for contributory fault?"

The evidence

6. I heard evidence from the claimant. On behalf of the respondent evidence was given by Mr Marcus Makinson, Managing Director.

7. In addition to the oral evidence the parties adduced a joint bundle of documents comprising more than 138 pages. References will be made to the documents as numbered.

Findings of fact

8. The respondent is a professional security group specialising in the field of corporate security and protection of commercial and industrial properties, processes, and operations. It provides clock surveillance, uniformed guards, in-house patrols, mobile patrols, and other forms of security.

9. Security guards are required to patrol client's premises at least every hour or more frequently as the client stipulates. Failure to do so is likely to result in the client requesting their removal from site. The respondent is also likely to invoke disciplinary proceedings.

10. Most of the respondent's sites operates what is referred to as an Active Guard patrol recording system. This requires the security guard to swipe their electronic recorder at each station located on the client's premises. This creates an electronic record of the guard's patrols which is then provided to the client when required.

11. In the claimant's contract of employment, which he signed on 1 August 2017, clause 4.2.1 states, amongst other things, the following:

> "All patrols must therefore be carried out without fail. Failure to carry out patrols, falsely entering patrols which have not been carried out or failure to use the Active Guard system where this system is in operation will result in the loss of any site bonus that may otherwise be payable and will also be treated as an act of gross misconduct and will be addressed in the company's disciplinary procedure." (page 84)

12. In the respondent's disciplinary policy, examples of gross misconduct includes: –

    12.1 failure to comply with reasonable management instructions;

    12.2 sleeping whilst on duty; and

    12.3 failure to wear a uniform or personal detective equipment during working hours.

13. In Clause 8.2 it states,

> "Any employee who is not wearing uniform or other Personal Protective Equipment (PPE) as necessary whilst on duty will be issued with the relevant uniform/PPE items and charged for them from their next salary. The sum of £10 will be deducted from the employee salary for each occasion that uniform or PPE is not worn", (86)

14. The policy further states that an audio recording of a disciplinary hearing may be made. (90-91)

15. Clause 6.6 states that for the purposes of calculating the average number of weekly working hours,

> "Breaks and time spent travelling to and from the companies or the client's premises at the beginning and the end of the working day will not be working time for these purposes." (85)

16. Clause 6.5 states that the claimant was entitled to one hour break during working hours. This could be taken at any time and in any combination, such as, four fifteen minutes; two thirty minutes; or two fifteen and one thirty minutes, and so on. (85)

17. The respondent's holiday year runs from 1 April to 31 March. The claimant's holiday entitlement for the holiday year was 28 days. "Holiday entitlement shall accrue on a monthly basis throughout the year"., Clause 11.1. This, in my view, means that an employee first must work a month before they are entitled to receive their monthly holiday entitlement.

18. Upon termination of employment, the claimant was entitled to a payment in lieu of any unused holiday, Clause 11.7.

19. Clause 14.4, states "The company may terminate the employment without notice or pay in lieu of notice in the event of gross misconduct by the employee." (88)

20. He commenced employment on 14 March 2017, as a Security Guard. As part of his job description, he was required "to provide an effective

deterrent at sites and at the premises as required by the company's clients.", Clause 4.1 (84)

21. He normally worked nights. He told me that this would normally be from 8.00pm to 8.00am, though this varied.

22. On 25 May 2017, he was issued with a final written for:

> "As noted by the client not using the Active Guard from 8pm, you were on site for at least four hours when you should have been in the security cabin watching the CCTV and patrolling."

23. The final written warning was to last 12 months and expired on or around 24 May 2018. (29)

24. In a letter sent to him by Ms Lorraine Lovelock, Human Resources Administrator, on 23 June 2017, he was warned that he must engage in Active Guard duties and if they were not done in accordance with site requirements, "he would be called for a disciplinary.", (30)

25. It is surprising that within 10 weeks into his employment, he had not been carrying out his Active Guard patrols as required by the respondent and those of its clients. So serious was the misconduct that he was given the final written warning.

26. In a further letter sent to him by Ms Lovelock, dated 11 August 2017, she again reiterated the importance of him carrying out Active Guard patrols. She wrote:

> "As you are aware we monitor Active Guard patrols daily and take them very seriously. Active Guard is one of the most significant ways we oversee your actions on site and make sure you are adhering to the assignment instructions you were issued with when you were first allocated this patrol.
>
> In regards to your patrols you are required to perform patrols every hour. We have noticed that you are not correctly carrying out these duties.
>
> This is unacceptable as you are fully aware of your assignment instructions and have been continually reminded about the importance of Active Guard.
>
> Due to this we require an improvement in the next week on your patrols otherwise disciplinary action will be taken." (31)

<u>18 July 2018</u>

27. On 18 July 2018, Mr Marcus Makinson, Managing Director, received a complaint from a client that Active Guard patrols were not regularly carried out by the claimant, as required at the Regents Crescent site.

