



# **EMPLOYMENT TRIBUNALS (SCOTLAND)**

**Case Number: 4102893/2020**

**Final Hearing held remotely by Cloud Video Platform (CVP) on 15 and 16  
June 2021**

**Employment Judge J Shepherd**

**Mr Steven Morton**

**Claimant  
Represented by:  
Mr Gordon Bathgate  
Solicitor**

**The City of Edinburgh Council**

**Respondent  
Represented by:  
Mr Scott Milligan  
Solicitor**

## **JUDGMENT**

The judgment of the Tribunal is as follows:

1. The Respondent did not refuse to permit the Claimant to exercise his right to rest breaks under Reg 12(1) Working Time Regulations 1998.
2. The Respondent did not refuse to permit the Claimant to take an equivalent period of compensatory rest under Reg 24 Working Time Regulations 1998.
3. The Respondent did not make unlawful deductions from the Claimant's wages.

## REASONS

### Introduction

1. By a claim form dated 27 May 2020 the Claimant presented a complaint under Reg 30(1)(a) of the Working Time Regulations 1998 ('WTR') that the Respondent had refused to permit him to exercise his right to rest breaks under Reg 12 WTR, and a complaint of unlawful deduction of wages (pursuant to s.13 Employment Rights Act 1996) in that he asserted that, as he was required to work during his breaks, he was entitled to be paid for that time. The period of time with which this claim is concerned is, in respect of the WTR claim, 28 February 2020 to 27 May 2020, and in respect of the unlawful deductions claim, 28 May 2018 to 27 May 2020.
2. By consent, the hearing was held by video. The Claimant was represented by Mr Bathgate, Solicitor. The Respondent was represented by Mr Milligan, Solicitor.
3. I had before me a joint agreed bundle of documents.
4. The Claimant gave evidence on his own behalf. The Respondent called two witnesses: Janet Sinclair, Team Leader of the Southhouse Close Support Unit until she retired on 31 March 2021, and Frank Phelan, Team Manager of Residential Services.

### Findings of Fact

5. The tribunal makes the following findings of fact –
6. The Claimant commenced employment with the Respondent on 5 January 1995. He worked as a Residential Care Officer on the night shift at the Southhouse Close Support Unit ('the Support Unit') from July 2013 until his retirement on 7 April 2021.

7. The Support Unit is a five bedded residential unit for young people not able to live with their family. Generally, these young people are aged between 12 and 18. The Support Unit offers support and long-term care for young people who have often experienced multiple placement breakdowns. The young people at the Support Unit require a significant amount of care and assistance. There are three members of staff on duty at all times, except between 1am and 7.15am when there are usually two members of staff on duty.
8. The shift patterns at the Support Unit changed in 2013. The Respondent considered that it needed to make changes to its working practices in residential childcare to ensure it was fully complying with the WTR. The Respondent embarked upon a consultation process with staff and trade unions in this regard in 2012 because it considered that some aspects of its working patterns meant that they were not providing adequate rest periods for staff. At that time, during the night shift at the Support Unit there would be one waking member of staff on duty, and one member of staff on a 'sleep in.' The 'sleep-in' member of staff would be woken if required.
9. The Respondent, in consultation with the Unions, developed alternative working patterns to meet the needs of the service and to comply with the WTR. As part of that process, new rotas were drawn up for the Support Unit. The 'sleep in' shift was removed and instead two waking members of staff would be on duty throughout the night shift. The Respondent also introduced a 30 minute unpaid break into the night shift that previously did not exist. As a consequence of the introduction of unpaid breaks into shifts, and therefore a reduction in the number of hours worked by staff on each shift, there was an increase in the number of shifts to be worked. The revised working pattern, including the 30 minute unpaid break, took effect from 1 October 2013.
10. The Respondent published some Managers Guidance on the Working Time Regulations. The Claimant was familiar with this document. At paragraph 7.1

(1) under the heading “*Rest breaks during the working day*” the guidance provides: “*In certain limited circumstances a worker may be requested to take their unpaid break in their workplace, but away from their workstation, e.g. for the purposes of continuity of care of service users or in an emergency.*” Paragraph 8.6 provides, under the heading “*Compensatory Rest*”: “*In certain circumstances it may not be possible during the work period for the unpaid 30 minute rest break to be taken, e.g. if a worker is required to work through the rest break to deal with an emergency situation. In those circumstances the manager must ensure that the worker is given an equivalent period of rest within the same day. Finishing the work period early to compensate for a rest break not taken is not acceptable practice.*” Paragraph 8.7 provides: “*Alternatively, the period of interrupted rest can be given on the subsequent working day in addition to the normal unpaid rest break for that work period.*”

