EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4105465/2020

Hearing held by Cloud Video Platform (CVP) on 28, 29 and 30 June 2021

Employment Judge Smith

Mr Emmanuel Ofori	**Claimant** **Represented by** **Mr Komeng, Lay Representative**
Group Employment Services Limited	**Respondent** **Represented by** **Ms Patullo, Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

1. The Claimant's claim of unfair dismissal is not well-founded and is dismissed.

2. The Claimant's claim of wrongful dismissal is dismissed.

3. The Claimant's claim under **regs.12** and **30 Working Time Regulations 1998** is dismissed.

REASONS

Introduction

1. By way of an ET1 claim form received on 10 October 2020 the Claimant presented to the Tribunal the following claims:

   (1) Unfair dismissal, contrary to **ss.94** and **98 Employment Rights Act 1996**;

   (2) Wrongful dismissal in breach of contract; and,

   (3) A claim under **reg.30 Working Time Regulations 1998** ("**WTR 1998**") for compensation for an alleged breach of the Claimant's right (under **reg.12(1)**) to a rest break where his daily working time was more than six hours.

2. These claims were defended in their entirety by the Respondent.

Issues

Unfair dismissal

3. It did not appear to be in dispute that the Respondent's ostensible reason for dismissal was one relating to the Claimant's conduct. In an unfair dismissal case it is for the employer to prove a potentially fair reason for dismissing the employee (**s.98(1) Employment Rights Act 1996**) before a Tribunal considers matters relating to the actual fairness of the dismissal.

4. On the question of the fairness of the dismissal (**s.98(4) Employment Rights Act 1996**) the parties agreed on the issues to be determined at the hearing at its outset. These followed the well-known formula set out in the Employment Appeal Tribunal cases of ***British Home Stores Ltd v Burchell [1978] IRLR 3*** and ***Iceland Frozen Foods Ltd v Jones [1982] IRLR 439***, as follows:

(1) Did the employer genuinely believe in the employee's guilt?

(2) If so, did the employer have reasonable grounds upon which to sustain that belief?

(3) If so, did the employer nevertheless carry out as much investigation as was reasonably required, in all the circumstances of the case?

(4) Objectively assessed, were the actions of the employer (including the decision to dismiss) those which a reasonable employer acting reasonably could have taken?

5. As this was a conduct-related case I considered that in the event the Claimant succeeded in his claim it would nevertheless be necessary to also determine some further matters of principle before determining any others relating purely to remedy. The further issues to be determined were therefore:

a. Had the Claimant engaged in culpable or blameworthy conduct prior to his dismissal, and if so, should the basic award be adjusted to reflect this?

b. Had the Claimant engaged in culpable or blameworthy conduct which caused or contributed to his dismissal, and if so, should the compensatory award be adjusted to reflect this?

c. Even if his dismissal was unfair, was there a chance that the Claimant would have been dismissed in any event? If so, should any award of compensation be adjusted to reflect this (the rule in ***Polkey v A E Dayton Services Ltd [1987] 3 All ER 974***, House of Lords).

6. The Claimant was not seeking reinstatement or re-engagement. Therefore, if the Claimant succeeded in his claim it would be necessary to assess compensation in the form of a basic award and a compensatory award before applying any appropriate deductions.

Wrongful dismissal

7. The Claimant was dismissed without notice. The sole issue in this claim was therefore whether the Respondent was entitled to dismiss him without notice, i.e. did the Claimant engage in repudiatory conduct entitling the Respondent to dismiss him summarily?

8. If the Claimant was wrongfully dismissed, to what award of damages is he entitled?

Working Time Regulations 1998, reg.12

9. In this claim the issues were as follows:

   (1) On 3 June 2020 and the night shifts worked by the Claimant earlier that week, was the Claimant's daily working time longer than six hours?

   (2) If so, the Claimant was entitled to a rest break of 20 minutes. Was his right infringed?

   (3) If the Claimant's right was infringed, to what award of compensation (if any) is he entitled?

Evidence

10. The Tribunal heard oral evidence from Mr Frank Baker (Regional Manager) and Mr Biagio Paciolla (National Operations Manager) on behalf of the Respondent, and from the Claimant on his own behalf. A productions file containing 25 documents and amounting to 138 pages was available to the Tribunal.

Application to amend

11. During my preliminary discussions with the parties' representatives prior to the commencement of the evidence Mr Komeng contended that the Claimant's **reg.12 WTR 1998** claim referred to his being denied rest breaks throughout the entirety of his employment. I determined that the wording of the Claimant's Particulars of Claim did not support such a broad proposition: the alleged denial of rest breaks was confined to the *"time of my dismissal"*, which on any sensible reading meant either the date of the Claimant's dismissal itself or, at its highest, the immediate time before that date. Accordingly, I deemed that an application to amend the claim form was necessary if that argument was to be pursued. Mr Komeng duly made an application, and it was resisted by Ms Patullo on behalf of the Respondent.

12. Considering the application in light of the guiding principles set out by the Employment Appeal Tribunal in the case of ***Selkent Bus Company Ltd v Moore [1996] IRLR 661***, I refused the Claimant's application to amend for the following reasons:

    (1) Whilst the proposed amendment was clear enough (*"that I was not afforded rest breaks throughout the entirety of my employment with the employment contrary to* **reg.12 WTR 1998***"*, proposed to be added to the end of paragraph 2 of the Particulars of Claim), the breadth of the proposed amendment could not properly be characterised as a mere re-labelling of an existing claim. Permitting the claim to cover a period of more than three years would be a very substantial change even if the legal cause of action remained the same. It would, on the face of things, cover every single shift the Claimant worked over that period. This factor militated away from an amendment being allowed.

    (2) On the question of time limits, taking the Claimant's case at its highest it was nevertheless clear that any alleged breach of **reg.12** that took place before the last few of days of May 2020 would be out of time. Mr Komeng

accepted that the whole of what was more than a two-year period would be out of time. Also, there is no equivalent to **s.23 Employment Rights Act 1996** – concerning a "series of deductions" of wages – in **reg.30 WTR 1998**, and no equivalent to the "continuing act" concept in **Equality Act 2010** cases, meaning that each individual breach would have its time limit and if this amendment were allowed, each individual breach would be out of time. This factor also militated away from an amendment being allowed.