28. His work number was 4003. From the electronic printouts, on 9 July 2018, between 18.29 and 02.00, there were no Active Guard patrols, (97); no Active Guard patrols between 02. 21 to 05.57, 10 July 2018, (97); likewise, between 20.41 to 23.7, 10 July (97); 23.26 on 10 July to 03.05, (98); 03.14 to 18.00,11 July, (98); 20.09 to 23.07, on 11 July,

(98); none before 14.48 on 14 July, (102); and none before 14.34 on 15 July, (105).

29. When the claimant was cross-examined, he challenged the accuracy of the entries in the records but did not provide any documentary evidence, or other evidence to the contrary. He made the bald allegation that the records have been falsified. It was clear to me, having considered the records, that there were gaps in his Active Guard patrols.

30. The client required his immediately removal from the Regents Crescent site. Mr Gary Mitchell, Control Manager, employed by the respondent, spoke to him by phone on 18 July 2018 at 12.24pm, to inform him of the gaps in his patrol and of the decision to remove him from the site. The conversation was recorded and later transcribed. From the transcription, the claimant told Mr Mitchell that the gaps in his patrol were to do with a delivery at 3 o'clock in the morning and he had to stay at the gate for about an hour because the policy was that he was not allowed to leave the gate. He said he had made a written entry in the logbook. Mr Mitchell said that he would ask that the logbook to be brought back so that he could look at it. He was concerned that there had been not one-hour gaps in the claimant's patrols but between four or five hours. He said that human resources would contact him, to which the claimant replied that he knew his rights. Later in the conversation he said, unprompted, "I don't sleep at work." At no point in their discussion did Mr Mitchell accused him of sleeping at work. (45-47)

31. On 18 July 2018, Ms Lovelock wrote to the claimant confirming his removal from site with immediate effect due to gaps in his Active Guard patrols. She then informed him that control would look at the logbook and compare the entries with the gaps in his patrols. (50)

32. He was transferred to another site, St. George's Court site, on 18 July 2018.

33. On the same day he was informed by Ms Lovelock that he was required to attend a disciplinary hearing scheduled to take place at the respondent's head office in St Albans, on Tuesday, 24 July 2018 at 11.00am. He was advised of his right to be accompanied either by a work colleague or a representative of his own choosing. The allegation being, "Gaps in active guard patrols." (49)

34. Mr Makinson was to conduct the disciplinary hearing and called the claimant at 1158 on 24 July 2018. The conversation was recorded by the claimant and later transcribed. At the time the claimant was working on site. Mr Makinson asked him whether he was out doing his patrols, to which he confirmed that he was. Mr Makinson then said, "Okay then will be down to see you shortly." The claimant replied, "Sorry", Mr Makinson repeated that he would be down to see him shortly. The claimant response was, "Okay". They then said their goodbyes. (52)

35. The claimant said in evidence that he did not receive the invitation letter and to suggest the contrary was a lie. He stated that there was no CCTV recording of Mr Makinson being on site and at the alleged disciplinary hearing. The invitation letter was not disclosed to him until 2019.

36. Mr Makinson, in evidence, said that he did meet with the claimant on site, on 24 July 2018, to conduct a disciplinary hearing. The meeting was in a cabin and they discussed the allegation of the gaps in his patrols. It was not recorded, and no minutes were taken. At the conclusion of the meeting, he had not decided on the outcome because it was going to be put in writing by human resources.

37. It was not challenged that the claimant asserted for the first time during the hearing and in cross-examination, that the disciplinary hearing did not take place. This caused the respondent some surprise as it had not previously been stated that that was part of his case. He maintained that no such meeting took place. He said it was due to be held at the head office, but Mr Makinson called to asked him whether everything was fine and how he was doing. It was a very brief conversation.

38. In a letter dated 26 July 2018, sent by Ms Lovelock, and addressed to the claimant, she wrote in respect of the disciplinary meeting held on 24 July 2018, the following: –

> "I write following the disciplinary meeting you attended on 24 July 2018 to discuss your alleged failure: gaps in active guard patrols.
>
> All evidence and information has been reviewed and all the details you provided taken into account.
>
> Taking the above into consideration, we have decided that this misconduct warrants the imposition of a final written warning, and this letter is formal confirmation of this.
>
> The final written warning will remain on your personnel file for a period of 12 months, and any repetition of similar misconduct during that period could therefore result in your dismissal." (53)

39. The claimant also said that he did not receive this outcome letter.

40. I was told that both the invitation to the disciplinary hearing and the written confirmation that he was removed from site, were in the joint bundle of documents prepared for the final hearing in 2019. The disciplinary outcome letter was not disclosed until January 2021.

