



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr A Ahimbisibwe

**Respondent:** Strada Care Limited

**Heard at:** London South Employment Tribunal (by video by CVP)

**On:** 26-27 February 2025

**Before:** Employment Judge Musgrave-Cohen

**Representation:** Mr Ahimbisibwe, in person  
Ms S Wood, Solicitor for the Respondent

## JUDGMENT

1. Pursuant to regulation 21(c)(i) of the Working Time Regulations 1998, the Claimant's work activities involved the need for continuity of service in relation to residential institutions and therefore the right to daily rest under regulation 10 Working Time Regulations did not apply to the Claimant. The Claimant's claim alleging breach of regulation 10 is not well founded and is dismissed.
2. The Claimant's claim that the Respondent failed to allow him to take an equivalent period of compensatory rest as he was entitled to under regulation 24 Working Time Regulations 1998 is not well founded and is dismissed.
3. The Claimant's claim that he was dismissed contrary to section 101A(1) Employment Rights Act 1996 because he proposed to refuse to comply with a requirement to work in contravention of the Working Time Regulations or because he proposed to refuse to forgo a right conferred on him by those regulations is not well founded and is dismissed.

# REASONS

## Introduction

1. The Claimant was a Support Worker who worked for the Respondent from 1 May 2023 until his dismissal on 27 December 2023. His work required him to work night shifts and afternoon shifts supporting living services for adults with learning disabilities at a residential house. The Claimant submitted a claim to the Tribunal in which he claimed that his entitlement to a rest period of not less than 11 consecutive hours in each 24 hour period was regularly infringed and that he was not being allowed to take an equivalent period of compensatory rest. He says he proposed to refuse to comply with what he says was a requirement to work in contravention of the Working Time Regulations or that he proposed to refuse to forego his rights under the Regulations and that in response he was dismissed. The Respondent said he was dismissed because he intentionally went to sleep while working a waking night shift.

## Claims and issues

2. The first morning of the hearing was spent clarifying the claims the Claimant pursued and confirming which sections of the Employment Rights Act 1996 ("ERA") and Working Time Regulations 1998 ("WTR") applied and which claims the Tribunal had jurisdiction to consider. The Claimant made allegations of breach of the WTR that fell outside of the jurisdiction of the Tribunal (for example concerning regulation 6 – night work). Likewise the Respondent gave evidence about regulations that were not pleaded in the Claimant's case (for example concerning regulation 11 – weekly rest period). The Tribunal have not made findings about such matters other than where necessary for the purpose of determining the claims the Claimant had pursued and which the Tribunal did have jurisdiction to consider under regulation 30 WTR and section 101A ERA.
3. Once agreed, the list of issues was typed and sent to the parties who both confirmed their agreement to it. The Claimant had indicated a wish to pursue a complaint for failure to grant weekly rest under regulation 11 WTR but this was not detailed in his claim form, schedule of loss or witness statement. He also intimated a breach of contract claim. He did not pursue a case for either and no application to amend the claim to add either was made.
4. It was agreed to consider liability first with a separate remedy hearing to be listed as required.
5. The final list of issues and expression of the parties positions was as follows:
  1. *Did the Respondent refuse to permit the Claimant to exercise any right he has under regulation 10(1) Working Time Regulations 1998?*
    - a. *The Respondent says that regulation 10(1) does not apply because the Claimant's activities involved the need for*

- continuity of service in a residential institution (regulation 21(c)(i)).*
- b. The Claimant agrees in principle but wished to leave this to the Tribunal to make the final decision.*
2. *Did the Respondent refuse to permit the Claimant to exercise any right he has under regulation 24 Working Time Regulations 1998, in so far as it applies where regulation 10(1) is modified or excluded?*
    - a. The Respondent says that they allowed the Claimant to take an equivalent period of compensatory rest (in reliance on s.24(a) Working Time Regulations).*
    - b. The Claimant says that the Respondent did not allow him the compensatory rest he was due.*
  3. *Was the Claimant automatically unfairly dismissed for the reason or principal reason that he:*
    - a. Refused or proposed to refuse to comply with a requirement which the Respondent imposed or proposed to impose in contravention of the Working Time Regulations (contrary to s.101A(1)(a) Employment Rights Act 1996) and/or*
    - b. Refused or proposed to refuse to forgo a right conferred on him by those Regulations (contrary to s.101A(1)(b) Employment Rights Act 1996).*
      - i. The Claimant says the reason he was dismissed was because of his refusals or proposal to refuse made in the following conversations:*
        - 1. With his line manager Sharon Whitby and Operations Manager Chris Knight on 28 October 2023.*
        - 2. With his line manager Sharon Whitby on 8 November 2023.*
      - ii. The Respondent says the Claimant was dismissed due to gross misconduct having been found intentionally sleeping on duty.*
  6. *It became apparent at the end of day 1 that there was also an issue concerning time limits and jurisdiction to hear the complaints under the WTR (the dismissal complaint was within time). This issue was raised with the parties. The fourth and final issue that came before the Tribunal was therefore:*
    4. *Given the date the claim form was presented and the dates of early conciliation, any complaint about something that happened before 26 November 2023 may not have been brought in time. Was the Working Time Regulations complaint made within the time limit in regulation 20(2) WTR? The Tribunal will decide:*
      - a. Was the claim made to the Tribunal within three months (plus early conciliation extension) of the date on which it is alleged that the exercise of the right should have been permitted?*