11. The following is an extract from the Frequently Asked Questions section of the Managers Guidance document:

**Q24 What is the entitlement to a rest break during the working day/night?**

*A24 The basic entitlement is 20 minutes when a working day is for 6 hours or longer. The Council has increased this to a minimum of 30 minutes per day/night up to a maximum of 1 hour 5 minutes for all Red Book Employees.*

**Q25 Is the break paid time?**

*A25 No, the break is unpaid.*

**Q26 When should the break be granted?**

*A26 The break can be given at any time during the working day to meet the needs of the service, but not 30 minutes into or before the end of a period of work.*

**Q27 How can a lunch break be at anytime during the working day/ night?**

*A27 The break is not defined as a lunch/meal break*

**Q28 Can workers be required to take their break in the building?**

*A28 In certain workplaces, eg a residential unit, school, public facilities etc. managers can require a worker to take their 30 minute break in the building.*

*This must be in a separate rest area away from the workstation, client group etc. This break should not be interrupted, unless there is an emergency.*

**Q29 Does this mean that workers are on call during their break?**

*A29 No, workers are still on their break, just not outwith the building.*

**Q30 Can workers be called on to undertake work when they are on a break?**

*A30 In the case of an emergency, eg if a service user is injured, workers on their break could be called on to assist with the emergency, but must be allowed to take the part of their break that they have missed at another time during the work period.*

**Q31 Why can a worker not leave the premises if they are on unpaid time?**

*A31 The rest break during the work period, albeit unpaid, is still part of the work period ie a work period of 8.5 hours inclusive of an unpaid break is the contractual work period. The break is to ensure a rest from working.*

**Q32 What happens if a worker refuses to remain in the building?**

*A32 This would be viewed as failure to obey a reasonable instruction.*

**Q33 What does compensatory rest mean?**

*A33 Compensatory rest is a period of rest the same length as the period of rest, or part of the period of rest that a worker has missed.*

**Q34 When could compensatory rest be required?**

*A34 Anytime when a worker has been required to work during their daily rest break, daily rest period or weekly rest period. This could be because of an emergency, call out when on standby, or working through their break.*

**Q35 When should compensatory rest be given?**

*A35 It must be given immediately after the interrupted rest period. Only in exceptional circumstances can it be carried over into the following day/ night. In these circumstances advice should be sought from HR.*

12. The Claimant was unhappy about the introduction of unpaid rest breaks into the night shift. He has what he described in his evidence as “an ideological objection to the idea of breaks in residential childcare.” The Claimant felt strongly that the work he did as a Residential Care Officer required him to

ensure that he was meeting both the essential and non-essential needs of the young people throughout the night shift at all times, and that taking a rest break would amount to relegating the non-essential needs of the young people, such as reading them a bedtime story, as being secondary to the need for staff to take a break. The Claimant felt that saying to a child that they could not see a member of staff because they were on a rest break was not appropriate because the message it might send to them was that the member of staff was on a break from the child, because they were hard work. The Claimant stated in evidence "I came in to work with young people, not to go off and have a break for half an hour."

13. The Claimant was also unhappy about the need for night staff to work additional shifts as a consequence of the introduction of the unpaid breaks. He asserted in evidence that he believed that the unpaid rest breaks had been forced upon night shift staff and that they had been introduced by the Respondent's management as a means to make night shift staff work extra shifts. The tribunal finds that the reason for the introduction of the 30 minute unpaid rest breaks into the night shifts was because the Respondent believed it was necessary to do so in order to comply with the WTR, not in order to require night shift staff to work extra shifts without further pay. The tribunal heard, and accepted, the evidence of Mr Phelan, that the changes to the shift patterns to introduce these rest breaks came at additional financial cost to the Respondent as a result of needing to recruit additional waking night time staff once the 'sleep in' shifts were ceased.
14. As a consequence of the Claimant's views on rest breaks, the Claimant did not seek to exercise his right to take rest breaks during his night shifts for the period relevant to this claim.
15. During the period of time with which this claim is concerned, the Claimant worked permanent night shifts from 9.45pm to 7.15am. He worked 12 shifts every 4 weeks.