(3) On the question of the balance of prejudice, I concluded that there was a significantly greater prejudice to the Respondent than to the Claimant if the application were to be allowed. The Claimant did have an in-time **reg.12** claim so he would not entirely deprived of a remedy for breach if the application was refused, and in any event the financial value of claims presented on the **reg.12** basis is generally very limited and does not include compensation for injury to feelings (***Santos Gomes v Higher Level Care Ltd [2016] IRLR 678***, England and Wales Court of Appeal). On the other hand, the application was being made on the first day of a three-day hearing. There would in those circumstances be serious prejudice to the Respondent in having to potentially respond afresh, speak to another witness, and call that witness to deal with each rest break over a period of more than three years. Allowing the amendment would almost certainly have meant the hearing being vacated, causing further delay to the proceedings. That outcome would not have been in the interests of justice. All those factors pointed away from the application being allowed.

13. As a consequence, the Claimant's **reg.12**/**30** claim would proceed but only on the originally pleaded basis. The complaint in relation to **reg.12** was therefore limited to the date of the Claimant's dismissal on 6 July 2020 and the days that immediately preceded that date.

Findings of fact

14. The Claimant commenced employed by the Respondent on 1 April 2017 as a Security Officer. The Respondent is a company that provides security and facilities management services to third-party clients, under the trading style "SecuriGroup". The Respondent employs 2,000 people across Great Britain. A statement of employment particulars was provided to the Claimant in advance of his commencement, and he signed a copy on 24 March 2017 (page 45).

15. Throughout his employment the Claimant was assigned by the Respondent to Imperial Place, one if its clients' sites, located in Borehamwood, Hertfordshire, England. Imperial Place is a site to which people require access on a 24-hour basis, seven days a week. At the entrance to the site is a gatehouse, which was where Security Officers would typically be based. By the gatehouse is a set of main gates, which can be opened to allow vehicles and/or pedestrians access to the site. Behind the main gates is a barrier which can be lowered across the road section to prevent vehicular access even when the main gates are open. The gatehouse building has a customer-facing area and a separate area with a table, where meals and drinks could be prepared.

16. In general terms the Claimant's role as a Security Officer was to monitor people coming in and out of the Imperial Place site, to look after the safety of people on the site, and to prevent crime occurring on site.

17. In relation to each of the sites at which the Respondent provides services a document is prepared called "Assignment Instructions". These Assignment Instructions contain a large quantity of relevant information, including a site overview, a list of important contacts, contractual information (including the requirements in relation to training, uniform and operational hours), emergency procedures, alarms and CCTV systems, patrolling requirements, incident management procedures and a considerable bank of instructions and duties applicable to the relevant Security Officers.

18. The Assignment Instructions for Imperial Place appeared at page 45 of the productions file. A copy is always stored in the gatehouse at Imperial Place, and the Claimant knew this. Amongst the instructions given to Security Officers was clause 18.4, which was headed *"Leaving Site"*. The single-line instruction set out under that heading was, *"Officers are always to remain on the client's premises and must not leave without the client/supervisor's consent."* This clause envisages situations where a Security Officer may leave the site on an authorised basis, and Mr Paciolla explained that this would typically happen when a Security Officer would be on patrol and in order to observe the perimeter of a site they would temporarily leave it. This would be authorised because the client would expect the Respondent (through its Security Officer) to carry out such observations. This evidence was not challenged and I accepted it as factual.

19. Whilst Assignment Instructions are reviewed from time to time, upon each periodic review the Respondent requires the relevant employees to sign a declaration that they have *"read the Assignment Instructions and understand the duties and standards required and expected"*. The Claimant signed such a declaration on 17 August 2018 (page 101) and again upon a subsequent review, on 2 August 2019 (page 105).

20. The Claimant tended to work night shifts, although he did on occasion work day shifts. The night shift started at 7pm and ended at 7am the following morning. As per clause 14 of his statement of employment particulars, the Claimant was entitled to a *"20-minute unpaid break by arrangement and at times convenient to the company"*. The Imperial Place Assignment Instructions also contained a provision, at clause 18.3, that *"All breaks and timings are at the Premises Managers discretion. Should you have any queries, contact your SecuriGroup Line Manager"*.

21. Whilst Mr Baker acknowledged that he did not manage the Imperial Place site and that the only knowledge he had of it was through his involvement in the Claimant's disciplinary process, he was able to comment on the general position regarding rest breaks for night shift Security Officers employed by the

Respondent. His evidence was that in reality, the Respondent permits night shift Security Officers to take 40 minutes' break during their shift, or even an hour's break if the circumstances permitted. This, he said, could be taken in two 30-minute stretches or as a continuous hour, depending on the demands on site at any one time, because during a night shift there is normally at least one hour of what he described as "downtime". On this issue Mr Baker's evidence was cogently explained by reference to what typically happens during a night shift, and he was entirely consistent when challenged by Mr Komeng in cross-examination. For these reasons I accepted his evidence and found that over and above the break entitlement set out in the Claimant's statement of employment particulars, the Respondent in practice permitted night shift Security Officers more generous provision in respect of breaks and that this applied to the Claimant as well.

22. In relation to how the breaks were to be taken, both Mr Baker's and Mr Paciolla's evidence was that night shift Security Officers are generally expected to self-manage the time they take a break during the course of the shift. In Mr Baker's words, *"It is common across the company that an officer would determine his own break depending on amount of traffic passing by"*, and *"a one-man site officer has discretion when he takes his break"*. In Mr Paciolla's words, an in referring to the stipulation regarding breaks in the Assignment Instructions, he explained that *"We don't give times, we give estimations made on the best practice of the site… We expect an officer to take breaks where there is a suitable gap"*. I found the consistency of this evidence between these two witnesses to be compelling.

23. By contrast, the Claimant's evidence on this point was unsatisfactory. In his evidence the Claimant described situations where he had settled into a break in order to eat a meal, only for it to be interrupted by someone calling his attention. Whilst the interruption of breaks is not an irrelevant matter, the Claimant's own evidence suggested that he had at least some breaks and was able to self-manage them. Furthermore, the Claimant had never raised a complaint about rest breaks at any point during his employment. If he had

been denied even a single break during that more than three-year period it would be extremely unlikely that he would have simply accepted this without complaint and carried on working. The impression the Claimant gave to me is that he is a forthright man who would not passively accept such a state of affairs.

24. Finally, the picture painted by the Claimant in evidence is that he was confined to the Imperial Place gatehouse for the duration of his 12-hour shift. This too was unlikely to be true, as the Claimant on his own admission was a smoker (the subject of which I shall return). By the law applicable to his workplace in England he would not be permitted to smoke within the confines of the gatehouse, and in any event smoking cannot be described as an activity related to work. He would have had to leave the gatehouse to smoke, at the very least. The reality was that the gatehouse had a separate area where meals and drinks could be prepared, to which the Claimant could go even if he did not wish to leave the gatehouse. That area could not properly be classed as the Claimant's workstation even if it was located within the gatehouse building.