41. I have to make a factual finding as to whether the claimant was invited to a disciplinary hearing and whether one was held on 24 July 2018. I am satisfied that there were concerns about the gaps in his Active Guard patrols in July 2018. This was a consistent theme running throughout his employment. It was a matter that had to be investigated as the claimant was asserting that there were deliveries to the site making it difficult for him to engage in patrols. Ms Lovelock was the person who mostly dealt with the claimant concerning disciplinary matters. The respondent had to investigate the matter of whether there

were gaps in Active Guard patrols. He was told about them by Mr Gary Mitchell. He was made aware that the matter would be investigated.

42. Mr Makinson said in cross-examination that the logbook was not investigated, and in April 2021, he asked the client for confirmation whether there was a delivery on site as he claimed. The client responded in an email dated 19 April 2021 confirming that it would never allow deliveries to the rear Regents Crescent site out of working hours between 8.00am and 6.00pm. This was not information before Mr Makinson at the time he issued the final written warning. (83A)

43. Mr Makinson also said that he took the gaps in the claimant's Active Guard Patrols very seriously.

44. I am satisfied that the claimant was informed on 18 July, that there would be a disciplinary hearing on 24 July.

45. In the conversation recorded by the claimant of his discussion with Mr Makinson, Mr Makinson informed him on 24 July, that he would be visiting the site to speak to him. I was satisfied that Mr Makinson did visit the site as he was clear where the meeting took place and spoke to the claimant about gaps in his patrol. Later, on 26 July 2018, the claimant was informed of the outcome in writing, namely that he would be on a final written warning for 12 months.

46. I found Mr Makinson to be a credible witness. He made a few admissions in cross-examination, such as, no recording was made of the meeting on 24 July; that the final written warning was not in the claimant's dismissal letter; and that failure to wear PPE, on its own, would not warrant summary dismissal. I found the claimant's responses alleging fabrication of the electronic printouts in relation to gaps in his patrols, not credible.

47. The gaps in his patrols at Regents Crescent were serious to warrant disciplinary action.

St Georges Court

48. Within 12 days after his removal from the Regents Crescent site to St George's Court, and four days after the date of the final written warning, the claimant again failed to carry out regular hourly Active Guard patrols. I find that he did not carry out any patrols on 30 July between 08.47 and 14.56, and there were no patrols after 15.16. On the following day, 31July, there was no patrol between 08.46 and 12.56, and between 13.08 and 17.59. No patrols were carried out on 1 August between 09.08 and 12.47. (108, 112, and 115)

1 August 2018

49. The events on 1 August 2018, led to the claimant's dismissal. On that date Mr Makinson received an email from one of the respondent's clients, Mr Paul Goodrich, Logistics Manager, St George's Court. He wrote:

"Hi Marcus

> Thanks for the report on Rylands.
>
> I thought we were also to have this on St George's Court? And once again this week, I walked to the gate, unlocked the padlock, drove in and wondered if the guard was walking around - however found 'Sleeping Beauty' in the corner of the hut and only Walker when he heard my shutter click.
>
> Logging station needed I think!
>
> Regards" (54)

50. What Mr Goodrich seemed to be saying was that it was not the first time he had observed the claimant's sleep as he used the words "And once again this week". Mr Goodrich took a picture of the claimant on his mobile phone on 1 August at 11.23am and sent it to Mr Makinson. The claimant started work at 08.00 that morning and as referred to above, he did not carry out hourly patrols from 09.08 and 12.47. The photograph shows him in a cabin with his head and left shoulder resting on one of the sides of the cabin. He had taken off his trainers and was not wearing his protective boots. There was no evidence of any food having been eaten or beverages drunk. There are also no signs of any newspapers having been read. It was only when the camera on Mr Goodrich's phone clicked did he wake up or open his eyes. (56, 80)

51. The client requested that the claimant be removed from site.

52. On 3 August 2018, Ms Lovelock wrote to the claimant informing him that he was removed from the site due to the respondent's client finding him asleep. She informed him that he was required to attend a disciplinary hearing on Tuesday 7 August at 3.30pm at the respondent's head office. (57)

53. Mr Makinson was unwell on 7 August. The disciplinary hearing was, therefore, rescheduled by Ms Lovelock to 13 August at 2.00pm, at the respondent's head office. The claimant was advised of his right to be accompanied at the meeting and that it would be recorded. The allegation was, "Gaps in active guard patrols and being found asleep by the client at St George's Court." (58)

