Neutral Citation Number: [2019] EWCA Civ 269

Case No: A2/2017/3242

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE EMPLOYMENT APPEAL TRIBUNAL
His Honour Judge Shanks

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 05/03/2019

Before :

LORD JUSTICE UNDERHILL
(Vice-President of the Court of Appeal (Civil Division))
LORD SALES
and
LADY JUSTICE ASPLIN

- -

Between :

NETWORK RAIL INFRASTRUCTURE LTD	**Appellant**
- and -	
DAVID CRAWFORD	**Respondent**

- -
- -

Mr Andrew Burns QC (instructed by **Eversheds Sutherland LLP**) for the **Appellant**
Ms Naomi Ling and **Ms Elizabeth Grace** (instructed by **Thompsons Solicitors**) for the **Respondent**

Hearing date: 7th November 2018

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Approved Judgment

Lord Justice Underhill:

INTRODUCTION

1. The Claimant in these proceedings, the Respondent to this appeal, is a signaller employed by Network Rail Infrastructure Ltd ("Network Rail"). He claims that Network Rail has not provided him with the rest breaks to which he is entitled under the Working Time Regulations 1998 ("the WTR"). His claim was dismissed by an Employment Tribunal sitting at London Central, chaired by Employment Judge Norris; but it was allowed by the Employment Appeal Tribunal (HH Judge Shanks sitting alone).

2. The Claimant is represented before us by Ms Naomi Ling and Network Rail by Mr Andrew Burns QC. Both counsel appeared in both tribunals below.

THE BACKGROUND LAW

3. The WTR represent this country's implementation initially of EU Directive 89/391/EEC and subsequently of Directive 2003/88/EC ("the Directive"), which provide for various protections for workers as regards working time. The Directive is a health and safety measure. We were referred to the decision of the CJEU in *United Kingdom v Council of the European Union* (C-84/94) [1997] ICR 443, in which the Court observed, at para. 15 of its judgment (p. 501 D-E), that a broad interpretation of the relevant legislative powers should be adopted, and continued:

> "Moreover, such an interpretation of the words 'safety' and 'health' derives support in particular from the preamble to the constitution of the World Health Organisation to which all the member states belong. Health is there defined as a state of complete physical, mental and social wellbeing that does not consist only in the absence of illness or infirmity."

4. Chapter 2 of the Directive is headed "Minimum Rest Periods – Other Aspects of the Organisation of Working Time". It provides for various different kinds of protection relating to working time. It is only necessary for our purposes to note that there is separate provision for "rest periods" (see articles 3 and 5), which fall between periods of working time, and "rest breaks" (article 4), which occur during working time. This appeal is concerned with the latter. Article 4, which is headed "Breaks", reads:

> "Member States shall take the measures necessary to ensure that, where the working day is longer than six hours, every worker is entitled to a rest break, the details of which, including duration and the terms on which it is granted, shall be laid down in collective agreements or agreements between the two sides of industry or, failing that, by national legislation."

5. It will be noted that the Directive does not itself specify the characteristics of the breaks provided for, not even their minimum duration: that is left to agreement at the industrial level or, "failing that", national legislation. That reflects a realistic recognition that what kinds of break are most likely to promote the well-being of the worker and fit with the reasonable needs of the employer is likely to vary enormously

across the world of work and if possible should be agreed between the "industrial partners".

6. Regulation 12 of the WTR is headed "Rest Breaks" and reads (so far as material):

> "(1) Where a worker's 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.
>
> (4)-(5) …".

7. It will be seen that the primary provision of regulation 12 is that the details of the rest break will be a matter of agreement between employer and workers, and the provision in paragraph (3) for an uninterrupted 20-minute period simply represents a default. This reflects the philosophy of the Directive referred to above, though I am not sure to what extent it reflects the reality on the ground in this country. To similar effect, regulation 23 (a) provides that a collective agreement or a workforce agreement (for short, a "relevant agreement") may "modify or exclude the application of" various regulations, including regulation 12 (1) "in relation to particular workers or groups of workers."