25. For these reasons I preferred the evidence of Mr Baker and Mr Paciolla over that of the Claimant on this issue. As a consequence, I found that the Respondent does indeed have an expectation that a night shift Security Officer would self-manage his breaks and that he was able to take them depending on when the appropriate opportunity arose. I further found that the Claimant was able to, and did, self-manage such breaks when working night shifts. I found that the Claimant was able to do that during his shift on 3 June 2020 and during each of the shifts he worked that week, as at any other time during his employment. The Claimant in fact provided no evidence whatsoever of any denial of his right to a rest break, nor of any interruption to a rest break.

26. In 1995 the Claimant was living in Germany, together with his wife. On one occasion in that year the Claimant was involved in a dispute with a male friend of the Claimant's wife, although I make no finding as to who was the instigator

or indeed whether this was an actual physical fight. At around 6pm on 3 June 2020 the Claimant saw his wife engaged in what appeared to be an argument with the same male friend, outside the front door of their house. The Claimant was due to start his night shift at 7pm that evening. In evidence the Claimant told me that he found this situation stressful, and that as a consequence he was *"not thinking straight"* and his *"head was finished"*. Understandably, he was not challenged about these events or how he felt about them, and I accepted the Claimant's evidence in relation to them.

27. One result of the argument at the front door was that the Claimant left for work in a state of some distress. He forgot his cigarettes. Within the first hour of his shift the telephoned a friend of his – Kevin – to ask him to collect his cigarettes and bring them to the Imperial Place site for him. Kevin told the Claimant that he was himself late for work, so he would not bring the cigarettes to the Imperial Place gatehouse (where the Claimant was working) but instead take them to another location where they could meet in order for Kevin to hand him the cigarettes.

28. On this occasion – and as usual, for a night shift – the Claimant was working the 3 June 2020 night shift as the sole Security Officer on the Imperial Place site. At around 8pm the Claimant left the Imperial Place site to meet Kevin and acquire his cigarettes. Initially it had been unclear precisely where the two were to meet for this purpose, but it was ultimately agreed that the location was opposite a bus stop on Shenley Road, away from the Imperial Place site and slightly beyond the Elstree Studios building which is located immediately to the rear of the Imperial Place site. There was some dispute as to how far from the Imperial Place perimeter this location was because the two site maps that appeared in the productions file were blurred, but it was clear that the distance was relatively short and could be reached from on foot from the gatehouse within five to ten minutes. The Imperial Place site has a secondary exit to the rear, and from there the bus stop could be reached in a shorter time.

29. Unfortunately for the Claimant, at 8.11pm he was seen walking away from the Imperial Place site by Ms Haley Donovan, the Facilities Manager of Imperial Place who was an employee of the Respondent's client. The Claimant had walked beyond the neighbouring Elstree Studios site by this time. Ms Donovan was driving home when she spotted the Claimant, and he saw her as she passed by. At this point the Claimant panicked and started walking back to the Imperial Place site. Ms Donovan decided to drive back to the Imperial Place gatehouse and upon reaching it, discovered that the main gates to the site had been left open. She also discovered that two cars were awaiting entry to the site, and that individuals were looking around the gatehouse in order to gain access. The gatehouse had been left locked and in darkness. There is a vehicle barrier and that had been lowered by the Claimant, preventing the entry of vehicles, but the main gates being left open by the Claimant meant that pedestrians could access the site unhindered and unchecked.

30. Upon his arrival at the gatehouse the Claimant and Ms Donovan engaged in a brief discussion. He told her that he had left the site to meet his friend and collect his cigarettes. She asked him why his friend hadn't simply dropped them off at the site for him, as he knew he could not leave the site. The Claimant did not answer. Ms Donovan told him the matter would be dealt with the following morning.

31. At around 7.15am on 4 June 2020 the Claimant and Ms Donovan met once again, the Claimant having waited for her after his shift finished at 7am. During this exchange the Claimant lowered himself to the floor and begged Ms Donovan not to *"sack"* him. Ms Donovan replied that the matter would be dealt with by the Respondent, and following this discussion she reported the matter to the Claimant's line manager Mr James ("Jim") Lindsay. Via email later that day Mr Lindsay requested that Ms Donovan provide a written account of what she had witnessed (page 106), and shortly afterwards Ms Donovan duly obliged. Her email read as follows:

Hi Jim,

At 8:11pm last night Wednesday 3rd June 2020. I was leaving Tesco on my drive home as I approach the round about side Imperial Place I look just past the studios entrance next door and I see Emmanuel walking away from site down towards the main high street.

He saw me panicked and turned around and started to walk back towards site. By this pint I have returned to sit to find the main gates open , 2 cars awaiting entre and people looking in the Security Gatehouse for someone to let them in. The Gatehouse was locked and in darkness. Emmanuel then comes around the corner and says to me he was just going to meet someone to get Fags. I said why didn't they drop them off to you? You know you cant leave site. He had no answer for me I said this will be dealt with in the morning.

I arrived on site around 7:15am Emmanuel is waiting for me he starts begging me to not sack him. I told him to get up off the floor and said it will be dealt with by Securigroup I then left the gatehouse and called James.

Kind Regards

32. In cross-examination the Claimant accepted that the version of events recorded by Ms Donovan in her email was almost entirely accurate. It is on the basis of that concession that I have made the findings set out in the preceding three paragraphs. The only fact the Claimant took issue with was whether there were in fact two cars waiting to be admitted to the Imperial Place site, as he said he did not see them himself. In my judgment, there was no reason to doubt the accuracy of that part of Ms Donovan's account. The Claimant could not say either way because he was not at the gatehouse when the cars were said to be present. On the balance of probabilities I found that Ms Donovan's written account – which was in all other respects entirely accurate and given less than a day later – was also accurate in relation to her account of the waiting vehicles.

33. The Claimant was suspended from work on full pay with effect from 4 June 2020.

34. Mr Lindsay was appointed to investigate Ms Donovan's complaint about the Claimant. On 5 and 8 June 2020 he emailed the Claimant (page 109), explaining that *"I have received a formal complaint from the Client at Imperial place. I have been advised that you were witnessed to have left site on the 3rd of June. Furthermore, on further investigation the site was seen to be left unsecure during the period you were off site.*" The Claimant was invited to provide a written statement within 48 hours, and he did so on 9 June 2020 (page 108). The account he provided is set out as follows:

Dear Jim,

Further to your email dated 8th June 2020.