54. At the commencement of the hearing, Mr Makinson confirmed that the claimant had been removed from site as he was not doing regular Active Guard patrols and was found asleep by the client. The claimant replied that he was "not asleep, just resting his eyes" as he was on his lunch break. He confirmed that his shift was 8.00am – 8.00pm. He was asked "How long do we pay you for". He replied 8-8. He was shown the photographic evidence at which point it was put to him that it looked like he was asleep. He responded by saying that it was his lunch break. Mr Makinson pointed out that there was no evidence of food or drink, whereupon the claimant said that he was not sleeping but resting his head. The claimant then raised an issue about being accused of being late to work when he was asked to work on another site. Mr Makinson responded by saying that he was not marked down as late for work. The claimant then referred to a guard he had trained who was not good

at his job. He then alleged that Mr Makinson was picking on him, which Mr Makinson denied. The claimant then said that he did not play with his job. He did his patrols because he liked walking around and was going to Africa on Friday of that week to attend his father's funeral. Mr Makinson then said that he would write to the claimant within 3 to 5 days informing him of the outcome. (59)

55. In Mr Makinson's rationale, he considered that the photograph was taken about 3½ hours into the claimant's 12-hour shift. He did not believe that the claimant was on his lunch hour at that time. Further, he did not accept the claimant's assertion that he was not asleep. Despite receiving a final written warning there was subsequent evidence that he failed to engage in hourly Active Guard patrols despite the instructions given to him. The photograph showed that he was not wearing his personal protective equipment, that being his boots and he had taken off his trainers.

56. The claimant said in cross-examination that he took his boots off because he was on his break and that his trainers were off because he only wore them when leaving work to go home. He admitted that sleeping at work constitute misconduct.

57. Mr Makinson considered the provisions in the disciplinary procedure, namely, sleeping whilst on duty; wilful disregard of duties or instructions relating to employment; and failure to wear uniform or PPE during working hours. Taking all of these into account, he concluded that the claimant was guilty of gross misconduct and should be dismissed summarily. This was set out in a letter sent to the claimant, dated 16 August 2018, by Ms Lovelock, in which she wrote the following:-

> "I write following the interview you attended on 13 August 2018, to discuss issues with Mr Makinson the Control Room Manager.
>
> This matter has been discussed fully, with the information you have provided at the interview.
>
> The company has decided your actions were an act of gross misconduct, which leaves us with no alternative other than to dismiss you from the company.
>
> Should you wish to appeal against this decision, please submit this in writing within seven days of the date of this letter to the company directors." (60)

58. In cross-examination, Mr Makinson acknowledged that the notes of the disciplinary hearing on 13 August 2018, did not have any references to a discussion about the claimant not wearing his boots. It did, however, form part of his outcome decision. If it was just the failure to wear his boots, it would not be a fundamental breach of contract, he said. He further admitted that the notes do not refer to Active Guard patrols, but said it was a factor although most of the time the discussion was about whether the claimant was taking a break. He said the claimant's previous conduct, in particular, the 26 July 2018 final written warning, was not discussed but was taken into account in the final outcome. He

said the claimant did not wake up when Mr Goodrich walked in and shut the door. He only woke up when he heard the sound of the camera on Mr Goodrich's mobile phone. The claimant was not allowed to sleep on duty and remain on duty while on his break. He stated that breaks are not working time, Clause 6.6. The claimant should have been alert at all times. This was expected by the client. From looking at the photograph, the claimant had removed his shoes and socks which gave the distinct impression that he was sleeping. If he was on a break why did he take off his shoes and socks? The time the photograph was taken was a consideration.

59. He said that the claimant's requests for a copy of the minutes would have gone to human resources for a response. He emailed the client in January 2019 to find out when the photograph was taken. He repeated that the claimant was dismissed for failing to wear his PPE; not doing his regular patrols; and sleeping while on duty. He confirmed that he had access to the information on the Active Guard system.

60. On 22 August 2018, Sam Ulegede, on behalf of the claimant, wrote that the claimant appealed his dismissal. The claimant prepared his own grounds of appeal in which he stated that over the 1½ years he had been employed by the respondent, he had never been found asleep; he had been doing a 12-hour shift; he was entitled to a break under employment law; and when it was alleged that he was asleep he was on his break. He asked for a copy of the notes of the disciplinary interview. (61, 62)

61. It was unclear to me why an appeal hearing was not held.

Submissions

62. Ms Vince, representative on behalf of the claimant, and Mr Stephens, counsel on behalf of the respondent, prepared detailed written submissions and spoke to those. In summary, Ms Vince submitted that the claimant was automatically dismissed because the principal reason was that he had refused to comply with a requirement contravening the working Time regulations 1998; or refused to forgo a right conferred on him by the regulations; or for asserting a statutory right.