16. Between 9.45pm and 1am there were three employees on shift at the Support Unit; two night shift workers and one twilight worker. The twilight worker went home at 1am, leaving the two night shift workers on shift until 7.15am. There is a Care Inspectorate requirement for a minimum of two members of staff to be present in the Support Unit at any one time.
17. The night shift staff had developed a system for deployment of staff where, prior to 1am, one person would supervise the corridor beside the young people's bedrooms (known as the 'radiator person' as they would be located next to the radiator in the corridor), one person would be the 'runner' to carry out any errands that needed to be done, such as fetching drinks and snacks for the young people or answering the telephone, and the third person would be the 'bedroom person' who would spend time with the young people in their bedrooms, settling them in for the night.
18. The tribunal finds that, although this was the system used by the night staff, it was not a rigid or inflexible system, and that staff could swap between these roles or make changes to that system as necessary.
19. When the Claimant started his shift at 9.45pm, not all of the residents would necessarily be present in the Support Unit. Residents would return at times set out in their care plans. Some of the young people had extended freedoms that were largely age related. When those young people returned to the unit at night they would go into their rooms but would not always be asleep. The majority of the residents would be settled and in their rooms by 10.30pm. The young people would normally be sleeping by 1am, or at least settled in their rooms with little disruption for the staff.
20. In the period between 9.45pm and 1am, when there were three members of staff on duty, one staff member could take a 30 minute break away from the Support Unit, as long as they were contactable by telephone during that break so that they could return to the Support Unit in an emergency if required. After 1am, any rest breaks were required to be taken within the Support Unit in

order to comply with the requirement of 2 staff members being present at all times.

21. The tribunal finds that, during the average shift, it was possible for night shift staff to take a 30 minute break from their work duties. The nature of the work in the Support Unit was such that there may be emergencies that would occur from time to time that would prevent a member of staff from taking their break prior to 1am, or that they may be interrupted from their break, but that this was the exception rather than the norm, and that in those circumstances it would ordinarily still be possible for the member of staff to take a break from their work duties after 1am.
22. In the Support Unit there was a staff room that was set aside exclusively for the use of staff. Night staff could use this room to take their 30 minute break. On occasion, the staff room would be used by day staff who may have to sleep over as a consequence of being unable to travel home due to working late, or in circumstances of adverse weather conditions. On those occasions, night staff were able to take their 30 minute break in the 'chill out' room or the sitting room as those rooms would not be used by the young people during the night.
23. Night staff had significant autonomy as to when to take their breaks during the night shift. If the break was taken before 1am it could be taken away from the Support Unit so long as the members of staff remained contactable by telephone. After 1am it must be taken in the Support Unit.
24. In the period from 1am to 7.45am, the Claimant generally positioned himself upstairs in the office near the young people's bedrooms. The other member of staff would usually be downstairs. From 1am onwards, when it was quiet and there was no other work to do, the Claimant would often spend time working on the book he was writing.



25. The Claimant raised a grievance about rest breaks in April 2019. Prior to this, neither he nor any other staff at the Support Unit had raised any concern about being unable to take their 30 minute break during the night shift. The Claimant raised a grievance in April 2019 in which he complained that, when the Support Unit implemented a Working Time Directive compliant rota in October 2013, this required him to work an additional two nights over a four-week cycle. He also complained that the rota required him to work an extra 2 hours per week unpaid and classed as 'breaks' (30 minutes per shift) and that whereas day staff could take breaks away from the unit, night staff were required to remain in the unit on their breaks. The Claimant stated that he had not previously felt confident enough in his position to formally complain about these changes until he reached retirement age, and that is why he was raising the issue some 6 years after the introduction of the new rotas.

26. The Claimant's grievance was not upheld. The Respondent found that the change in rota in October 2013 did require the Claimant to work additional night shifts, but his total hours did not change. The total number of hours worked remained the same after the change, but these had to be spread over a higher number of shifts to accommodate adequate rest breaks in accordance with the Working Time Regulations. The Respondent also concluded that the Claimant did have the opportunity to have a break during his shift.