8. The effect of regulation 12, in a case where there is no relevant agreement, is that the worker is entitled to a rest break which (i) is uninterrupted; (ii) lasts at least 20 minutes; and (iii) may be spent away from the workstation. In *Gallagher v Alpha Catering Services Ltd* [2004] EWCA Civ 1559, [2005] ICR 673, this Court identified a further element as necessarily implicit, namely that the worker must know at the start of his or her rest break that they will have 20 minutes' uninterrupted rest: see para. 50 of the judgment of Peter Gibson LJ (p. 684 A-B). Breaks satisfying all those requirements are often described as "*Gallagher* rest-breaks", though only the fourth requirement derives from *Gallagher* itself.

9. Regulation 21, which reflects article 17.3 of the Directive, provides that, subject to regulation 24, the provisions of various regulations, including regulation 12, do not apply to workers in the circumstances specified under heads (a)-(f). We are concerned only with (f), which reads:

> "Where the worker works in railway transport and –
>
> (i) his activities are intermittent;
>
> (ii) he spends his working time on board trains; or

(iii) his activities are linked to transport timetables and to ensuring the continuity and regularity of traffic."

10. Regulation 23 (a) provides that a relevant agreement may "modify or exclude the application of" various regulations, including regulation 12 (1): since regulation 12 (3) operates as a gloss on regulation 12 (1), that means that the requirement for "an uninterrupted period of not less than 20 minutes" can be excluded or modified. Regulation 23 makes clear that the saving at the start of regulation 12 (3) allows a relevant agreement to exclude the rights conferred by regulation 12 as well as to enhance them.

11. Regulation 24, which reflects provisions found in article 17.2 of the Directive, is headed "Compensatory Rest" and is the provision with which this appeal is principally concerned. It reads:

> "Where the application of any provision of these Regulations is excluded by regulation 21 …, or is modified or excluded by means of a collective agreement or a workforce agreement under regulation 23(a), and a worker is accordingly required by his employer to work during a period which would otherwise be a rest period or rest break –
>
> (a) his employer shall wherever possible allow him to take an equivalent period of compensatory rest, and
>
> (b) in exceptional cases in which it is not possible, for objective reasons, to grant such a period of rest, his employer shall afford him such protection as may be appropriate in order to safeguard the worker's health and safety."

12. The reference to a worker being "required … to work during a period which would otherwise be a rest period or rest break" is rather awkwardly expressed, but it is clear enough that the reference is to a case where, by reason of regulation 21 or a relevant agreement, the worker has not been accorded a rest break (or rest period) to which he or she would otherwise have been entitled. It therefore applies where a worker is not given an entitlement to an uninterrupted 20-minute rest break. The worker's primary entitlement in such a case is to compensatory rest under (a), which applies "wherever possible"; and the alternative entitlement at (b) applies only where it is not possible ("for objective reasons") to provide such rest, which it is contemplated will only occur exceptionally. It is not necessary on this appeal to consider what form the required "appropriate protection" under (b) may take, but it will necessarily be of a different character from the compensatory rest under (a): possibilities canvassed in the oral submissions before us included special health checks or (if appropriate) additional rest periods before the next shift or longer rest breaks in that shift.

13. By regulation 30 (1) a worker may present a complaint to an employment tribunal that his employer "has refused to permit him to exercise any right he has under … regulation 24, in so far as it applies where regulation … 12 (1) is … excluded". Paragraph (2) requires any such claim to be brought before the end of three months

beginning with the date on which it is alleged that the exercise of the right should have been permitted.

THE BACKGROUND FACTS

14. The Claimant's job is to provide relief cover – that is, to stand in for absent colleagues – for a group of five signal boxes in Surrey and Sussex: Oxted, Dorking, Reigate, Lancing and Whyteleafe South/Littlehaven. All but one of the boxes (Lancing) are single-manned. Except on Sundays, eight-hour shifts are worked at each of the boxes, starting at 6 a.m., 2 p.m. and 10 p.m. On Sundays there are two twelve-hour shifts, starting at 6 a.m. and 6 p.m.

15. In April 2013 Network Rail published a guidance document setting out its view of the application of the WTR as regards the provision of rest breaks for signallers and crossing keepers ("the Guidance"). The Guidance proceeds on the basis that signallers' work is "intermittent" and accordingly falls within the terms of regulation 21 (f)[1]. It follows, though the Guidance does not say so in terms, that the relevant entitlement is to compensatory rest under regulation 24. Para. 4 deals with single-manned boxes. It reads:

> "At single-manned locations breaks must be taken between periods of operational demand where there are opportunities for 'naturally occurring breaks'. These are times where there is no operational activity which requires immediate attention or response. At such locations the 20 minute break may be an aggregate of shorter breaks over the course of the 3rd, 4th and 5th hours. In this instance at least one of the naturally occurring breaks should be of sufficient length to allow the individual to take a personal needs break and to take refreshment (Note: 5 minutes is the recommended minimum time)."