- b. If not, was it reasonably practicable for the claim to be made to the Tribunal within the time limit?*
- c. If it was not reasonably practicable for the claim to be made to the Tribunal within the time limit, was it made within a reasonable period?*

## **The proceedings**

- 7. The Claimant attended the hearing alone and represented himself. He explained his understanding of the facts and the law well and clearly. The Respondent was represented by Ms Wood, solicitor. The Tribunal was grateful to both the Claimant and the Respondent for their conduct of the case.
- 8. The Tribunal were provided with an electronic bundle of documents and witness statements from the Claimant, Mr Shamtally and Ms Whitby. The Respondent also provided a late statement from Ms Johnson. The Claimant confirmed he did not object to it being admitted having had time to consider it and prepare questions for Ms Johnson. All of these witnesses attended the Tribunal to give oral evidence and be questioned by the opposing party.
- 9. The Claimant provided a late statement from Ms Fiona Wood who was the Claimant's colleague who was also found asleep on the same night as the Claimant and who was also dismissed. The Respondent did not object to the statement but invited the Tribunal to place little weight on it. The statement was not signed and Ms Wood did not attend the hearing to give oral evidence. The Tribunal therefore placed little weight on it when deciding the case.
- 10. The Tribunal noted itself that there was an issue in respect of whether or not the Claimant's complaints under the WTR were within time. This was raised with the parties at the start of the second day. Following a short break, the Claimant gave oral evidence as to why he had brought his claim when he did and why he said it was not reasonably practicable to have brought it earlier, within 3 months of the acts complained of. He was cross examined by the Respondent's representative. Both parties made submissions about the applicability of the time limits and, at the end of the evidence, about the case as a whole. The Respondent provided written submissions.

## **Findings of Facts**

- 11. The Claimant started working for the Respondent on 1 May 2023 as an Overseas Sponsored Support Worker working with vulnerable adults at the residential home Weavers House. He had a positive relationship with his employer throughout his employment and there was no suggestion during the hearing that he was anything other than a good and committed employee.

### **The Claimant's working pattern**

- 12. The Claimant was contracted to work 48 hours a week. By July 2023, the agreed shift pattern was for the Claimant to work 4 night shifts of 12 hours each.

In addition, having opted out of the 48 hour working week, the Claimant frequently took on extra shifts to supplement his income. These additional shifts were written by hand onto draft rotas before being approved and finalised by the House Manager Sharon Whitby.

13. Some of these extra shifts were taken on entirely of the Claimant's own free choice and others were taken on at the request of the Respondent. He was not obliged to do additional shifts and there were no consequences when he turned down requests to work overtime. Both parties benefitted from the Claimant working additional shifts. The Claimant wished to do extra shifts for financial reasons and the Respondent wanted him to do extra shifts to help to fill gaps in the provision of the service.
14. On 25 September 2023 the Claimant worked a particularly long shift from 2.30pm until 9.30am the next day. A WhatsApp conversation on the same day records Ms Whitby trying to limit the Claimant doing too many long shifts saying *"Hi Amon. I was thinking about you doing the PM shift tomorrow and I think we should keep agency as you will only be getting a 6 hour break which is not enough considering you would have done a 17 shift followed by another 17 shift"*. The Claimant answered *"If that's what you have decided, it's fine with me"* (p.104).
15. From this point onwards, the Claimant did long overnight shifts on average once a week, starting at either 2.30pm or 4.30pm and working until sometime between 7am and 9.30am the following morning. He was required to be awake throughout the shift.
16. On 28 October 2023 the Claimant wrote to Ms Whitby by email saying *"Following recent rota changes and a conversation we had, I would like to request a mixture of days and night shifts on the next rota to complete my contracted hours"*. Ms Whitby wrote back saying *"Following our conversation, I will where possible look at giving you a mix of days and nights"*. The Claimant did not answer this message or say anything to the effect that he would only work a certain shift pattern or that he would refuse to work only night shifts.
17. The Tribunal accept that the Claimant would have mentioned that he was tired during this conversation and that his intention in saying this was to allow for adequate rest and recovery to alleviate the physical and mental strain he was experiencing. He did not refuse to work night shifts. He simply wished to mix them with day shifts. The evidence does not show a refusal to work or proposal to refuse to work particular shift patterns, in contravention of the WTR, and it does not show him refusing or proposing to refuse to forgo his rights under the WTR.
18. On 8 November 2023 the Claimant had a further WhatsApp conversation about his hours with Ms Whitby. The Tribunal took into account the whole conversation from pages 106-111. At first it appeared that Ms Whitby was asking the Claimant to work 7 days in a row. He said he was willing to work 7 days a week but couldn't do the Sunday shift. He apologised and said that he

had meant to cancel the shift on the rota but had not yet done so. Ms Whitby answered *"I can't let you do 7 nights without a break so works out quite well. I have taken the PM so all covered (sic)"*.