I was on duty on Wednesday 3rd of June at 7:00pm and at 7:51pm I conducted a check call, after the check call I realised I had left my cigarette at home so I phone my flatmate to bring it to me at work and he said he was running late for work so I quickly rushed out and collected it by the road side as I was in the same location.

Mr Jim, I know the rules that you can't leave the site but that side is in the same location and if you check in the cameras, you can see the time distance and the location I was waiting for that guy.

I went to [Ms Donovan] *to explained to her.*

Mr. Jim I 've worked with [Ms Donovan] *for almost four years and I 've not called sick or taken one day off so I went to and explained but she didn't understand.*

Can you please help me to explain to her.

Thank you very much.

Kind regards

Emmanuel Ofori

35. An investigatory meeting was convened by Mr Lindsay on 15 June 2020 and was attended by the Claimant. There were notes of that meeting (page 110) and it was not alleged that they were inaccurate. For this reason I accepted that the notes, whilst not verbatim, faithfully recorded the exchange between Mr Lindsay and the Claimant. During the meeting the Claimant was asked a number of questions by Mr Lindsay. It is not necessary to rehearse the entire record here, save to record the following material findings:

    (1) When asked why he had left the Imperial Place site, the Claimant explained that he done so in order to meet his friend and collect his cigarettes.

    (2) The Claimant admitted that he *"would not normally leave the control room unless I patrol"*.

    (3) The Claimant admitted that he had left the main gates open and although the vehicle barrier was in the down position, pedestrians could get into the site.

    (4) As to mitigation, the Claimant explained that *"That day I was driving, and I saw my wife with another man; and friend. I was distracted and distresses and rushed home and god dressed for work and left and forgot my cigarettes… I was stranded and needed a cigarette."* When asked by Mr Lindsay as to whether he considered this an emergency situation, the Claimant accepted that it was not and that *"I know I should not leave site; but I was distressed and stranded. I needed a cigarette to calm."*

    (5) When asked by Mr Lindsay whether there was anything else he wished to add, the Claimant said *"I was working there for 4 years and don nothing before. I know I should not have left site."*

36. On 24 June 2020 Mr Baker wrote to the Claimant inviting him to a disciplinary meeting, to take place on 26 June 2020 (page 113). He enclosed the Claimant's email to Mr Lindsay, Ms Donovan's original email of complaint, and

the investigation meeting notes referred to above. He also reminded the Claimant of his right to be accompanied at the meeting by a Trade Union representative or a colleague. Within the letter the following allegations against the Claimant were set out:

(1) *"1. It is alleged that on 3rd June 2020 you left your place of work, thus leaving our clients premises unattended.*

(2) *2. Further to the above, you left our client's premises unsecure by leaving the main gain open and vulnerable to intruders.*

(3) *3. Dereliction of duties in that two visitors were unable to access our client's premises due to your absence from site.*

(4) *4. Each of the above actions individually constitute gross misconduct*

(5) *5. The above actions have brought the company in to disrepute with the client."*

37. It appeared to me that allegation 4 was not a separate allegation of itself but a characterisation of allegations 1, 2 and 3. Furthermore, it appeared to me that allegation 5 described was not an allegation as such but a description of a consequence that had flowed from allegations 1, 2 and 3. In reality, the Respondent was pursuing three disciplinary allegations against the Claimant, all of which concerned the events of the evening of 3 June 2020. There was nothing ambiguous about the language used in the letter.

38. The disciplinary meeting did not take place on the originally intended date but a short time later, on 2 July 2020. The meeting was conducted via Microsoft Teams and chaired by Mr Baker. The Claimant was in attendance but did not exercise his right to be accompanied. The meeting was minuted and the non-verbatim notes (page 115) were agreed on the same day by the Claimant. I therefore accepted that the notes were an accurate reflection of the discussion during the meeting. Since 2002 Mr Baker has conducted more than 50 disciplinary meetings and could therefore be fairly described as very experienced in this field.

39. The meeting started with Mr Baker reading out the list of allegations against the Claimant, as set out above. Again, it is not necessary to rehearse the entire exchange but the following points of importance arose:

    (1) The Claimant once again admitted that he had left the Imperial Place site, and that he had done so with the intention of meeting his friend to collect his cigarettes.

    (2) The Claimant confirmed – as he had to Mr Lindsay – that he knew he was not permitted to leave the site without authorisation.

    (3) When asked by Mr Baker why he had left the site despite knowing he was not allowed to, the Claimant replied that *"I needed a cigarette and where I was to meet him I sometimes patrol anyway"*.

    (4) As to mitigation, the Claimant said that *"I am disappointed and need my job back, I started with the company about 4 years ago on the site and have never been late or absent and never had any absences. I couldn't complain as it was the client who said I had been off site. I wasn't in a shop or anything. I've made no mistakes in 4 years and I'm always on time."*

40. Following the meeting Mr Baker deliberated and reached his conclusions. On 6 July 2020 he wrote to the Claimant setting out his findings and his decision (page 119). In relation to allegations 1, 2 and 3, Mr Baker found these matters proven. In cross-examination the Claimant accepted that Mr Baker genuinely believed him to be guilty in relation to these matters.

41. The first and second allegations had been admitted to by the Claimant. The third had not been, but Mr Baker said in evidence that he had made that finding on the basis of Ms Donovan's original email of complaint. In cross-examination it was suggested to Mr Baker that he ought to have checked to see if there was CCTV footage that would have shown whether Ms Donovan was correct in asserting that there were indeed two waiting vehicles. Mr Baker did not check or view any CCTV, but the potential availability of CCTV was not mentioned by the Claimant at any stage during the disciplinary meeting

(or, for that matter, the investigatory meeting with Mr Lindsay that had preceded it). The only evidence Mr Baker had on this issue was contained within Ms Donovan's email. I did not accept the Claimant's assertion in evidence that he asked Mr Baker to look at CCTV because it did not appear in the minutes which the Claimant agreed were accurate.