The guidance was based in part on a study carried out for Network Rail by external consultants called Systems Concepts.

16. In February 2014 the Claimant raised a grievance in relation to the provision of compensatory rest breaks. In response to that grievance, Emma Lowe, an occupational psychologist, and Chris Hack, an ergonomist, both working for a unit within Network Rail called Network Rail Ergonomics., carried out a study which resulted in a formal "rest break assessment" covering the single-manned boxes in question: it considered the position at Oxted in the most detail, because it was the busiest of the four. The study proceeded, again, on the basis that regulation 21 applied. It concluded, in summary, that there were at all of the boxes sufficient naturally occurring breaks to enable signallers to take compensatory rest in accordance with the Guidance and that accordingly there was no need to provide for a formally rostered rest break, which would require cover by another signaller. On that basis the grievance was rejected.

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[1] As will appear, the ET thought the case might fall under (iii) as well as or instead of (i), but since there is no issue before us about the application of regulation 21 I need not consider whether that is right.

THE CLAIM AND THE ET DECISION

THE CLAIM

17. The Claimant's original case was that he was entitled under regulation 12 (3) (there being no relevant agreement) to a *Gallagher* rest-break in every shift. However, he also contended that if, contrary to that case, regulation 12 was excluded by regulation 21, he was nevertheless entitled to compensatory rest under regulation 24 in the form of at least 20 minutes of uninterrupted rest in any shift, the only difference from the regulation 12 (3) entitlement being that he did not need to know at the start of the break that that was what it was (i.e. the *Gallagher* gloss would not apply). On either alternative it was his case, and his evidence, that the requirements of his work were so continuous that he was afforded no opportunity to take such a break, or indeed any shorter break.

18. It was Network Rail's primary case that regulation 21 applied and that accordingly the Claimant's only entitlement was to compensatory rest under regulation 24. It submitted that that entitlement could be satisfied by discontinuous shorter periods of rest amounting to at least 20 minutes, in accordance with para. 4 of the Guidance. It further contended that the Claimant had never requested any such breaks and had accordingly never been "refused" them within the meaning of regulation 30 (1) ("the no refusal defence"). It appears to have been the Claimant's case that the dismissal of his grievance constituted the relevant refusal: Network Rail disputed that, but it argued that, if it did, it in any event occurred more than three months before the institution of the proceedings and so was out of time ("the limitation defence").

19. The ET heard the claim over two days in July 2016. On the first day of the hearing in the ET the Claimant conceded that he had the opportunity to take a 20-minute continuous break when working night shifts, so the claim was thereafter concerned only with the two day shifts.

THE ET's DECISION

20. By a Judgment with written Reasons promulgated on 22 August 2016 the ET dismissed the claim. Paras. 1 and 2 of the formal Judgment held that regulation 21 applied and accordingly that the Claimant's entitlement was to compensatory rest under regulation 24. That is not now disputed. Para. 3 reads simply: "The Respondent has not refused to permit the Claimant to exercise his right to compensatory rest".

21. The Tribunal's findings of fact are set out at paras. 12.1-12.23 of its Reasons and are largely determinative of the claim. The structure of the relevant paragraphs is not very clearly signposted, but it can be summarised as follows:

    (1) Para. 12.1 finds, unsurprisingly, that the Claimant worked in the rail industry, so that the first element in regulation 21 (f) was satisfied. It finds, again unsurprisingly, that head (ii) was not satisfied. It does not make any explicit finding about either head (i) or head (iii); but, as will appear, the Tribunal goes on later to hold that one and/or the other applied, and the remaining parts of

para. 12 proceed on the basis that the relevant entitlements are under regulation 24 and not regulation 12. Since that is common ground before us I need say no more about this aspect.

(2) Paras. 12.2-12.18 make a series of findings about the nature of the Claimant's duties and the opportunity that they afford him to take rest breaks. In practice, though not avowedly, they are largely directed to the question whether the requirements of regulation 24 (a) are satisfied. I summarise the relevant findings below.