#### Relevant law

27. Reg 12 of the Working Time Regulations 1998 provides:

*12. Rest Breaks*

*(1) Where a 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 a 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...*

Reg 21(c) provides:

21. Other special cases

*Subject to regulation 24...regulations...(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...residential institutions...*

Reg 24 provides:

24. Compensatory rest

*Where the application of any provision of these Regulations is excluded by Regulation 21...and a worker is accordingly required by his employer to work during a period which would otherwise be a rest period or rest break –*

*(a) His employer shall wherever possible allow him to take an equivalent period of compensatory rest, and*

*(b) In exceptional cases in which it is not possible, for objective reasons, to grant such a period of rest, his employer shall afford him such protection as may be appropriate in order to safeguard the worker's health and safety.*

Reg 30 provides:

30. Remedies

*(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...12(1)...*

*(ii) regulation 24, in so far as it applies where regulation...12(1) is modified or excluded...*

*(2) Subject to regulations 30A and 30B, 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...beginning with the date on which it is alleged that the exercise of the right should have been permitted...*

*(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...months.*

28. Section 13(3) of the Employment Rights Act 1996 (ERA) provides that there is a deduction from wages where the total amount of any wages paid on any occasion by the employer is less than the total amount of the wages properly payable by him to the worker on that occasion.

29. Under s.27(1) ERA 'wages' means any sums payable to the worker in connection with their employment.

### The Claimant's submissions

30. In summary, the Claimant's submissions were as follows:

31. The Respondent had not afforded the Claimant rest breaks in accordance with Reg 12 as it was not possible to take those breaks due to the function of the Support Unit, namely its care for young people who needed close support. The restrictions put in place meant that the Claimant had to remain in his workplace and at the Respondent's disposal so that the Claimant was engaged on working time for the entirety of the period between 9.45pm and 7.15am.

32. The operational requirements of the unit meant that breaks could not be taken between the start of the shift and 1am, when the third member of staff (the

twilight worker) was on duty. Even if the Claimant was able to take a break he was still at the Respondent's disposal as he was required to be contactable by telephone.

33. The Claimant's workstation was the entirety of the Support Unit building as he worked all over the unit and he was unable to escape the unit to take a break or pursue his own interests unfettered.
34. On behalf of the Claimant, Mr Bathgate accepted that the work carried out by the Claimant did fall within the definition of Reg 21(c), but asserted that the tribunal must focus on the worker's activities and not the work carried out by the employer. It is the worker's activities that involved the need for continuity for Reg 21 to be engaged. Mr Bathgate asserted that there was no need for the Claimant himself to provide continuity and therefore Reg 21(c) was not engaged.
35. Mr Bathgate referred to the **Interpretative Communication on Directive 2003/88/EC of the European Parliament and of the Council concerning certain aspects of the organisation of working time** at pages 16 to 25. He also relied upon the case of **Sindicato Medicos de Asistencia Publica (SIMAP) v Conselleria de Sanidad y Consumo de la Generalidad Valencia (Case C – 303/98) [2001] ICR 1116, ECJ**, the case of **Landeshauptstadt Kiel v Jaeger (Case C – 151/02) [2004] ICR 1528, ECJ** and the case of **Gallagher and others v Alpha Catering Services Ltd (trading as Alpha Flight Services) [2005] ICR 673**.
36. The period of time during which the Claimant claims a breach of the WTR is from 28 February 2020 up until the date the claim was raised on 27 May 2020. In respect of the unlawful deductions claim the relevant period claimed for is 28 May 2018 to 27 May 2020. The Claimant commenced ACAS early conciliation on 27 January 2020 and the certificate was issued on 11 February 2020. The Claimant asserts that there was a continuing situation with regard both to the exercising of rights to rest breaks and the alleged unlawful

deductions up until the Claimant went off sick in July 2020 and the claims are therefore brought within the relevant time limits.

The Respondent's submissions

37. In summary, the Respondent's submissions were as follows:

38. The Respondent put arrangements in place for the Claimant to take a 30 minute rest break during a night shift, but the Claimant elected not to take a break. There was therefore objectively no refusal to permit the Claimant to exercise his right under Reg 30(1)(a).

39. There was no breach of Reg 12. Prior to 1am there was an opportunity for the Claimant to take breaks away from the building as there were three members of staff. In the alternative a break could still be taken after 1am, although it couldn't be taken away from the building it was still compliant with Reg 12. An entire workplace cannot amount to a work station and if the WTR had meant to say workplace it would have done so.

40. In the alternative Reg 21(c) applies. The Claimant's activities did require continuity as was clear from the Claimant's own evidence of the type of activities he carried out and the fact that he did not feel he could abandon those activities to take a break. This was a small unit where the staff had a relationship with the young people in their care and continuity of service was required, so Reg 21(c) was engaged, although the Respondent still aspired to provide Reg 12 compliant breaks.