63. Her focus was on the disciplinary hearing held on 13 August 2018. She said that the claimant stated that at the time he was photographed by Mr Goodrich, he was having his break. She submitted that the respondent imposed a requirement contrary to the regulations as it denied that the claimant his right to take a break and disciplined him for doing so. It amounted to a requirement in contravention of regulations 12 and 24 which entitles an adult worker who is engaged in security and surveillance activities requiring permanent presence in order to protect property and persons, either a minimum break of 20 minutes in shifts of more than six hours, or if the employer requires them to work during a period which would otherwise be a rest break, the employer shall, wherever possible, allow the worker to take an equivalent period of compensatory rest.

64. She asserted that the claimant refused to comply with this requirement or to forego his right to rest under the regulations, in a manner which satisfies the interpretation of "refuse" as defined in the case of Ajayi and Ogeleyinbo v Aitch Care Homes (London) Ltd, for the purposes of section 101A ERA. His refusal was also repeated in his letter of appeal as he stated he was entitled to a break under employment law when he was disciplined for having taken that break.

65. The assertion, Ms Vince submitted, of his right to a break under employment law, was an assertion of a relevant statutory right and that the respondent was infringing that light by disciplining him. She referred to the case of Andrew William Armstrong v Walter Scott Motors (London) Ltd. The reason, or if more than one, the principal reason for the claimant's dismissal, was not that he took his break and chose to rest during it, rather it was the fact that he refused to forego his right to breaks when required to do so by the respondent during the disciplinary meeting. He defended his actions in such a way that it amounted to an allegation that the respondent had infringed and was infringing his right to a rest break for the purposes of section 104A(1)(b) ERA.

66. Ms Vince further submitted that the respondent did not want to employ someone who asserted their right to take breaks as this would result in future problems with clients as many client sites sought round-the-clock guards.

67. In relation to notice pay, or wrongful dismissal, Ms Vince submitted that the claimant did not commit gross misconduct or a fundamental breach of his employment entitling the respondent to dismiss him without notice pay, Clause 14.4 of his contract of employment. He was contractually entitled to a break during his shifts and was taking a break when he was photographed resting. He did not miss the required security patrols and was monitoring deliveries.

68. The failure to wear PPE boots, on its own, was not sufficiently serious to amount to a fundamental breach of the claimant's contract of employment.

69. As regards holiday pay, the issue is whether the claimant's entitlement accrued at the commencement of each month, or at the end of the month? Ms Vince submitted that Clause 11.1 entitled the claimant to the accrual of 2.33 days at the start of each month. At the date of his dismissal, he was entitled to 11.7 days accrued, untaken holiday. As he was paid one day's holiday on 7 May 2018, his entitlement was 10.7 days which equates to £1005.32 gross.

70. Mr Stephens submitted that the claims that the claimant had been dismissed for having refused to comply with a requirement imposed by the respondent in contravention of the regulations, all because he refused to forego right given to him by the regulations, were not sustainable. Regulation 21(b) makes it clear that the right to a regulation 12 rest break does not apply to security guards. There is nothing in the regulations granting an employee the right to sleep. Further, in the case of Pazur v Lexington Catering Services Ltd, the

EAT held that section 101A ERA, requires there to have been some explicit refusal, or proposal to refuse, to accept a requirement imposed in contravention of the regulations.

71. The claim based on section 101A is misconceived.

72. In relation to the claim that the respondent dismissed the claimant because he had alleged the infringement of a relevant statutory right, in the case of Spaceman v ISS Mediclean (t/a ISS Facility Service Healthcare, as in the present case, the allegation relied upon by the claimant was one made at the disciplinary hearing that he was entitled to a rest break when found asleep. The claim failed because the claimant was alleging unfairness in the disciplinary process, not that he had been subjected to the disciplinary process because of a prior allegation of infringement. The assertion must be that the employer had infringed, not may infringe on the future, his right.

73. Further, Mr Stephens submitted, that the claimant in stating his "employment law right to a lunch break", was not an allegation of infringement of any statutory right as he was relying on his right to a lunch break as his defence for having been found asleep. His reference to his right to a lunch break under employment law, carried an implication that the outcome of the disciplinary process may be unfair. This falls within the judgment in the Spaceman case as it was not "you have infringed my right".