(3) Paras. 12.19-12.22 address the no refusal and limitation defences and find in terms, accepting Network Rail's case, (a) that there had never been any refusal on the part of Network Rail to allow the Claimant to exercise his entitlements under regulation 24, and (b) that, even if there had been, the claim was out of time. For reasons that will appear I need say nothing more about these issues.

(4) Finally, para. 12.23 addresses the question whether, if, contrary to its earlier findings, the Claimant were unable to take equivalent compensatory rest, it would be "possible" for Network Rail to provide relief cover so as to enable him to do so.

22. The Tribunal states its conclusions at para. 13 of the Reasons. It does so briefly because they are essentially determined by its prior findings of fact. At para. 13.1 it holds that the Claimant's work is covered by "regulation 21 (f) (i) and/or (iii)", with the result that his entitlement is governed by regulation 24. Para. 13.2 reads:

> "The Claimant has not requested and hence has not been refused compensatory rest. He has been permitted (indeed, encouraged) to take compensatory rest breaks."

The first sentence accepts the no refusal defence, but the second appears also, and has been understood by the parties, to accept that the policy set out in the Guidance – which, as we have seen, provides, in the case of the single-manned boxes, for discontinuous breaks amounting to no less than 20 minutes – satisfies regulation 24 (a). Paras. 13.3-13.4 uphold the limitation defence.

<u>THE ET's FINDINGS RELEVANT TO REGULATION 24</u>

23. I here summarise the Tribunal's findings at paras. 12.2-12.18 and 12.23: see para. 21 (2) and (4) above.

24. It is convenient to start by noting that at para. 12.16 the Tribunal found that in the Lancing box, where there were two other signalmen, work could be arranged between them so that the Claimant could take whatever breaks were required. There is no appeal against that finding. We are therefore concerned only with the position at the four single-manned boxes, and only (see para. 19 above) during the day shifts.

25. The basic structure of the Claimant's work in the single-manned boxes, as found by the Tribunal, was that the only positive tasks that he had to perform was when a train came through, which at Oxted (being the busiest) could be six times an hour: those tasks took no more than a minute or two. But in between those episodes there was

always the possibility of unexpected events, which might in principle involve a real risk of injury to passengers or others, affecting the stretch of track for which he was responsible and with which he would have to deal; and he would need to be ready to deal with such problems at any time. That responsibility is described as "monitoring"; but it does not involve, as that term might suggest, constant scrutiny of a screen, but being available for immediate action if notified of a problem by a phone call or alarm.

26. The Tribunal heard and referred to a good deal of anecdotal evidence, some of it from the Claimant himself, about how there had developed a culture of signalmen occupying themselves with hobbies or other private activities while monitoring; but it was the Claimant's case that all that was past history, and the Tribunal made it clear that it relied for its findings not on material of that kind but on the Lowe/Hack report: Ms Lowe gave oral evidence at the hearing. At para. 12.11 of its Reasons it said:

> "The analysis carried out by Ms Lowe and Mr Hack for the Respondent also showed that there were numerous naturally occurring breaks during the period of activity that they observed, which they then 'overlaid' with the likely additional events such as line blockages using the Operational Demand Evaluation Checklist ('ODEC'). There were, according to this analysis, more than enough to give an aggregate well in excess of 20 minutes per working day, even discounting breaks that were shorter than five minutes, which we heard was the recommended minimum time."

(The reference in the final sentence is clearly to the parenthesis at the end of para. 4 of the Guidance – see para. 15 above.)

27. The Tribunal went on to consider the Claimant's challenges to those findings, summarised in his assertion that "his day was totally filled with incessant activity so that he was unable even, on some days, to go to the toilet without being interrupted". But it rejected his case, saying, at para. 12.14:

> "… [W]e cannot make a finding to that effect, because all the other evidence before us is that in fact there are numerous opportunities to take discontinuous breaks that aggregate to well in excess of 20 minutes a day."

That general statement was particularised at para. 12.15, where it said:

> "The Lowe/Hack analysis showed that at Oxted between 09.00 and 11.00 for instance there were a total of 49 minutes' aggregate of naturally occurring breaks, each of at least five minutes' duration. We did not find it plausible that the day that Ms Lowe and Mr Hack observed was the only day on which no unplanned events occurred, and in any case, as we noted above, they subsequently qualified their findings using the ODEC information."