19. The Claimant queried the inconsistency and Ms Whitby answered *"What I meant was I have changed the rota so you are not (sic) doing 7 days in a row. To avoid getting agency and avoid you doing 7 days in a row counting the days you are doing this week"*.
20. The Tribunal accepted that Ms Whitby simply made a mistake in how she expressed her message and that she was in fact adjusting the rota to ensure that the Claimant did not work 7 days in a row rather than requiring him to do so.
21. The Claimant said he would free up some shifts for others in the team to take. Ms Whitby said *"Nobody wants to take any more lol"* and then *"Just check the shifts on the rota is OK with you. Please don't cancel any lol"*.
22. The Claimant said this conversation showed that Ms Whitby was willing to allow him to do 7 days a week and refused to allow him to cancel shifts. However this is not supported by the content of the messages. The full conversation, read as a whole, shows Ms Whitby trying to ensure that the Claimant did not work too many hours and showing compassion for his expression of tiredness. The comment about not cancelling shifts was in jest and was contained in a conversation in which the Claimant had said he had meant to cancel a shift on the rota that Ms Whitby was working to.
23. During the conversation the Claimant said that he wanted to do contracted hours only and said he was tired. The conversation and times of each message is recorded as being:

Claimant at 9.46pm:	<i>"But I could do contracted hours only"</i>
Ms Whitby at 9.46pm:	<i>"Oh is that what you want to do"</i>
Claimant at 9.47pm:	<i>"My body feels tired, am looking at a few shifts, I might drop"</i>
Ms Whitby at 9.47pm:	<i>"I thought you wanted the overtime"</i>
Ms Whitby at 9.47pm:	<i>"Oh OK fair enough it must be tough going doing (sic) so many night wakes"</i>
Ms Whitby at 9.49pm:	<i>"After Christmas we could look at maybe doing says and nights if that helps"</i>
Ms Whitby at 9.49pm:	<i>"Days*"</i>

24. Ms Whitby explained that her answer *"I thought you wanted the overtime"* was not a comment made in judgment in response to the Claimant's expression of tiredness. She said that comment was in response to the Claimant saying he could do contacted hours only. The Tribunal accept her evidence that the timing of the messages shows that she answered his comment about his tiredness with care and consideration saying *"Oh OK fair enough it must be tough going do so many night wakes"* and proposing to look at changing the working pattern after Christmas.
25. The Tribunal were provided with an agreed record of the times the Claimant signed in and out of work between 13 August 2023 and 11 December 2023 (p.339-341). These records show that he did not always have 11 hours of rest between every shift. On occasion he had just 10.5 hours and on other occasions the breaks were far less, for example between 5-8.7 hours. There were also many occasions where his breaks were longer than 11 hours, for example 12, 14, 13.7 or 15 hours.
26. On 26 November 2023 the Claimant completed at 10.3 hour night shift at 7.15am and started his next shift at 4pm on the same day leaving a rest break of just 8.7 hours. After finishing that 15.3 hour night shift at 7.15am on the morning of 27 November, he had a break of 13.7 hours before starting work again at 9.00pm that evening.
27. Having had two consecutive rest breaks of 13.7 hours, on 2 December 2023 the Claimant completed a 10.3 hour night shift at 7.15am and started his next shift at 4pm on the same day leaving a rest break of just 8.7 hours. After finishing that 15 hour night shift at 7am on the morning of 3 December 2023, he had a break of 15 hours before starting work again at 10pm on 3 December 2023.
28. The Claimant completed the 9.3 hour night shift of 3 December at 7.15am on 4 December. He then had a 8.7 hour break before starting work again at 4pm that same afternoon. He then had a 37.7 hour break entailing a 24 hour break plus 13.7 hours.
29. Between 6 December 2023 and the 11 December 2023, the Claimant worked 5 shifts of 10.3 hours each and had 13.7 hours break between each of them.

#### The Claimant's dismissal

30. During his employment, the Claimant had attended a team meeting in which it had been made clear that sleeping while on duty as a waking night shift was a gross misconduct offence. Sleeping on duty is not listed as an example of gross misconduct within the Respondent's disciplinary policy but the policy does include the examples of "actions which may harm the well-being of a Service User" and "bringing Strada Care Ltd into serious disrepute". The Tribunal accept the Respondent's position that they considered sleeping on duty when carrying out the role of waking night worker in a home serving vulnerable

residents to be potential gross misconduct warranting a disciplinary investigation.