74. The real reason for the claimant's dismissal was that the respondent convened a disciplinary meeting in relation to the allegation of "Gaps in active guard patrols and being found asleep by the client at St. George's Court". The claimant was removed from site with immediate effect. He did not make any references to his legal rights during the disciplinary meeting on 13 August 2018. Mr Makinson did not believe him when he said he was not asleep but resting his eyes and did not believe that he was on a lunch break as there was no evidence food, drink, or newspapers. The claimant lunch break was 3½ hours into his shift. Mr Makinson had repeatedly engaged with him to improve his performance and had met with him on 24 July 2018. The principal reason for the claimant's dismissal was that he was found asleep whilst on duty. Other reasons were also relevant, namely that there had been gaps in his patrol and he was not wearing PPE footwear.

75. In relation to the wrongful dismissal claim, Mr Stephens submitted that the claimant had engaged in serious breaches of his duties; he was not an effective deterrent while asleep; failed to always wear PPE and was asleep at work. He was asleep when the photograph was taken on 1 August 2018. His conduct went to the root of his contract with the respondent entitling the respondent to dismiss him summarily

76. As regards your holiday pay, the difference between the respondent's and the claimant's respective positions, is clear. The claimant is not entitled to 2.33 days at the commencement of each month's employment. He acquired those days at the end of the month. Instead

of 10.7 days as claimed by the claimant, the respondent's position is that he is entitled to 9.5 days.

The law

77. Section 101A(1) Employment Rights Act states:

> "An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee –
>
> (a) refused (or proposed to refuse) to comply with a requirement which the employer imposed (or proposed to impose) in contravention of the Working Time Regulations 1998,
>
> (b) refused (or proposed to refuse) to forego a right conferred on him by those Regulations.

78. Section 104 ERA, on the assertion of a statutory right, states:

> "(1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee –
>
> (a) ……..
>
> (b) alleged that the employer had infringed a right of his which is a relevant statutory right.
>
> ……..
>
> (4) The following are relevant statutory rights for the purposes of this section –
>
> (a) any right conferred by this Act for which the remedy for its infringement is by way of a complaint or reference to an employment tribunal."

79. Regulation 12, Working Time Regulations 1998, states that "Where a worker's daily working time is more than six hours, he is entitled to a rest break." This is normally for a period of not less than 20 minutes but there is no upper limit.

80. Regulation 12(1), rest breaks, do not apply "where the worker is engaged in security and surveillance activities requiring a permanent presence inn order to protect property and persons, as may be the case for security guards and caretakers and security firms;" regulation 21(b).

81. Whether the regulations in relation to rest breaks are excluded by regulation 21 or 22, or is modified or excluded by means of a collective or workforce agreement, under regulation 23(a), under regulation 24 where, "a worker is accordingly required by his employer to work during a period which would otherwise be a rest. Or a rest break –

> (a) his employer shall wherever possible allow him to take an equivalent period of compensatory rest."

82. A security guard is entitled to a period of compensatory rest.

83. In the case of Ajayi and Ogeleyinbo v Aitch Care Homes (London) Ltd UKEAT/0464/11/JOJ, Langstaff P, held in relation to the application of section 101A ERA, that an Employment Tribunal did not err in law in holding that a "refusal" or "proposed refusal" of an employee to accept either a contravention, or a proposed contravention of the Working Time Regulations by his employer, had to be communicated in advance to the employer and the section did not operate to render the dismissal unfair of the two employees who were found sleeping on duty notwithstanding their subsequent assertion that they were exercising their rights to a rest break at the time, and refused to accept their employer's failure to provide any breaks. A refusal must be explicit not implicit. "….as a matter of fact and finding of fact, the Employment Tribunal saw no refusal or proposed refusal of the required sort in this case." The appeal was dismissed, paragraph 17 to 23.

84. In that case the EAT declined to give a ruling on whether an employee "could during that break legitimately have a snooze or a catnap".

85. In the case of Pazur v Lexington Catering Services Ltd, UKEAT/0008/19/LA, HH Judge Eady QC, as she then was, held that the claimant, who worked as a kitchen porter, had been denied his right to a daily rest break country to regulation 10 and his contractual entitlement, when he was assigned to work for client L. When he subsequently refused to return to client L, he was first threatened with dismissal and later dismissed. He brought proceedings under sections 45A, the right not to suffer a detriment in working time cases, and 101A ERA. He also complained that he had been wrongfully dismissed. The Employment Tribunal found that the claimant had previously left client L's because he refused to comply with a requirement that was in breach of the Working Time Regulations. Requiring the claimant to return to client L amounted to the imposition of or proposed imposition, of a requirement in contravention of the regulations. However, the Tribunal was not satisfied that the claimant had provided sufficient evidence to establish that the refusal to return to client L was a refusal for the purposes of sections 45A or 101A and dismissed those claims but found in favour of the claimant in relation to his wrongful dismissal.