It is necessarily implicit in those paragraphs, when read with para. 13.2, that the Tribunal regarded discontinuous breaks amounting to at least 20 minutes as capable of satisfying regulation 24 (a).

28. The Tribunal also referred to various other pieces of evidence from the Lowe/Hack and/or Systems Concepts reports relevant to the benefits of Network Rail's approach. At para. 12.6 it said:

> "… [T]he feedback that [Ms Lowe] and Mr Hack received suggested that there would be considerable resistance in many instances to the introduction of an enforced break. The signallers she had spoken to were happy with the set up and with planning breaks when they needed to take them, since they would be familiar with the timetables and would build in time for a break which might have to be delayed or brought forward if a train was late or an unexpected incident occurred."

The Claimant's grievance was not supported by any of the other signallers employed at the boxes in question: see para. 12.16. The Tribunal also noted that Systems Concepts – and, as I read it, Lowe/Hack – believed (see para. 12.8) that in boxes of the kind where the Claimant worked:

> "… one of the major challenges to maintaining concentration was not having to concentrate for too long, but in fact the reverse – that for quite large chunks of their working day, signallers might have too little to do so that their concentration slipped. A report by the company Systems Concepts supported this, saying that one signaller had reported the most tiring aspect of the job was working on Sundays because there was never enough to do, although another said that it was only tiring if it had been a 'hectic' shift."

At para. 12.10 it referred to recommendations made by Systems Concepts that where actual tasks were only intermittent Network Rail should:

> "… consider the promotion of 'micro-breaks' i.e. building in two-three minute breaks consisting of a change of posture and/or task activity every 30-45 minutes. They suggested that the policy of a 20-minute break as advocated by the Claimant was actually **more** likely to increase the risk of fatigue and musculoskeletal discomfort. This evidence would suggest that discontinuous breaks, aggregated across the working day, would be more beneficial than a single continuous break at a certain point."

It also referred at para. 12.15 to advice from the Office of Rail Regulation that:

> "… where there is a requirement for 'continuous sustained attention', **with no natural breaks**, there should be a regular 10-15 minute break every two hours in the day and every hour at night (the latter not being an issue) – our emphasis."

29. At paras. 12.17-12.18 of the Reasons the Tribunal found that "monitoring" did not require the Claimant to be constantly seated at the control panel. Although he could not leave the box he could leave his work-station and, for example, go out onto the balcony for a smoke or go to the lavatory or the cooking facilities, which were out of sight of the panel, "while being ready to return to the panel if summoned by an audible alert or phone call".

30. The total effect of those findings is that on all his shifts the Claimant had the opportunity to take rest breaks in accordance with para. 4 of the Guidance – that is, breaks cumulatively amounting to at least 20 minutes. That was comfortably the case even at the busiest box, being Oxted, and all the more so at the three others. It is clearly those findings that underpin the decision at para. 13.2 that the Claimant was "permitted (indeed, encouraged) to take compensatory rest breaks".

31. I turn, finally, to para. 12.23, which reads:

> "If we are wrong on all of the above, we find that the Respondent could introduce the facility to roster breaks as it has done elsewhere. We do not accept Mr Burns's submission that it makes no sense to provide relief for the relief signaller. When the Claimant is the relief signaller, he is the signaller for that shift. A relief signaller would then be able to move between the boxes, giving each single signaller a break, notwithstanding that we have heard this is apparently not desired by anyone in the region where the Claimant works, other than the Claimant himself."

That is a little opaque, but it was common ground that what it means is that it would be "possible" for Network Rail to employ a signalman to visit a number of single-manned boxes in the course of a shift in order to enable the signallers to take a 20-minute *Gallagher* rest break. That finding is, as the Tribunal makes clear, directed to a question which did not arise because of its earlier finding that the Claimant could take "an equivalent period of compensatory rest" in any event. But it is said by Ms Ling in fact to undermine that finding: I return to this below.