31. In the early hours of 11 December 2023, Ms Whitby and Mr Knight, the Group Operations Manager, attended Weavers House for a spot check. Ms Whitby reported that *"the lights were off and AA was laying on top of a duvet and a blanket over the top of him and he appeared to be asleep. We stood there for a while but he did not move. I then started to approach him and he made a grunting sound."*
32. When he was woken the Claimant apologised for being asleep. Ms Whitby reported that *"AA apologised and said he realised he was at fault and should not have been asleep"* (p.138).
33. Mr Knight reported that he and Ms Whitby *"found AA in the dark asleep on the sofa with a blanket wrapped around him. We waited and observed AA asleep ..."* (p.140). Mr Knight also reported that the Claimant apologised straight away saying *"Yes, I was sleeping and am sorry"*.
34. The Claimant wrote an email of apology on the same day confirming that he had fallen asleep and that he realised this was unprofessional. He said *"I understand that you have all the rights to take action against such an unprofessional behaviour and I will accept whatever decision you take in this regard. I would consider it a lesson on my side. I assure you that this will not happen again in the future and I will take necessary steps to ensure that I am always fully present and committed to my job. I value my position in the company and I am willing to work hard to regain your trust"* (p.142).
35. The Claimant was suspended. A disciplinary meeting was conducted by Sue Johnson on 13 December (p.146). During the meeting, the Claimant was asked *"What impression do you believe you gave as a result of being round (sic) lying in the dark on the sofa in the lounge?"* The Claimant answered *"It was an impression of being unprofessional, embarrassment."*
36. The Claimant was asked if there was anything he would like to say in mitigation. He explained that he had calculated all the hours he had worked in the past 5 months and said it equated to 96 hours per week. He said he had informed his manager that he was very tired and believed he'd been burnt out. He complained that *"As NW they do not have brakes (sic) as the day staff. There are times he comes in at 4pm and up till the morning he has not had a brake. ... NW comes with fatigue which has led to him sleeping. He has to clarify that it's not intentional, he has done all his checks and it's because he has been burnt out. he has reflected on this and has written an apology letter and he will make sure that this does not happen again"* (p.147). On his behalf, the Claimant's accompanying colleague said *"There is no policies, he is a foreign working, coving (sic) shifts that's been asked for AA which he believed has resulted to all this"* (p.147).



37. On 15 December 2023, Ms Johnson took the decision to dismiss the Claimant without notice for gross misconduct. She considered that the Claimant had actively decided to sleep, as opposed to having just fallen asleep accidentally, and the consequence was to put the people living in the home at risk. This was in breach of the Respondent's policy regarding duty of care to the people in the home and brought the organisation into disrepute (p.151). Ms Johnson explained in her evidence that she felt the Claimant was raising the fact of being tired as a defence only because he had been found asleep. She was not aware that he had raised it earlier until he told her that he had. She was particularly influenced by the fact that both night workers had chosen to go to sleep on the same night.
38. The Claimant appealed the decision saying *"I feel that the sanction was too severe and disproportionate despite my extenuating circumstances, which I am prepared to present to you again for your consideration"* (p.152). He asked for a less severe sanction and said he was prepared to be transferred to working day shifts.
39. The appeal took place on 22 December 2023 and was chaired by Reza Shamtally (p.154). Mr Shamtally recounted the events of the night including that AA had been found asleep on duty having set up a sleeping station with pillow, duvet and darkened lighting. The Claimant did not disagree with this description but said he felt the punishment was too severe and there were mitigating circumstances.
40. The Claimant raised the issue of the length of his shifts, saying he had been coming in at 2pm and at 4pm until the next morning. He said that he had been on duty for 12 hours per day for the past 4 months and said *"I am human and I can get tired. I raised an issue that I was tired"*. A discussion followed about the hours the Claimant was working and the fact he had been choosing to take additional shifts crossing other people's allocation off to take the hours. His long shifts were discussed stating that they had intentionally adjusted his hours to accommodate a long shift of an afternoon and night wake of 15 hours *"which are the same as the day shift"*. Mr Shamtally said *"I discussed it with the team and it's not extraordinary to do these shifts"*. He also said *"I am not happy about the hours; we are going to be making changes to avoid that happening as this is not a good practice"* (p.154-159).
41. The key issue of concern to Mr Shamtally was that the Claimant had intentionally chosen to sleep. He said *"we believe that you set out to sleep on shift. I have dismissed staff previously who have been caught asleep. If you dosed off it would have been different, we believe that it was premeditated and that you set out to fall asleep."*
42. The Claimant said that he had raised the issue of his tiredness in the past to which Mr Shamtally said *"You did not dose off, you set yourself up to sleep. It's a breach of duty of care to the resident"*.

43. In his evidence, Mr Shamtally explained that he had looked at the hours worked over the last week before the incident and had noted that he had had sufficient rest in the week before he was caught sleeping.

44. Mr Shamtally took time to make his decision communicating it in writing on 27 December 2023 (p.160). He addressed the points raised by the Claimant saying:

*“You have been working beyond your contracted hours – despite opting-out of the working time directive, you feel you were asked to hours well beyond your contracted hours implying that this had been done more to suit the needs of the business, covering shift and providing alternatively to agency work. Decision: following a review we believe that you actively sought to work extra hours, some deemed by management to be excessive hours, and we have additional evidence of this in emails and rotas that you have edited. Steps had been taken by management to reduce a potential PM + Waking Night shift to equate to 15 hours. Whilst we appreciate this is a long shift, this is not unusual in the social care sector and comparative to a long-day shift. We do not consider this to be a mitigating factor.”*

45. Mr Shamtally upheld the decision to dismiss the Claimant.

46. The Claimant and Mr Shamtally communicated about the Claimant's final pay, loan details and sponsorship over the months that followed.