41. Where Reg 12 compliant breaks were not possible, compensatory rest was possible as Reg 24 compliant compensatory rest did not have to be of the same nature as a Reg 12 break. Mr Milligan referred the tribunal to the case of **Hughes v Corps of Commissionaires Management Ltd (No.2) [2011] IRLR 915** as authority that a Reg 24 compliant break did not have to be

identical to a 'Gallagher rest break'. He also referred to **Crawford v Network Rail Infrastructure Ltd [2019] ICR 1206**.

42. Mr Milligan also referred me to the cases of **Grange v Abellio London Ltd [2017] ICR 287**, **Martin v Southern Health and Social Care Trust [2010] IRLR 1048**, the Court of Appeal decision in **Royal Mencap Society v Tomlinson Blake (CA) [2018] IRLR 932** and **Camden Primary Care Trust v Atchoe [2007] EWCA Civ 714**.

43. The Respondent asserts that the claims are issued out of time on the basis that, as early conciliation was commenced by the Claimant on 27 January 2020, the Claimant then had 3 months minus a day to issue proceedings (26 April 2020), extended by the 15 days of early conciliation, taking the deadline for issuing a claim to 11 May 2020, and as the claim was not issued until 27 May 2020, the claim is therefore brought outside of the relevant time limits.

### Discussion and Decision

#### **Jurisdiction – time limits and early conciliation**

44. The period of which the Claimant complains in respect of rest breaks is 28 February 2020 to 27 May 2020. In respect of his unlawful deductions claim it is 28 May 2018 to 27 May 2020.

45. The Claimant commenced ACAS early conciliation on 27 January 2020 and the certificate was issued on 11 February 2020. The claim was then issued on 27 May 2020.

46. s.18A Employment Tribunals Act 1996 provides that a prospective Claimant must notify ACAS prior to instituting proceedings. There is no requirement to institute those proceedings within a specific period of time, unless the time limit has started to run on the claim itself.

47. An early conciliation certificate issued by ACAS may cover claims that crystallise after the date that it is issued. As the subject matter of these complaints was ongoing, there was no requirement for the Claimant to issue his claim within a specified period from the date of the issue of the certificate.
48. Both claims were brought within three months of the last date of the period complained of. The claims are therefore in time and the tribunal has jurisdiction to consider them.

### **The WTR claim**

Did the Claimant have a right to rest breaks under Reg 12(1) WTR or was Reg 21(c) WTR engaged?

49. Firstly, the tribunal must consider whether the Claimant had a right to rest breaks under Reg 12(1) WTR or whether his employment fell within the 'Other special cases' provided for in Reg 21.
50. The parties were agreed that the Claimant's activities related to services relating to the care provided by residential institutions (Reg 21(c)(i)). However, the Claimant does not accept that the Claimant's activities involved the need for continuity of services, it being contended on behalf of the Claimant that it was only the Respondent's activities that required such continuity.
51. The Court of Appeal in **Gallagher and ors v Alpha Catering Services Ltd t/a Alpha Flight Services 2005 ICR 673, CA** confirmed that the wording of Reg 21(c) is such that it is the worker's activities, not the work carried out by the employer, that must involve the need for continuity.
52. The tribunal finds that the Claimant's activities did involve the need for continuity of service in relation to services relating to the care provided by residential institutions. The Claimant in his evidence set out the nature of the

work done by the Residential Care Officers during the night shift, noting that when working with traumatised young people it is reassuring to them to see the staff present who are caring for them. The role of a Residential Care Officer is to ensure that both the essential and non-essential needs of the young people in their care are met. The Claimant described in his witness statement a number of hypothetical scenarios when staff might be needed to deal with an emergency incident, or where a young person would make a request for assistance that might not be able to be provided by a member of staff because they were engaged on other duties. He stated that, in those circumstances, there was a risk of unacceptable behaviour escalating if staff were not able to tend to that young person's needs in a timely fashion. That is an example of when a member of staff might need to be interrupted from a break to provide continuity of service. The Claimant described how it would not be appropriate to break off from reading a child a bedtime story in order to take a rest break, as this sent the wrong message to the child. In the Claimant's words "We are there to be there for them". The nature of the work of the Residential Care Officers, and the importance of the relationship between them and the young people in their care, was such that continuity could not be provided by, for example, a peripatetic worker visiting the Support Unit for short periods of time to allow members of staff to take a rest break away from the Support Unit.