THE APPEAL TO THE EMPLOYMENT APPEAL TRIBUNAL

32. The Claimant appealed to the EAT on four grounds. Ground 1 reads:

> "The tribunal erred in finding as it did at paragraph 12.14 of the judgment that a discontinuous (as opposed to continuous) period of 20 minutes was sufficient to amount to compensatory rest pursuant to Regulation 24 (a) for the purposes of the Working Time Regulations 1998. Following the case of *Hughes v Corps of Commissionaires Management Ltd* [2011] IRLR 915, a period of compensatory rest must so far as possible ensure that the period which is free from work is at least 20 minutes (paragraph 54) (i.e. be a continuous break)."

The remaining grounds were concerned with the no refusal and limitation defences.

33. The appeal was heard by HH Judge Shanks on 8 November 2017. By a judgment given the same day he allowed the appeal. He dealt briefly with the no refusal and limitation points at para. 9 of his judgment, saying that there must in practice have been occasions in the three months prior to the commencement of the proceedings in which the Claimant had been required to work on a shift where there was no scope for a 20-minute break and that, since his grievance in that regard had been rejected, any such a requirement must be treated as a refusal. He continued:

> "In the circumstances, it seems to me that there is indeed but one issue raised on this appeal, namely, whether the ET were entitled to find, as a matter of law, that what was provided on such occasions amounted to compliance with regulation 24 (a)?".

In fact, having regard to the terms of ground 1, the issue is even more specific: was Network Rail obliged by regulation 24 (a) to provide the Claimant with at least 20 minutes *uninterrupted* rest ?

34. As to that issue, Judge Shanks allowed the appeal. As appears from the pleaded ground, that decision depended on the decision of this Court in *Hughes v Corps of Commissionaires Management Ltd* [2011] EWCA Civ 1061, [2011] IRLR 915; and I need to set out the reasoning in that case.

35. I can take the facts of *Hughes* from the headnote in the IRLR report, the relevant part of which reads as follows:

> "The claimant, Mr Hughes, was employed by the Corps of Commissionaires Management Ltd as a security guard. The employer had a contract with another company to provide 24-hour security guard cover at the latter's premises. The claimant was one of the three guards assigned to cover another company's premises. At any one time, one guard covered the site. Each guard worked a 12-hour shift. On any one day, one guard worked the day shift, one guard worked the night shift, and one guard had a rest day. During a shift, the claimant could take 20-minute breaks in a kitchen area, but he had to leave a sign on the reception desk indicating that he was on a break and specifying a number where he could be contacted. It could not be guaranteed in advance that his break periods would be periods of uninterrupted rest. It was, however, possible for the claimant to choose when to take his break and he could time it so as to coincide with when, in his experience, he was least likely to be interrupted. If he did get interrupted during a break, he was allowed to start his break from the beginning again."

36. Regulation 21 excludes the operation of regulation 12 in the case of security guards (see head (b)), so that the claimant's entitlement was, as in the present case, to compensatory rest under regulation 24. After an earlier decision and appeal to the EAT, with which we need not be concerned, the ET to which the claim was remitted dismissed it on the basis that the case fell within regulation 24 (b). The EAT (Lady Smith, Mrs Christine Baelz and Ms Barbara Switzer) allowed a cross-appeal by the employer on the basis that on the ET's findings the claimant had in fact been allowed "an equivalent period of compensatory rest" within the meaning of regulation 24 (a)

(though it upheld the finding under regulation 24 (b) in the alternative): see [2010] UKEAT 0173/10, [2011] IRLR 100. After referring, at para. 12, to the decision in *Gallagher*, Lady Smith continued, at para. 13 (p. 103):

> "In a special case, such as the present one, [i.e. where regulation 21 applies] the worker is not entitled to a 'Gallagher' rest break. The employer is, however, obliged 'wherever possible' to allow the worker to take 'an equivalent period of compensatory rest'. It is plain that that is not the same as a 'Gallagher' rest break. Certainly, the objective is to provide the worker with some break from his duties but the language of equivalence and compensation shows that it is something which is not identical to a 'Gallagher' break. It connotes something which makes up for the fact that the worker does not receive such a break by providing a break that is as near in character, quality and value to a 'Gallagher' rest break as possible. The precise elements of that equivalent period of compensatory rest will obviously vary according to the facts and circumstances of the individual case. In some cases, it may be possible for the employer to provide a break that very nearly meets the 'Gallagher' criteria – circumstances where the worker is technically 'on call' during a 20 minute break but is, in practice, never called on, for example. In others, it may be that less freedom is able to be afforded to the worker during his break but he does get one or it may be that no break at all can possibly be given during the first shift of each cycle but that is compensated for by the worker being given a double break of 40 minutes in the second shift he works in the cycle. There are, no doubt, many other possible scenarios."