42. Mr Baker also found that the Claimant had brought the Respondent into disrepute because it had been the client (in the form of Ms Donovan) who had had to complain, but in evidence he confirmed that this was not a reason for dismissal. He also said that he did not consider the disrepute element to amount to gross misconduct. This appeared to be at least partially at odds with the wording of his outcome letter, which read *"My view is that one, some, or all of the allegations I have upheld would constitute gross misconduct."* However, Mr Baker explained – and I accepted – that in relation to the reputational issue this was a factual finding only. Mr Baker had found as a fact that the relationship between the Respondent and its client had been damaged by the Claimant's actions, but he was also of the view that client relationships are sometimes capable of being repaired by the Respondent.

43. Mr Baker took into account the Claimant's length of service, his previously clean disciplinary record, and accepted the Claimant's assertion that he had never been late. He also found as a fact that the Claimant had not acted with *"malintent"* when leaving the site. Mr Komeng asked Mr Baker what he meant by this, and his evidence was that he did not believe the Claimant left the site in order to cause a problem or cause damage to the Respondent. The problem as Mr Baker understood it was that leaving the site without authorisation was something incredibly serious even if the purpose of doing so was not itself malicious. I accepted this explanation as a logical distinction.

44. Set against these positive factors were the potentially serious consequences of the Claimant having left the site. Mr Baker explained that in a lone-working situation like the one the Claimant was in on the evening of 3 June 2020, not having a Security Officer on site would not only have led to the problems that Ms Donovan had reported but would also have meant that there would be

nobody present to respond to situations such as organising the evacuation of the buildings in case of fire or fire alarm, or criminal activity requiring the Police to be called. If the Security Officer was off site there was no way of telling whether he could even hear an alarm sounding. The primary responsibility of a Security Officer, Mr Baker said, is to protect life. That could not be done if the Security Officer was not on site.

45. The impression given by Mr Baker was that he approached the Claimant's case with an open mind and gave careful thought to his conclusions, making clear findings of fact before weighing up the factors in the Claimant's favour with those that went against him. Overall, Mr Baker was an impressive witness whose evidence was compelling.

46. Mr Baker's decision was that the Claimant was guilty of gross misconduct and he decided to dismiss him without notice for this reason. The decision to dismiss the Claimant was communicated to him in the outcome letter of 6 July 2020 (page 119). The Claimant was at the same time informed that he had a right of appeal and could exercise this by writing to the Respondent within five working days.

47. The Claimant duly appealed, by an undated letter which was drafted by Abinelle Solicitors and appeared on that firm's letterhead paper (page 121). The letter asserted that the Claimant had been unfairly dismissed, and the Claimant's grounds of appeal were as follows:

    (1) *"… although he admits that he left his duty post on 03/06/2020 he was unaware that he was unable to leave his post temporarily."*

    (2) *"… he was within close proximity of the work site and felt that this would not be deemed as gross misconduct."*

    (3) *"… he was not provided with a handbook which would set out the rules and acceptable conduct within the work environment."*

    (4) *"…Additionally, Mr Emmanuel Ofori has informed us that he was not given adequate training."*

48. In examination-in-chief the Claimant expressly disavowed his first ground of appeal, stating that he did in fact know that he could not leave the site temporarily. His explanation for how the first ground appeared in the letter when it was known by him to be untrue was that he had not read the letter before it was sent by Abinelle Solicitors to the Respondent. I found this explanation deeply unsatisfactory, particularly where the letter itself states that this position is what the Claimant instructed Abinelle Solicitors to say. In cross-examination Ms Patullo asked further questions about this issue and whether Abinelle Solicitors had misunderstood what the Claimant had told them. He did not say they had misunderstood. The Claimant simply said that he had narrated his story to the solicitor and that she had *"used her mind"* to write the letter, although he could not remember what he told her. In my judgment, the Claimant did know that this first ground of appeal was untrue when Abinelle Solicitors put it forward on his behalf as a ground of appeal.

49. Mr Paciolla was appointed to hear the Claimant's appeal, and an appeal meeting was arranged. It took place on 17 July 2020, again via Microsoft Teams. The Claimant attended together with a companion, Mr Eric Ohente-Kuntoh. Non-verbatim notes were taken by Mr Paciolla (page 124) during the meeting and they were finalised the following day. It was not suggested by the Claimant that these notes were inaccurate and I therefore accepted them as an accurate reflection of the meeting. Again, it is not necessary to rehearse the entire exchange but the following points of importance arose:

    (1) The Claimant retold his account of how he came to be off site on the evening of 3 June 2020 (the collection of his cigarettes from his friend). He did mention to Mr Paciolla that he was having problems with his wife and told him that his wife had been unfaithful, which was why he needed a cigarette that evening.

    (2) Despite what he had said in his first ground of appeal, the Claimant accepted that he was not permitted to leave the site without approval, although he sometimes did leave the site as part of his patrols. Mr Paciolla responded by saying that patrols were an authorised activity

and that leaving the site on that basis was *"not considered to be an issue"*.

(3) In relation to his second ground of appeal, the Claimant suggested that Mr Paciolla examine CCTV footage in order to establish exactly how far from the site he was. He did not say that any CCTV footage should be examined to identify whether Ms Donovan was correct in relation to the two waiting vehicles.

(4) The Claimant made no mention at all of the provision of a handbook or indeed a lack of adequate training (the third and fourth grounds of appeal).

(5) The Claimant mentioned his length of service and prior clean disciplinary record.

50. Following the meeting Mr Paciolla deliberated and reached his conclusions. The result was that he did not uphold the Claimant's appeal in any respect, and this was communicated to the Claimant in a letter dated 24 July 2020 (page 126). The Claimant accepted that Mr Paciolla genuinely believed in his guilt. Mr Paciolla's conclusions can be summarised as follows:

(1) In relation to the first ground of appeal Mr Paciolla noted the concession the Claimant had made, namely that he knew he was not permitted to leave the site without authorisation and that when he did so on 3 June 2020, this was not authorised.

(2) In relation to the third ground of appeal, Mr Paciolla disagreed that the Claimant had had inadequate training on the basis that he had never complained about that during his employment and there had been no performance issues which might have indicated a need for particular training.

(3) In relation to the fourth ground of appeal, Mr Paciolla found that *"A copy of the company handbook was within the site assignment*

instruction up until August 2018, when the handbook became electronic. For a period of 3 months after this change a link to the handbook was sent with every pay slip you received from the business", and further found that the Claimant did know he could not leave the site because of the admissions he had made to Mr Lindsay during the investigation and *"on more than one occasion"*.