47. On 26 February 2024 the Claimant approached ACAS to commence early conciliation. After receiving the certificate he proceeded to issue his claim within one month. The Claimant explained that he commenced early conciliation on that day under the guidance of ACAS who he said had told him that he needed to do so within 3 months of his dismissal.

## **Relevant law**

### Relevant provisions of the Working Time Regulations

#### Regulation 10 Daily rest

(1) A worker is entitled to a rest period of not less than eleven consecutive hours in each 24 – hour period during which he works for his employer.

#### Regulation 21 Other special cases

Subject to regulation 24, regulations ... 10(1) ... do not apply in relation to a worker ...

(c) where the worker's activities involve the need for continuity of service ... as may be the case in relation to –

- (i) services in relation to the reception, treatment or care provided by ... residential institutions ... .

#### Regulation 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 rest period ... .

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

#### Regulation 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 10(1) ...
    - (ii) regulation 24, in so far as it applies where regulation 10(1) ... is excluded ... .

- (2) An employment tribunal shall not consider a complaint under this regulation unless it is presented –

- (a) before the end of the period of three months ... beginning with the date on which it is alleged that the exercise of the right should have been permitted (or in the case of a rest period or leave extending over more than one day, the date on which it should have been permitted to begin).

- (3) Where an employment tribunal finds a complaint under paragraph 1(a) well-founded, the tribunal –

- (a) shall make a declaration to that effect, and

- (b) may make an award of compensation to be paid by the employer to the worker.

- (4) The amount of the compensation shall be such as the tribunal considers just and equitable in all the circumstances having regard to –

- (a) the employer's default in refusing to permit the worker to exercise his right, and

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

48. In Landeshauptstadt Kiel v Jaeger [2004] ICR 1528, the ECJ described compensatory rest for daily rest as being *“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”*. The ECJ said *“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”*.
49. In the context of regulation 12 rest breaks, the Court of Appeal in Hughes v Corps of Commissionaires Management Ltd (No.2) [2011] IRLR 915 described how an equivalent compensatory rest under regulation 24(a) needed to be a period of rest in the sense of a break from work and had, as far as possible, to be free from work for the same period of time as the statutory rest break. The precise components of the equivalent period of compensatory rest will vary according to the facts and circumstances of the individual case.
50. There is nothing with the WTR to stipulates when the equivalent compensatory rest must be. However, within the case of Landeshauptstadt Kiel the ECJ considered that daily rest under the Working Time Director *“must... follow on immediately from the working time which they are supposed to counteract in order to prevent the worker from experiencing a state of fatigue or overload owing to the accumulation of consecutive periods of work”*. The Court said: *“In order to be able to rest effectively, the worker must be able to remove himself from his working environment for a specific number of hours which must not only be consecutive but must also directly follow a period of work in order to enable him to relax and dispel the fatigue caused by the performance of his duties. That requirement appears all the more necessary where, by way of exception to the general rule, normal daily working time is extended by completion of a period of on-call duty”*.
51. The Respondent drew my attention to the cases of Miles v Linkage Community Trust Ltd [2008] IRLR 602 and Carter v Prestige Nursing Ltd (UKEAT/0014/12) in which it was held that the regulation 30(1)(a) “refusal” to permit an employee to exercise his right to a rest break or a compensatory break only arose where there was a deliberate act of refusal in response to an employee’s request to exercise their right for a break.
52. The Respondent recognised that these authorities predated the decision of HHJ Eady in Grange v Abellio London Ltd [2017] ICR 287 which itself considered Scottish Ambulance Service v Truslove UKEATS/0028/11. In Truslove, the EAT presented an alternative approach to rest break entitlement under the WTR observing that *“an employer cannot withdraw into a passive role and grant rest periods only to those workers who ask for them (see para 68). The onus is on the employer where daily rest periods are concerned.”*
53. The Respondent suggested that Miles and Carter should be preferred over Truslove and Grange and that in the present case the Claimant had never requested or sought to exercise his right to compensatory rest. This Tribunal

disagrees with that explanation of the correct law. In Grange, HHJ Eady considered the alternative approaches towards rest break entitlements and, having considered the Working Time Directive and the European Court of Justice guidance, determined that the approach in Truslove was to be preferred. This means that employers are required to “*proactively ensure working arrangements allow for workers to take those breaks*” (see para 43).

54. Applying the test of Grange and the analysis of para 47 of that case to the present claim, I consider the entitlement to compensatory rest will be “refused” within the meaning of the WTR if the Respondent puts into place working arrangements that fail to allow the taking of an equivalent period of compensatory rest where the rest period of 11 hours daily rest has not been provided. If however the Respondent has taken active steps to ensure that working arrangements enable the Claimant to take compensatory rest it will have met the obligation on it to positively enable the break.