86. Judge Eady QC held that under sections 45A and 101A, it is required that there be some explicit refusal, or proposal to refuse to accept a requirement in contravention of the regulations. As the tribunal found in relation to the wrongful dismissal claim, that the reason, in part, was the requirement to work in contravention of the regulations and given that the respondent's conduct and decision to dismiss were materially influenced by the claimant's refusal to return to client L, it ought to have found in favour of the claimant in his section 45A claim. Under section 101A, the question was whether that refusal was the reason, or the principal reason for the dismissal which was remitted to the Tribunal for reconsideration.

87. In Andrew William Armstrong v Walter Scott Motors (London) Ltd [2003] UKEAT/766/02/TC, the EAT construed a letter by the claimant objecting to having to wait to the end of the year to exercise his right to

take his holiday. It held, HHJ McMullen QC, "He is, of course, saying that, making the more general point, that he alone among all workers, is required to submit to their condition, see, for example, his reference to "how any employee can be expected to work" and "morally indefensible in this day and age.", paragraph 15.

88. The Armstrong case was decided in 2003. Spaceman v ISS Mediclean (t/a ISS Facility Service Healthcare, [2019] IRLR 512, was decided 6 years later. In that case, Mr Spaceman was employed by the respondent as a dispatch porter. Allegations were made that he had sexually harassed and assaulted colleagues. Following a disciplinary hearing, he was summarily dismissed. He brought proceedings alleging that he had been unfairly dismissed by virtue of section 104 ERA for asserting a statutory right at the disciplinary hearing because the respondent had already made up its mind to dismiss him and had given instructions to that effect. The Employment Tribunal considered that the statutory right in question was the right not to suffer unfair dismissal. It struck out the claim stating that section 104(1)(b) required an allegation that the employer had infringed a right of his which was a relevant statutory right and that the use of the past tense was significant. If the assertion of the right could only be made after the dismissal it could not then be relied on as a reason for the dismissal. The claimant appealed.

89. At the EAT Richardson J held that:

> "26. Nor, in my judgment, does *Armstrong* take the matter any further. That case was concerned with the different issue – whether the allegation of the employee was an allegation of an infringement of the statutory right. The point with which that case is concerned probably did not arise. If it did, it was not decided by the employment tribunal or by the EAT.
>
> 27. In my judgment the starting point must be the language of s 104 itself. Read naturally, s 104(1)(b) requires an allegation by the employee that there has been an infringement of the statutory right. An allegation that there may be a breach in the future is not sufficient. The thrust of the allegation must be "*you have infringed my right",* not merely *"you will infringe my right."*
>
> ……..
>
> 31. In my judgment ss 104(1)(a) and (b) must be given their natural meaning. It is true that they can both have been drafted to afford wider protection; but it is not possible within ordinary canons of construction to interpret them as if they did. It would, for example, be impossible to know what criterion to apply in s 104(1)(b). Would it be sufficient for the employee to allege that an infringement may take place onward the allegation have to encompass a threat of infringement or a proposal to infringe or an intention to infringe?
>
> 32. In my judgment therefore the EJ was correct in his interpretation of s 104(1)(b). In the context of the right not to be unfairly dismissed, it requires an allegation by the employee that he has been unfairly dismissed, not merely that the employer is taking action, which will all threatens or may result in an unfair dismissal in the future."

90. I have also taken into account the cases of Abernethy v Mott, Hay and Anderson [1974] ICR 323, a judgment of the Court of Appeal; Dr Kevin Beatt v Croydon Health Services NHS Trust [2017] EWCA Civ 401, CA;

W Devis & Sons Ltd v Atkins [1973] 3All ER 40, CA; and Hughes v Corps of Commissionaires Management Ltd [2011] EWCA Civ 1061, CA.

91. As regards wrongful dismissal, I have considered Article 3, Extension of Jurisdiction (England & Wales) Order 1994, which is the Employment Tribunal's jurisdiction to hear contract claims.

92. The tribunal must consider whether the conduct of the employee was, on the balance of probabilities, so serious as to amount to a repudiatory breach of the contract of employment entitling the employer to summary terminate the contract, Laws v London Chronicle (Indicator Newspapers) Ltd [1959] 1WLR 698, CA; and Briscoe v Lubrizol Ltd [2002] IRLR 607, CA.