53. The tribunal is satisfied that the Claimant's activities did fall within the special cases set out in Reg 21(c)(i) and that Reg 12 did not apply to the Claimant.

54. The Claimant's claim that the Respondent refused to permit him to exercise a right to rest breaks under Reg 12 WTR must therefore fail and is dismissed.

Was the Claimant provided with compensatory rest in accordance with Reg 24?

55. Reg 21 is made subject to Reg 24 which provides that when a worker is required by his employer to work during a period which would otherwise be a



rest period or rest break, his employer shall wherever possible allow him to take an equivalent period of compensatory rest.

56. In **Landeshauptstadt Kiel v Jaeger 2004 ICR 1528, ECJ**, the European Court held that, so far as daily rest is concerned (rather than rest breaks), equivalent compensatory rest is 'characterised by the fact that during such periods the worker is not subject to any obligation vis-à-vis his employer which may prevent him from pursuing freely and without interruption his own interests in order to neutralise the effects of work on his safety or health. Furthermore, 'the worker must be able to remove himself from his working environment' and be able 'to relax and dispel the fatigue caused by the performance of his duties'. In the Interpretative Communication, the European Commission proffers the view that the requirement for the worker not to be subject 'to any obligation vis-a-vis [the] employer' means that he cannot be on 'standby' during compensatory rest.

57. It is this that Mr Bathgate, on behalf of the Claimant, relies upon in asserting that an equivalent period of compensatory rest is identical to a rest break under Reg 12 and that, therefore, as the Claimant required either to be contactable by telephone, or to remain in the Support Unit, during his rest breaks, the Claimant has also not been provided with compensatory rest in accordance with Reg 24.

58. An equivalent period of compensatory rest need not be a rest break as defined in Reg 12. There may be a period of rest within the meaning of Reg 24(a) in the sense at least of a period when the worker is discharged from his obligation to perform work unless actively called upon to do so. The Court of Appeal in **Hughes v Corps of Commissionaires Management Ltd (No.2) [2011] IRLR 915** held that applying the construction that an 'equivalent period of compensatory leave' should be a break of the same length and of the same nature as a Reg 12 rest break would frustrate the health and safety objective which the legislation is designed to achieve. In the Hughes case a security guard working alone was provided with a kitchen area in the workplace where

he could take breaks and was allowed to leave a sign on the reception desk indicating he was on a break but giving a number where he could be contacted, so it could not be guaranteed that his breaks would not be interrupted. If any break were interrupted, he could start the break again from the beginning. The EAT concluded that these breaks did amount to compensatory rest under Reg 24(a), finding that 'equivalent compensatory rest' under Reg 24(a) is not identical to a standard 'Gallagher rest break' under Reg 12. The EAT said that it connotes something that is as near in character, quality and value to it as possible. The elements of that equivalent period of compensatory rest will vary according to the facts and circumstances of the individual case. Sometimes it may be possible to provide compensatory rest that very nearly meets the Gallagher criteria, for example where the worker is technically on call during a rest break but is, in practice, never called upon. In other cases, it may be impossible to provide any break during a particular shift but the employer may afford compensatory rest by granting a double break during the next shift. The EAT concluded that Hughes had been granted an 'equivalent period of compensatory rest' because he was freed of all aspects of his work apart from the need to remain on the premises and to be on call. Although being on call meant that he was not on a 'Gallagher rest break', the fact that he was allowed a 20 minute break at a time of his choosing and could start that break again if it was interrupted satisfied the requirements of equivalence and compensation. The Court of Appeal approved this decision.

59. The tribunal is satisfied that the arrangements put in place by the Respondent did mean that the Claimant was able, during the night shifts in the period in question, to take a 30 minute break away from his work duties. This was amply demonstrated by the Claimant's evidence that he was often, after 1am, able to spend time engaged on his own activities writing his book. Although he would remain in the workplace whilst doing so, and would therefore be contactable if needed, that was nevertheless an equivalent period of compensatory rest. The Respondent had provided areas in the Support Unit where the Claimant could be away from the place he would normally carry

out his duties during the night shift, namely the staff room, chill out room, or sitting room. The tribunal also finds that some greater flexibility to take rest breaks was offered prior to 1am as a consequence of three members of staff being available. This gave the flexibility to allow the Claimant to leave the workplace if he desired to do so, albeit that he would need to remain contactable by telephone. The tribunal finds that, had the Claimant exercised his right to take that compensatory rest, and it had at any time been interrupted due to an emergency, that he would have been able to restart that period of compensatory rest later in the shift when things were quieter after 1am, or at the very least to be able to take it in a following shift.