### Jurisdiction

55. The time limit for bringing a claim to the Tribunal under regulation 30 WTR is 3 months from the date on which it is alleged that the exercise of the right should have been permitted or, in the case of a rest period extending over more than one day, the date on which it should have been permitted to begin.
56. There is no equivalent to the “series of deductions” or “continuing act” provisions of other employment protection legislation which might mean limitation starts to run against a Claimant at the end of the relevant series of failures to grant rest or equivalent compensatory rest (such as the equivalents in discrimination or whistleblowing cases). These provisions do not apply to a claim under the WTR. Rather, as described in regulation 30(2)(a) WTR, time runs from afresh from the date of each “refusal”. This has been made clear in the EAT cases of Truslove and Grange.
57. The Claimant brought the case of Arthur v London Eastern Railway Ltd [2007] ICR 193 to the Tribunal’s attention. That is a whistleblowing case concerning whether or not acts or failures to act were part of a series of similar acts of failures for the purposes of treating them within time under s.48(3) Employment Rights Act 1996. It is not a case concerning the jurisdiction and time restraints of regulation 30 Working Time Regulations 1998 and so its principles are not applicable to the current case.
58. Time may be extended by such period as the Tribunal consider reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of the three month period (regulation 30(2)(b)).

### Relevant Provisions of the Employment Rights Act 1996

59. Section 101A Employment Rights Act 1996 reads:

## Working time cases

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

60. The Respondent directed me to the case of *Ajayi v Aitch Care Homes (London) Ltd* [2012] ICR D22 which also concerned night support workers at a care home who were dismissed after being found asleep on duty. The workers contended that they were exercising their right to a rest break and so were refusing or proposing to refuse to comply with a requirement under WTR or to forego their rights. The Employment Appeal Tribunal did not accept this. They found that a dismissal will only be automatically unfair under section 101A(1)(a) or (b) where the employee has communicated their refusal or proposal to refuse and that communication is the reason or principal reason for the dismissal.

61. The Claimant did not have 2 years of service at the Respondent and so the principles of ordinary unfair dismissal and fairness in all the circumstances do not apply in this case. The case only concerns whether the reason, or the principal reason, was the prohibited reason described in s.101A ERA.

## Conclusions on Liability

### Working Time Regulations

#### Jurisdiction relating to claims pursued under the WTR

62. The Claimant notified ACAS of his claim on 26 February 2024.

63. Any claim that predates 26 November 2024 is therefore on the face of it out of time. This means that any occasion on which the Claimant says he was not provided with a rest break or equivalent compensatory rest prior to 26 November 2024 is out of time. The out of time acts cannot be joined to the within time acts as a series of acts or continuing act as there is no such provision to do so within the WTR.

64. Having noted the point of jurisdiction, the Tribunal was bound to consider it and therefore raised it with the parties for their response (*Grange v Abellio*).

65. The Tribunal concludes that the Claimant has not provided any adequate explanation for the delay or adequately explained why it was not reasonably practicable for him to bring the claim in time. He appears to have calculated the limitation period by reference to the dismissal but that is not the relevant starting point for limitation for complaints pursued under the WTR. The Claimant says

he commenced his claim when ACAS told him to. The Tribunal is not privy to the information the Claimant gave ACAS or their advice to him and notes that responsibility is on the Claimant rather than ACAS to calculate time limits.

66. The Claimant was aware that he was not always receiving 11 hour breaks and he had said he was tired. He raised the issue of how long he was working and the Working Time Directive during his disciplinary and appeal processes. His ongoing correspondence in the weeks that followed his dismissal show that he was capable of communicating and expressing his concerns clearly and well.
67. The Tribunal is not satisfied that it was not reasonably practicable for the complaint to be presented within the three month limitation period nor that it was brought within a reasonable period thereafter.
68. Looking at the schedule of times worked at p.339, this means that the following dates are the only dates within time, and within the jurisdiction of the Tribunal, on which the Claimant received less than 11 hours rest in a 24 hour period and for which the Respondent should have allowed him to take an equivalent period of compensatory rest:
- a. 26 November 2023.
  - b. 2 December 2023.
  - c. 4 December 2023.

#### Regulation 6 WTR

69. The Tribunal's jurisdiction in respect of WTR is described in regulation 30. The Tribunal do not have jurisdiction to determine a complaint of a breach of regulation 6 WTR (length of night work) hence why this complaint was not included in the list of issues.

#### Regulation 10 WTR

*Issue 1 – Did the Respondent refuse to permit the Claimant to exercise any right he has under regulation 10(1) Working Time Regulations 1998?*

70. The Claimant worked in a home for vulnerable adults who need continuous support and care. He indicated his agreement that these activities fell within the definition of the special cases of regulation 21(c)(i) WTR and therefore that, subject to regulation 24, the requirement for daily rest under regulation 10 did not apply to him. He left the final decision to the Tribunal. The Tribunal conclude that the Claimant's activities did fall within the exemptions of regulation 21 and therefore that he was not entitled to daily rest pursuant to regulation 10.