Conclusion

93. What was the reason, or if more than one, the principal reason for the claimant's dismissal? I am satisfied that the principal reason for his dismissal was that he was asleep while on duty. There was evidence to suggest that he was not on his break. His boots were off his feet and he was not wearing his trainers. There was no evidence of lunch or a meal having been eaten or was in the process of being eaten. His head and left shoulder were lent against a wall and his eyes were closed. He did not open his eyes when Mr Goodrich approached and entered the cabin. He opened his eyes only when he heard the click sound of the camera on the mobile phone. Also considering the fact that he had not been on his patrol between 9.08am and 12.47 on 1 August 2018, and had been photographed at 11:23am on that date, led Mr Makinson to conclude, on the balance of probabilities, that the claimant was asleep and not on his break. Falling asleep whilst on duty is gross misconduct.

94. Mr Makinson also considered that the claimant had not engaged in hourly Active Guard patrols and was not wearing his PPE boots.

95. I, therefore, have come to the conclusion that the reason for the claimant's dismissal was his conduct and not denying or proposing to deny him his right to a rest break. Accordingly, his automatic unfair dismissal claim is not well-founded and is dismissed.

96. As regards the section 101A claim, this is of academic significance.

97. In Ajayi the claimants claimed that they we dismissed because of the refusal or proposed refusal of their rights to a rest break during the investigation and not that they were caught sleeping on duty. The Employment Tribunal found that they were dismissed for being asleep while on duty and not because the respondent refused or proposed to refuse their right to a rest break. This judgment was upheld by the EAT.

98. The facts in Ajayi are not dissimilar to those of the claimant's in this case.

99. The claimant only asserted during the disciplinary hearing on 13 August 2018, that he was on his lunch and was resting his eyes. He did not assert such a right when the photograph was taken off him by Mr Goodrich, nor when he was first informed by Ms Lovelock on 3 August 2018, that he would be removed immediately from site and that there would be a disciplinary hearing.

100. He admitted in evidence that he had previously exercised his right to a rest break without being prevented from doing so by the respondent.

101. Having regard to Pazur, there must be an explicit refusal, or proposal to refuse to accept a requirement in contravention of the regulations. In my judgment there was no such explicit refusal or proposed refusal to contravene the right of the claimant or for him to forgo a right under the Working Time Regulations.

102. As regards Section 104(1)(b) ERA, was the claimant dismissed for asserting a relevant statutory right, namely his right to a rest break under employment law? This matter was addressed in the case of Spaceman in which Richardson J, held that there must be an infringement of a relevant statutory provision. In the context of this case, the claimant said that he was asserting his right to a rest break under the Working Time Regulations in his grounds of appeal. By then the decision had been taken to dismiss him. There was no infringement of his statutory right to rest break as he had enjoyed the right during his employment with the respondent and the respondent never conceded that it had denied him that right. The disciplinary policy states that it is gross misconduct to be found sleeping while on duty.

103. I am satisfied that the claimant was not dismissed for asserting a statutory right but for sleeping while on duty, not carrying out regular Active Guard patrols, and not wearing his PPE boots.

104. His section 104 claim is also not well-founded and is dismissed.

Wrongful dismissal

105. In considering a wrongful dismissal claim I must have regard to the evidence as presented during the hearing. The claimant had a history of being instructed to carry out hourly or regular Active Guard patrols. It is significant that some of the gaps are several hours apart. It begs the question, what the claimant was doing during those times? On 1 August 2018, he had not been on his hourly Active Guard patrols between 9.08am and 12.47. The picture of him asleep was taken at 11.23am that morning. I am satisfied that he was asleep and probably for some time, by the time Mr Goodchild entered the cabin. Being asleep while on duty is gross misconduct. Security Guards are required to be alert at all times and ready to protect the premises and property. Mr Makinson was entitled to dismiss the claimant summarily. The respondent had not committed a fundamental breach of the claimant's contract of employment by dismissing him. The wrongful dismissal claim has not been proved and is dismissed.

Holiday pay

106. This is a very short point. The claimant acquired 2.33 days after and not before he completed a month's service. It follows from this that the respondent's position is the correct one and I adopt it. The holiday year runs from 1 April to 31 March. The claimant's full holiday entitlement for the year was 28 days. From 1 April 2018 to 16 August 2018, is 4.5 months. The claimant is entitled to 28/12 x4.5, which is 10.5 days. He had been paid for a Bank holiday. Which leaves 9.5 days. His daily rate of pay was £93.96 gross. His holiday pay is 9.5 x £93.96 = £892.62. The respondent is ordered to pay him this sum less any income and national insurance due and payable. I have considered and applied the judgments in Laws v London Chronicle (Indicator Newspapers) Ltd and Briscoe v Lubrizol Ltd.

..……..

Employment Judge Bedeau

16 May 2021

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Sent to the parties on:

.....22 May 2021.....

THY

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For the Secretary to the Tribunals