51. The second ground of appeal appeared to be a challenge to the deemed seriousness of the offence. Mr Paciolla's appeal outcome letter did not expressly address this point, but the fact his conclusion was to affirm Mr Baker's decision at least inferred to me that he agreed with Mr Baker's assessment of the gravity of the Claimant's misconduct. In evidence Mr Paciolla was particularly emphatic on this issue, stating that *"There were three major failures on behalf of the Claimant. One was leaving the site unattended. The second was that he was unable to conduct his duties as he was not on site. Three, and by far the most risk, as he was not on site he would not be able to hear fire alarms, rendering him totally unable to protect and react for the client if there was a major incident. When you put the three factors together I felt there was no other way but to uphold the decision."*

52. On the matter of the Claimant's apparent matrimonial difficulties, Mr Paciolla did not refer to this expressly in his appeal outcome letter. In answer to a judicial question about how much weight he attached to the Claimant's personal difficulties, Mr Paciolla confirmed that he took this into account but that the seriousness of having left the Imperial Place site unsecured and unattended outweighed that factor.

53. On the question of reputational damage said to have been caused by the Claimant's actions, Mr Paciolla's evidence was that *"the client felt very strongly that the company had failed in its basic role. This led to us having to regain trust with this client and a lot of extra management and focus had to be put on the premises to regain focus by the customer"*. The Respondent carried out a staffing review and re-assessed the Imperial Place site, and ensured that extra visits were made by the contracts manager. Mr Paciolla

considered that it took between three and six months for trust to be rebuilt between the Respondent and the client. This evidence was not challenged by Mr Komeng in cross-examination, and I accepted it. Mr Paciolla's finding was that there had been reputational damage caused by the Claimant's actions, in line with allegation 5, and he upheld the dismissal on this basis despite the fact that Mr Baker had not dismissed him for this reason.

54. I found Mr Paciolla to be a credible witness who demonstrated a detailed knowledge of the role of Security Officer and the expectations placed upon such employees by the Respondent. He appeared to the Tribunal to be a particularly well-informed person who had himself been a Security Officer before rising through the ranks and becoming the National Operations Manager. His evidence overall was compelling and, specifically in respect of his explanations for his conclusions in the appeal, I accepted it.

55. On 10 October 2020 the Claimant presented his ET1 claim form to the Employment Tribunal.

The law

Unfair dismissal

56. A claim of unfair dismissal is a statutory claim. **Section 94 Employment Rights Act 1996** confers the right upon an employee not to be unfairly dismissed by their employer, subject to the qualification (under **s.108(1)**) that they have two years' continuous service. There are categories of unfair dismissal claim for which two years' continuous service is not required, but the Claimant's case is not one of them. One of the potentially fair reasons for dismissal is a reason relating to the conduct of the employee (**s.98(2)(b)**). The burden of proof is on the employer to show a potentially fair reason for dismissal (**s.98(1)**).

57. If the employer has satisfied the Tribunal that the sole or principal reason for dismissal is a potentially fair one, the question for the Tribunal is whether the dismissal was actually fair. The test to be applied is that set out in **s.98(4) Employment Rights Act 1996**. The burden of proof is neutral but the Tribunal

must determine the fairness of the dismissal, having regard to the employer's reason, depending *"on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee"* and *"in accordance with equity and the substantial merits of the case"*.

58. In conduct cases the there is a considerable bank of settled authority governing Employment Tribunals in how they should assess the fairness of a dismissal through the lens of **s.98(4)**. The leading case remains ***British Home Stores Ltd v Burchell [1978] IRLR 3*** (EAT), which sets out three principal points for the Tribunal to consider, namely:

(1) Did the employer genuinely believe in the employee's guilt? That is a factual matter which looks at the mind of the dismissing officer.

(2) If so, did the employer have reasonable grounds upon which to sustain that belief? That involves looking at the evidence that was available to the dismissing officer.

(3) If so, did the employer nevertheless carry out as much investigation as was reasonably required, in all the circumstances of the case? The assessment of what amounted to a reasonable investigation will differ from case to case but it would generally involve looking at the steps the employer actually took in addition to those it could reasonably have taken but did not. Generally, what is reasonable will to a significant degree depend on whether the conduct is admitted or not (***ILEA v Gravett [1988] IRLR 497***, EAT), and the question is to be determined from the outset of the employer's procedure through to its final conclusion (***Taylor v OCS Group Ltd [2006] IRLR 613***, England and Wales Court of Appeal).

59. At all stages in a misconduct case the actions of the employer are to be objectively assessed according to the established standard of the reasonable

employer acting reasonably or, as it is sometimes put, whether the employer acted within a *"band of reasonable responses"* (***Iceland Frozen Foods Ltd v Jones [1982] IRLR 439****,* EAT). The Tribunal is therefore not concerned with whether the employee actually did do the things the employer found that it did; in line with the objective tests set out above, the task for the Tribunal is to determine whether the employer, acting reasonably, could have concluded that he had done (***Devis (W) & Sons Ltd v Atkins [1977] AC 931****,* House of Lords). Equally, the Tribunal cannot substitute its own view as to what sanction it would have imposed had it been in the dismissing officer's position (***Trust Houses Forte Leisure Ltd v Aquilar [1976] IRLR 251***, EAT); it is the sanction imposed by this employer which falls to be determined according to the band of reasonable responses test.

60. At all times I am required to have regard to the **Acas Code of Practice on Disciplinary and Grievance Procedures**, which is informative about the standards of procedural fairness to be expected of employers when dealing with disciplinary matters in the workplace.

61. If I find that the Claimant's dismissal is unfair I may nevertheless reduce any basic award under **s.122(2) Employment Rights Act 1996** if I find that the Claimant engaged in culpable or blameworthy conduct prior to his dismissal. Equally I may also reduce any compensatory award under **s.123(6) Employment Rights Act 1996** if I find that the Claimant's culpable or blameworthy conduct caused or contributed to his dismissal. Any reduction on this basis should be in a proportion the Tribunal considers just and equitable.

62. Also, if I find that the Claimant's dismissal is unfair it is necessary for me to consider whether there was a chance that he would have been dismissed in any event (the principle expressed in ***Polkey v A E Dayton Services Ltd [1987] 3 All ER 974***, House of Lords). The task for the Tribunal has been explained by the EAT (in ***Hill v Governing Body of Great Tey Primary School [2013] IRLR 274***) in the following terms:

"First, the assessment of it is predictive: could the employer fairly have dismissed and, if so, what were the chances that the employer would have done so? The chances may be at the extreme (certainty that it would have been dismissed, or certainty it would not) though more usually will fall somewhere on a spectrum between the two extremes. This is to recognise the uncertainties. A Tribunal is not called upon to decide the question on balance. It is not answering the question what it would have done if it were the employer: it is assessing the chances of what another person (the actual employer would have done) … The Tribunal has to consider not a hypothetical fair employer, but has to assess the actions of the employer who is before the Tribunal, on the assumption that the employer would this time have acted fairly though it did not do so beforehand."