#### Regulation 24 WTR

*Issue 2 – Did the Respondent refuse to permit the Claimant to exercise any right he has under regulation 24 Working Time Regulations 1998, in so far as it applies where regulation 10(1) is modified or excluded?*

71. As regulation 10 is excluded, the Claimant's right to rest must be considered under regulation 24, that is the right to equivalent compensatory rest. This regulation ensures that where an employee like the Claimant is required to work during a rest period, in this case, the daily rest period of 11 hours in each 24 hour period, the Respondent shall "wherever possible allow him to take an equivalent period of compensatory rest".
72. The Respondent contended that the Claimant was contracted to work a maximum of 60 hours a week and that any time over that was his choice. They said this meant that he was not refused compensatory rest as, essentially, it was his choice to forego it.
73. This is incorrect as it follows the analysis of the EAT in Miles which was expressly stated to be wrong in the later EAT decision of Grange. It is for the employer to take active steps to ensure that working arrangements enable the Claimant to take compensatory rest.
74. As well as being wrong in law, this approach does an injustice to Ms Whitby. It was not the case that Ms Whitby simply accepted the Claimant working long shifts without rest periods. On more than one occasion she refused him extra work, adjusted the shift pattern to prevent him working too much, encouraged him to go home and rest and instructed him to leave work early in order that he had sufficient rest. On occasion the Claimant did not follow these instructions.
75. As explained below, the Tribunal finds that the Respondent did allow the Claimant to take an equivalent period of compensatory rest on each occasion where he was required to work during a period which would otherwise have been a rest break.
76. In order to evidence this, the Respondent had to carry out a retrospective detailed review of all of its signing in sheets to show hours worked and rest breaks in-between. This was not straightforward for the Claimant, Respondent or Tribunal to always understand. Where the Respondent fell down was in its failure to operate any form of active monitoring of hours worked and compliance with the requirement for daily rest or equivalent compensatory rest during the period of employment. This is not to say that the Respondent must tell the Claimant which hours are deemed to be the equivalent compensatory rest (as the Claimant seemed to suggest they should) but rather the Respondent must ensure that it operates a working pattern which provides for the Claimant to take an equivalent period of compensatory rest. The Tribunal considers that the Respondent's compliance with section 24 WTR was down to Ms Whitby's good will and desire to try to support the wellbeing of those who reported to her rather than due to any conscious compliance or monitoring of compliance with the strict requirements of the WTR.
77. The Respondent has indicated that it has learnt through this case and that changes have been and are being made to more proactively monitor the hours worked. No findings are made in respect of this but the Respondent is



encouraged to do make changes in order that the Respondent can be satisfied that it is properly acting on and enforcing its obligations under the WTR so as to protect its employees and itself.

### 26 November 2023

78. On 26 November 2023, the Claimant finished one shift at 07:15am and started the next shift at 16:00pm. This was a break of 8.7 hours. This is 2.3 hours less than the stipulated 11 hour.
79. However, having finished his shift at 07:15am on 27 November 2023 the Claimant did not then start his next shift until 21:00pm that night. This is a break of 13.7 hours, or 2.7 hours more than the stipulated 11 hour break. I also note that the day before the 26 November break, the Claimant had a day off and was not required to work until the evening of 25 November, therefore having had a 37.7 hour break.
80. There is evidence that, through Ms Whitby, the Respondent had an eye on the number of hours the Claimant was working and his requests to work overtime. But there is no evidence that someone actively noted that the Claimant had not had an 11 hour break and told the Claimant, on or before 27 November, that he should finish his shift at the earlier time of 07:15am in order to ensure he had sufficient time to have a period of equivalent compensatory rest before restarting at 21:00pm.
81. Turning to the statutory language of regulation 24. The regulation requires the employer to “allow” the Claimant to take an equivalent period of compensatory rest. In this case, the informality of the arrangements does seem to have made it more difficult for the Respondent to demonstrate compliance with the Regulations. Nonetheless, the Tribunal accept that they have done so. The effect of the shift structure required of the Claimant was that on 27 November he was given a period of rest which was 2.7 hours in excess of the statutory requirement which had the effect of compensating him for the reduction of 2.3 hours less than the statutory daily rest the day before, on 26 November.
82. The Tribunal are satisfied that the Respondent allowed the Claimant to take an equivalent period of compensatory rest.

### 2 December 2023

83. On 2 December 2023, the Claimant finished one shift at 07:15am before then starting his next shift at 16:00. This is a break of 8.7 hours which is 2.3 hours less than the stipulated 11 hour break.
84. However, having finished that shift at 07:00 the next day, he then had a 15 hour break until he restarted work again at 22:00pm on 3 December 2023. This is 4 hours more than the regulatory 11 hour break. For the same reasons as above in respect of 26 November 2023, I consider that this amounts to the Respondent

satisfying its duty to allow the Claimant to take an equivalent period of compensatory rest.