60. If a period is properly to be described as an equivalent period of compensatory rest, it must have the characteristics of a rest in the sense of a break from work. The tribunal is satisfied that the Claimant was able to take rest that had equal value to a Reg 12 rest break in terms of contributing to the Claimant's well-being.

61. Although the tribunal acknowledges the Claimant's personal views about whether it was appropriate for him to elect to take a break from work during his shift, due to the nature of his work activities, the tribunal is satisfied that the arrangements the Respondent put in place were such that the staffing levels were adequate to meet the needs of the young people in the Support Unit, whilst also allowing staff to take a 30 minute break at some point during the shift. The tribunal accepts that it was important to the Claimant to always be available to the young people in his care, but equally it was very important for the staff in the Support Unit to be able to take a rest break during their night shift, and the Tribunal is satisfied that the Respondent facilitated the ability to take compensatory rest in accordance with Reg 24(a). As the Claimant had never sought to exercise his right to a break (or compensatory rest), he could not give any actual examples of having been prevented from doing so, or having been interrupted during such a break, but the tribunal is satisfied that, had the Claimant been so interrupted, he would have had the opportunity to take compensatory rest later in his shift. The Claimant's own

evidence was that, after 1am, the Support Unit was so quiet that he was able to engage himself on writing his book. In those circumstances, it would therefore have been possible for him to spend 30 minutes in one of the areas away from work duties, to enjoy some quiet and uninterrupted time.

62. Although the Claimant was required to be contactable by telephone during any such break, and therefore could be interrupted, whether by telephone if he left the building, or by being contacted in person if he stayed in the building, that would only be in the case of an emergency. If such an emergency occurred, then provision could be made for the Claimant to make up the time lost in another break later in the shift.

63. The Claimant was able to take breaks either in the staff room, or if the staff room was occupied by other staff sleeping over, in either the 'chill out' room or the sitting room, away from his usual duties. This amounted to an equivalent period of compensatory rest within the meaning of Reg 24.

64. Workers cannot be forced to take rest breaks, but they are to be positively enabled to do so – see **Grange v Abellio London Ltd [2017] ICR 287**. The tribunal is satisfied that, in changing the night shift rotas in 2013 and implementing the Manager's Guidance on the WTR, the Respondent had taken steps to ensure working arrangements that enabled the Claimant to take compensatory rest. The Claimant did not seek to exercise his right to compensatory rest because of his ideological objection to Residential Care Officers taking rest breaks.

65. The Respondent did not fail to permit the Claimant to exercise any right to rest breaks under Reg 12 as Reg 21(c)(i) applied and Reg 12 therefore did not apply to the Claimant. The Respondent did not fail to permit the Claimant to exercise his right to compensatory rest under Reg 24 WTR and the Claimant's WTR claim must therefore fail and be dismissed.

**Unlawful deductions claim**

66. The Claimant's case is that, as he worked during his 30 minute break on each night shift, he was entitled to be paid overtime for those periods.

67. The tribunal has concluded that the Claimant only continued to work through those 30 minute breaks as a matter of choice, not because the Respondent refused to permit the Claimant to exercise his right to compensatory rest, nor because the Respondent failed to put in place arrangements to allow the Claimant to take that compensatory rest.

68. The tribunal finds that the Respondent was entitled to designate 30 minutes of each night shift as an unpaid break. The Claimant was a salaried employee and accepted under cross examination that any overtime worked must be authorised. At no time did the Respondent authorise the Claimant to work overtime in working through his rest breaks. The tribunal accepts the Respondent's evidence that it was unaware, prior to the Claimant raising his grievance, that the Claimant had not been exercising his right to a 30 minute break.

69. The tribunal finds that, as the Claimant chose not to take his rest breaks, and the Respondent did not authorise the Claimant to work through his rest breaks and to claim that period as overtime, that the total amount of wages paid to the Claimant for his night shifts during the relevant period was not less than the amount of wages properly payable to the Claimant. The Claimant's claim for unlawful deduction from wages therefore fails and is dismissed.

Employment Judge: Jude Shepherd  
Date of Judgment: 29 June 2021  
Entered in register: 02 July 2021  
and copied to parties