At para. 27 (p. 104) she applied that approach to the facts of the case:

> "We are readily satisfied that the rest actually afforded to the Claimant amounted to an 'equivalent period of compensatory rest'. He was freed of all aspects of his work apart from the need to remain on the premises (which can be a feature of a 'Gallagher' rest break) and to be on call. The latter, we accept, cannot be a feature of a 'Gallagher' rest break (although, interestingly, it may not be working time, depending on the circumstances). He was, in principle, allowed a 20 minute break. He was compensated for the fact that he could not know in advance whether he would be interrupted and for the risk of actual interruption by being allowed to choose when to have his break and, if interruption occurred, to start his break again. These facts amply satisfy, in our view, the requirements of equivalence and compensation."

37. The claimant appealed against that decision. The only relevant ground for our purposes was that "any period of compensatory rest had to be a 'rest period' as defined in the Directive and therefore had to be outside working time" (see para. 49 in the judgment of the Court given by Elias LJ). I have some difficulty understanding that submission, but for present purposes all that matters is what Elias LJ said in dealing with it. He had set out in the earlier part of his judgment the passages from the judgment of the EAT which I have quoted above, and he observed at para. 52 that

it had proceeded on the basis that "an equivalent period of compensatory rest need not be a rest break as defined" and could occur within working time. At para. 53 he gave the Court's reasons for endorsing that conclusion, which meant that the ground of appeal in question was ill-founded. But he continued, at para. 54:

> "We would accept that if a period is properly to be described as an equivalent period of compensatory rest, it must have the characteristics of a rest in the sense of a break from work. Furthermore, it must so far as possible ensure that the period which is free from work is at least 20 minutes. If the break does not display those characteristics then we do not think it would meet the criteria of equivalence and compensation. In this case the arrangements plainly did meet those criteria, as the EAT found. Indeed, since the rest break begins again following any interruption, many would say that this was more beneficial than a regulation 12 *Gallagher* break would be."

38. At para. 11 of his judgment Judge Shanks quoted para. 54 of the Court's judgment in *Hughes*, and at para. 12 he referred specifically to the statement that the employer "must so far as possible ensure that the period which is free from work is at least 20 minutes". He continued, at para. 13:

> "Mr Burns tried with great skill and tenacity to suggest that paragraph 54 should be read in such a way that the 'period' - which is the word used in the second sentence of the paragraph - can comprise an amalgamation of different amounts of time which together amount to 20 minutes. I am afraid I just cannot read it like that. It seems to me clear that what Elias LJ was saying was that there should be a break from work and, so far as possible, that that break should last at least 20 minutes, and that otherwise it would not be 'an equivalent period of compensatory rest'. Given that paragraph 54 seems to me undeniably part of the reasons for the decision in the *Hughes* case, I can see no way round that conclusion."

39. In short, therefore, Judge Shanks allowed the Claimant's appeal because he regarded himself as bound by *Hughes* to hold that a period of rest could not be "equivalent" for the purpose of regulation 24 unless it was an uninterrupted period of at least 20 minutes: the aggregation of discontinuous shorter periods did not satisfy the requirements of the regulation.

THE APPEAL TO THIS COURT

40. Network Rail appeals with the benefit of permission given by the EAT itself. It advances two grounds of appeal. These are somewhat discursively pleaded, but a summary will suffice. Ground 1 is that the EAT was wrong to hold that it was bound by *Hughes* to decide that a period of compensatory rest under regulation 24 (a) must be an uninterrupted period of at least 20 minutes: on the true construction of the regulation discontinuous periods were enough. Ground 2 challenges the EAT's decision on the no refusal issue.

41. By a Respondent's Notice the Claimant seeks to uphold the decision of the EAT on additional grounds. As regards the effect of regulation 24, the Notice pleads:

> "If the Court of Appeal is minded to allow the appeal on the basis that an 'equivalent period' need not be a continuous period of 20 minutes then the claimant will argue in the alternative that:
>
> 1. the employment tribunal found that it was possible for a continuous period of 20 minutes compensatory rest to be provided, therefore the 'equivalent period' was required to be a continuous period of 20 minutes;
>
> 2. the employment tribunal did not give adequate consideration to or reasons for its conclusion that an equivalent period of compensatory rest had been provided."