63. ***Polkey*** deductions are not limited merely to procedural unfairness. They may be made in cases of substantive unfairness as well (***Gove v Propertycare Limited [2006] ICR 1073***, England and Wales Court of Appeal).

Wrongful dismissal

64. A claim of wrongful dismissal is a contractual claim. If an employee is summarily dismissed he will normally be entitled to damages representing payment for his period of notice if the circumstances did not justify summary dismissal. Whilst it is a long-established principle that there will be no wrongful dismissal if a lieu payment is paid even in circumstances where summary dismissal was justified (***Graham v Thomson (1822) 1 S 309***), whether such a dismissal was justified depends on whether in the circumstances the employee's conduct can be regarded as a repudiation of their contract (***Macari v Celtic Football and Athletic Co Ltd [1999] IRLR 787***, Court of Session).

65. Whilst each case is fact-sensitive, the Court of Session has provided guidance to Employment Tribunals on what repudiatory conduct means (***McCormack v Hamilton Academical Football Club [2012] IRLR 108***). The essential principle (set out at paragraph 8) is that,

"… summary dismissal has to be regarded as an exceptional remedy calling for substantial justification. It will not readily be sustained for misconduct which only peripherally affects the performance of core duties under the relevant employment contract. To bring summary dismissal into play, repudiatory conduct must be so serious as to strike at the foundation of the employer/employee relationship, and for practical purposes to make its continuance impossible."

66. The Employment Tribunal has jurisdiction to determine wrongful dismissal claims by virtue of ***art.3 Employment Tribunals Extension of Jurisdiction (Scotland) Order 1994***, as a contractual claim arising on the termination of employment.

Working Time Regulations 1998, reg.12

67. **Regulation 12** of the **WTR 1998** confers upon a worker a right to a rest break, as follows:

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.

68. Complaints regarding an infringement of the right to a rest break may be pursued in an Employment Tribunal by virtue of **reg.30 WTR 1998**.

Submissions

69. On behalf of the Claimant Mr Komeng made the following submissions:

(1) The Claimant's dismissal was unfair because his conduct was not serious enough to warrant dismissal; as Mr Baker stated in his dismissal letter, he was satisfied that the Claimant had shown no *"malintent"*. The Respondent could therefore not have deemed the Claimant leaving the site as gross misconduct. The dismissal therefore fell outside the band of reasonable responses, particularly when set against the context of the Claimant having experienced distress shortly before starting work when he saw his wife with another man. The Claimant's dismissal was also unfair because Mr Paciolla upheld it on a ground which Mr Baker had not, in relation to reputational damage. There should be no more than a 30% deduction made to any awards of compensation on conduct grounds, and no more than a 20% deduction under ***Polkey***.

(2) The Claimant's conduct was not serious enough to amount to conduct repudiating the contract and, accordingly, the Respondent was not entitled to dismiss him without notice. He was, Mr Komeng submitted, wrongfully dismissed.

(3) The Claimant was denied rest breaks because as a lone worker working a night shift, taking a break would have resulted in the Imperial Place site being unmanned. The Claimant would be interrupted when he tried to take a rest break. Mr Komeng also submitted that the Claimant had requested a rest break on 17 May 2020.

70. On behalf of the Respondent Ms Patullo made the following submissions:

(1) The Claimant's dismissal was for a potentially fair reason, namely conduct. That had been accepted by the Claimant in evidence, as had the

genuine beliefs held by Mr Baker and Mr Paciolla in the Claimant's guilt. The admissions made by the Claimant and the evidence gathered throughout the internal procedure provided reasonable grounds upon which to sustain their beliefs. The Respondent carried out as much investigation as was reasonable in the circumstances. The reasonable employer acting reasonably could have dismissed the Claimant given the seriousness of his actions and the implications of his not being on site. If the Claimant was unfairly dismissed, his compensation should be reduced to nil on both conduct and ***Polkey*** grounds.

(2) The Claimant had engaged in repudiatory conduct in leaving the Imperial Place site without authorisation on 3 June 2020, and accordingly, the Respondent was entitled to dismiss him without notice. His actions were as serious as Mr Paciolla described.

(3) The Claimant was entitled to a rest break on 3 June 2020 and in the other shifts he did in that week, but he was not denied his right because he was expected to, and could, self-manage his breaks during quieter times. He was not restricted to his workstation when taking a break. The Claimant had in fact provided no evidence of a particular infringement of his right in any event.

Analysis and conclusions

Unfair dismissal

71. There is no dispute that the reason for the Claimant's dismissal related to his conduct in leaving the Imperial Place site on the evening of 3 June 2020. That concession was fairly made by Mr Komeng on the Claimant's behalf. It follows that the Respondent has proven a potentially fair reason for dismissal and satisfied the requirement of **s.98(1)**.

72. Turning to the **s.98(4)** test in relation to the fairness of the dismissal, my conclusions are as follows:

(1) The Claimant fairly accepted – and I have found – that both Mr Baker and Mr Paciolla genuinely believed in his guilt in relation to

the incident on 3 June 2020. That double concession satisfies the first condition of ***Burchell***.

(2) The question then is whether there were reasonable grounds to sustain that belief in guilt. In my judgment, there was an abundance of evidence upon which Mr Baker and Mr Paciolla could have concluded the Claimant was guilty of misconduct on 3 June 2020:

(a) The Claimant had admitted leaving the site and that he knew he should not have done. That admission was made at every stage in the process.

(b) The Claimant had also admitted that he had left the main gates open when he left the site to collect his cigarettes, leaving the site vulnerable to intruders. That admission was also made at every stage of the process.

(c) Whilst there was a dispute about whether there were two vehicles waiting to be let into Imperial Place when Ms Donovan arrived at the gatehouse, Mr Baker was entitled to prefer the positive evidence on that point in her email of complaint, particularly in circumstances where the Claimant agreed the remainder of her email was factually accurate in its entirety and where the Claimant was not present and could not gainsay Ms Donovan's account.