#### 4 December 2023

85. On 4 December 2023, the Claimant finished one shift at 07:15am before then starting his next shift at 16:00pm. This is a break of 8.7 hours which is 2.3 hours less than the stipulated 11 hour daily break.
86. The Claimant then had a break of 1 day, not starting work again until 21:00pm on 6 December 2023. This amounted to a break of 37.7 hours. The law does not require a close analysis of precisely the same number of hours compensatory rest to offset the numbers of hours of daily rest lost. What matters is equivalence in order to allow the worker to rest and recover. However, the Tribunal found it instructive to look at the work pattern more broadly.
87. The Claimant is entitled to two uninterrupted periods of 24 hours in each 14 day period and the Tribunal do not consider it would be appropriate for that to be also considered as compensatory rest. However, in this case, the Claimant had a period of 37.7 hours which satisfies his requirement for 24 hours weekly rest, plus 11 hours daily rest plus compensatory rest of 2.7 hours which is more than equivalent to the 2.3 hours lost the day before.
88. The Tribunal have also taken note that the Claimant had 5 periods of daily rest between his shifts ending at 07:15am on 30 November 2023 and starting at 16:00 on 4 December 2023. During that time he had breaks totalling 59.8 hours which averages at a daily rest rate of 11.96 hours. This further supports the finding that equivalent compensatory rest was being allowed such that the Respondent had satisfied its duty under regulations 10 and 24 Working Time Regulations.
89. In addition to the calculation as to how much compensatory rest was allowed, the Tribunal took into account the times that the Respondent prevented the Claimant from working as much as he wanted to. For example on 6 December 2023 the Claimant said he was willing to do the late shift and the night wake on the same day. Ms Whitby answered saying *"But you need to go home and get some rest following training. You can't do 21 hours straight"*. The Claimant answered saying *"But you are short staffed for Evening. I was off yesterday"*, suggesting that he considered the previous day of rest to be enough for him to then work for 21 consecutive hours. Ms Whitby answered saying *"I can't let you fo (sic) 21 hours Amon it's not safe"*. This is one of several examples showing that Ms Whitby was aware of the need for safe working including keeping shift lengths within reasonable limits and ensuring adequate breaks.
90. The claims under the Working Time Regulations are not well founded and fail.

#### **Employment Rights Act**

91. The Claimant relies on the conversations of 28 October and 8 November 2023 as amounting to a refusal, or a proposal to refuse, to comply with a requirement which the employer imposed in contravention of the WTR or a refusal, or a proposal to refuse, to forgo a right conferred on him by those Regulations. He says that he was dismissed because of his refusal or proposal to refuse on those dates.
92. The Claimant has not satisfied the Tribunal that the Respondent did require him to work in contravention of the WTR or to forego a right conferred on him by the WTR. The Claimant has also not satisfied the Tribunal that he refused or proposed to refuse to so work or forgo his rights. Simply working overtime shifts was not the same as a requirement to work in breach of the WTR or to forgo his rights. There were plenty of overtime shifts available for him to choose to work without being in breach of the WTR.
93. During the conversations of 28 October and 8 November, the Claimant explained that he was tired. In the first conversation he asked to work a shift pattern of both days and nights. In the second conversation he said that he wished to work his contracted hours only. The Tribunal conclude that this is not the same as saying that he did not wish to work in breach of the WTR or forgo his rights. It was not a refusal or a proposal to refuse to work within the meaning of s.101A(1)(a) or (b) ERA.
94. In reaching this decision, the Tribunal noted that the Claimant continued to take up additional shifts and long hours of work even after his expressions of tiredness. The evidence suggests that Ms Whitby was trying to restrict his hours rather than impose more on him.
95. This is the end of the claim of automatic unfair dismissal as the Tribunal has concluded that the Claimant has not satisfied the conditions of section 101(1)(a) or (b). However, should that be wrong, the Tribunal have gone on to consider the reason for the dismissal.
96. The Tribunal accept the Respondent's explanation that the reason the Claimant was dismissed was because he intentionally chose to go to sleep while he was on night duty. The conversations of 28 October and 8 November 2023 played no part in the reason for dismissal.
97. The Tribunal accept that the Respondent considered the conduct of the Claimant to be of sufficient severity as to warrant dismissal. The Respondent supports the welfare of vulnerable service users. Having decided that those vulnerable service users require round the clock waking care support, it is reasonable to consider care workers choosing to make themselves a makeshift bed and go to sleep on the job to amount to gross misconduct. The Respondent considered the Claimant's explanation that he was tired and burnt out but (i) was satisfied that the Claimant had had adequate rest in the week before the incident, noting that in the 5 shifts preceding the occasion on which the Claimant was found asleep, his breaks between shifts had been 13.7 hours between each and (ii) considered that to be insufficient excuse for choosing to

make a bed and sleep given the nature of the Respondent's work and those in its care.

98. While the Tribunal is not required to make findings as to the procedural and substantive fairness of the decision to dismiss as this is not an ordinary unfair dismissal claim, the Tribunal did take note that the disciplinary process was full, fair and transparent and this supports the finding that the reason for dismissal was as the Respondent stated and not for the automatically unfair reason prohibited by s.101A ERA.

99. The claim of automatic unfair dismissal fails and is dismissed.

Approved by

Employment Judge Musgrave-Cohen

13 March 2025

---

Sent to Parties.

1 April 2025