(d) There was evidence of reputational damage having been caused by the Claimant's actions on 3 June 2020. The client's Facilities Manager – Ms Donovan – had had cause to complain to the Respondent about the incident in question. Given that the principal purpose of the Respondent's contract – and by extension, the Claimant's role – was to protect the Imperial Place site and the people within it, it would be surprising if Ms Donovan catching the Claimant away from the site would not have been deemed to have potentially

caused difficulty in the relationship between the Respondent and its client.

Therefore, in my judgment the second condition of ***Burchell*** is satisfied.

(3) In relation to the quality of the investigation, I remind myself that in the context of admissions being made the level of investigation required of an employer may be lower (the essence of ***ILEA v Gravett***). In this case, the only criticism made by the Claimant concerns CCTV footage in relation to allegation 3. As I have found, Mr Baker did not check any CCTV footage that may have been available in order to see whether there were indeed two vehicles waiting at the gatehouse whilst the Claimant was away from the Imperial Place site. Such footage as may have been available might have revealed that there were or indeed whether there were not any vehicles waiting. However, at no stage was the possibility of acquiring CCTV footage in order to establish the position ever mentioned to Mr Lindsay, Mr Baker or Mr Paciolla by the Claimant. The only mention of CCTV was in a different context, and it was mentioned to Mr Paciolla alone. That specific context was that the Claimant wished to establish how far he was from the site, not whether there were any vehicles waiting. In my judgment, that fact that neither Mr Baker nor Mr Paciolla acquired and reviewed CCTV footage to see if there were two vehicles waiting at the gatehouse is not something that rendered the Claimant's dismissal unfair. The investigation produced enough evidence as was reasonable – in the form of Ms Donovan's email – for Mr Baker and Mr Paciolla to establish the fact that there had been two vehicles waiting to gain access to the site whilst the Claimant was away collecting his cigarettes. In my judgment therefore, the third condition of **Burchell** is satisfied.

(4) In relation to the band of reasonable responses, on the basis of their beliefs and the evidence they had before them in support of their

conclusions, a reasonable employer acting reasonably could have reached the conclusion that the Claimant was guilty of leaving the site without authorisation on 3 June 2020. Equally, in my judgment it was open to the Respondent (in the form of Mr Baker and Mr Paciolla) to conclude that what the Claimant had done was of such seriousness that dismissal was warranted, even taking into account the Claimant's personal situation regarding his wife. It may have been for a relatively short time and a relatively short distance away from the Imperial Place site, but it was clear that the Claimant's absence could have had very serious consequences if something had occurred in his absence. A great deal of trust was placed in the Claimant as a lone-working Security Officer, and he had to be on site in order to be able to react to events (including those requiring emergency services assistance) and protect people and property. Not being present on site defeated the entire purpose of his role. A reasonable employer could have acted reasonably in dismissing an employee in these circumstances and this Respondent acted within the band of reasonable responses when it did so. It is not for me to substitute my view for what the Respondent actually did.

(5) Further, in my judgment the fact that Mr Paciolla decided to uphold the Claimant's dismissal in relation to allegation 5 did not cause unfairness to the Claimant or render his dismissal outside the band of reasonable responses. There was nothing in principle unfair about Mr Paciolla, as the appeal officer, deciding matters afresh for himself. His role was different to Mr Baker's: Mr Paciolla was deciding an appeal and not making the decision to dismiss. He was at liberty to assess, on the facts known to him, the significance of reputational damage in determining whether the Claimant should return to his employment or not. Furthermore, even though allegation 5 was not a reason why Mr Baker dismissed the Claimant, both he and Mr Paciolla spoke with one voice about the fact of the matter. Mr Baker had found that the Claimant had caused reputational damage to the Respondent *vis-à-vis* its client because

of his actions on 3 June 2020. That finding was not impugned on appeal, nor was it inconsistent. Mr Paciolla was entitled to reach that conclusion himself and for it to be a reason why he did not uphold the Claimant's appeal.

73. For these reasons, the Claimant's claim of unfair dismissal is not well-founded, and it is dismissed. It is therefore not necessary for me to go on to consider conduct and ***Polkey*** deductions, nor to determine remedy issues generally.

Wrongful dismissal

74. At paragraphs 26 to 30 I made factual findings regarding what happened on 3 June 2020. In my judgment, in leaving the site unattended that evening the Claimant engaged in repudiatory conduct of the type envisaged in ***Macari*** and ***McCormack***. Notwithstanding the distressed state the Claimant was in when he left for work that evening, the Claimant was in a position of trust whilst working alone as a Security Officer. It was essential for him to be on the Imperial Place site, not just so he could monitor people and vehicles coming in and out but to ensure the safety of the people on the site and the site itself. He stripped himself of the ability to react to incidents if that were necessary. As I have previously mentioned, his not being present on site defeated the entire purpose of his role. In abandoning the site and his responsibilities merely to collect cigarettes, he abandoned the contract of employment.

75. It follows that the Respondent was entitled to dismiss the Claimant without notice. The Claimant's wrongful dismissal claim is therefore dismissed and there is no need to assess an award of damages for breach of contract.

Working Time Regulations 1998, reg.12

76. At paragraphs 20, 26 and 28 I made factual findings about the length of the Claimant's night shifts in the week running up to, and including, 3 June 2020. Each shift in that time amounted to twelve hours, meaning that the Claimant qualified for a rest break under **reg.12(1)**.

77. However, in line with my findings at paragraph 25, the Claimant provided no evidence of any particular shift in which he was denied a break, whether in this particular time or otherwise. Equally, he provided no evidence of any break he attempted to take having been interrupted. Despite Mr Komeng's submissions, the **reg.12** claim lacked an evidential basis in these key aspects. It would not be permissible for the Tribunal to uphold such a claim on the basis of generalisation either.

78. My findings at paragraphs 20 to 25 demonstrate that contrary to the Claimant's submission, the Respondent in fact did permit the Claimant to take breaks of a greater duration than the twenty minutes provided for under **reg.12(3)**, and he was not restricted to his workstation. He could go to the area where food and drinks could be prepared, or he could go outside the gatehouse. He no doubt did so in order to smoke cigarettes. There was an expectation that these breaks would be self-managed and taken by the Claimant during a quieter part of his shift. That kind of arrangement reflected not only the trust placed in the Claimant as a Security Officer, but the practical reality of working the night shift in that role.

79. It follows that the Claimant's claim under **regs.12** and **30 WTR 1998** also fails and is dismissed. It follows that it is unnecessary for me to determine any issues relating to compensation.

Employment Judge: Paul Smith
Date of Judgment: 24 August 2021
Entered in register: 8 September 2021
and copied to parties