Again, for reasons which will appear I need not set out the Claimant's case as to the no refusal issue.

42. I begin with the question whether it is necessary as a matter of law for an "equivalent period of compensatory rest" within the meaning of regulation 24 (a) to consist of an uninterrupted 20 minutes. I park for the moment the passage in *Hughes* on which the EAT relies.

43. The starting-point must be that regulation 24 is only engaged because the WTR, following the Directive, provides that in the case of the kinds of work identified in regulation 21 an employer is not required to afford workers rest breaks satisfying the requirements of regulation 12. That being so, the description of the compensatory rest required under regulation 24 (a) as "equivalent" cannot be intended to import the identical obligation that would have applied under regulation 12. Rather, the intention must be that the rest afforded to the worker should have the same value in terms of contributing to his or her well-being. That is what Lady Smith says at para. 13 of her judgment in *Hughes* (see para. 36 above), with which I agree (subject to one immaterial caveat[2]): it should be noted that she was sitting with (highly-experienced) lay members, and the views of the EAT on matters of this kind should be respected wherever possible. Although on the appeal only one aspect of the EAT's reasoning was formally in issue this Court certainly endorsed its view that the requirements of regulation 12 and regulation 24 cannot be identical. Indeed at para. 23, albeit in a part of the judgment dealing with a different issue, Elias LJ said in terms (p. 918):

> "… the concept of an equivalent period of compensatory rest under regulation 24(a) cannot be a period identical to a regulation 12 break. It is something given in place of that break."

44. Whether the rest afforded in any given case is "equivalent", in the sense explained by Lady Smith, must be a matter for the informed judgment of the (specialist) employment tribunal. There is no basis in principle for the proposition that only an uninterrupted break of twenty minutes can afford an equivalent benefit in that sense; and the provision for a collective or workforce agreement to make some different

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[2] The caveat is that I am not myself sure that the scenario envisaged in the penultimate sentence of the passage quoted – where the worker is given a double break in a different shift – could constitute "equivalent" rest within the meaning of regulation 24 (a). I am inclined to think that it would qualify, if at all, only as alternative protection under head (b).

arrangement would be meaningless if that were so. I can see no reason why a single uninterrupted break of 20 minutes will always be better than, say, two uninterrupted breaks of 15 minutes one-third and two-thirds through the shift. The evidence referred to at para. 28 above provides other illustrations of how different kinds of rest may be thought appropriate in particular cases.

45. I do not believe that the observation relied on from para. 54 of the judgment in *Hughes* is authority to the contrary. In the first place it does not form part of the Court's dispositive reasoning. The issue which it was addressing was whether an "equivalent period of compensatory rest" had to occur outside working time (see para. 37 above). That question was answered in para. 53, and the role of para. 54 is simply to make the point that the Court's conclusion does not empty the regulation 24 obligation of all content. But in any event the Court does not say in terms that the 20-minute minimum period to which it refers should be uninterrupted: it simply says that the work-free period should be at least 20 minutes. I accept that in some contexts it might be natural to read that as referring to a continuous period, but there is no context here to require such a reading: there was no issue on the facts of *Hughes* about whether the 20 minutes which he was allowed needed to be uninterrupted, since if the period was in fact interrupted he was allowed another.

46. Ms Ling referred us to a different passage in the judgment of this Court in *Hughes* in which it approved (subject to an immaterial qualification) a formulation of the issues by the first EAT (Silber J and lay members) referring to "an equivalent period of uninterrupted 20 minutes compensatory leave [*sic*]": see paras. 28-31 (pp. 918-9). But that simply reflected the way the case was being argued; still less than in the case of para. 54 can the passage in question be read as addressing the question whether equivalent compensatory rest must always be an uninterrupted period of at least 20 minutes.

47. Ms Ling also argued that, since in substance Network Rail's case was that it was impossible to provide uninterrupted breaks of at least 20 minutes between trains coming through, it fell to be considered under regulation 24 (b) rather than regulation 24 (a): she drew attention to the phrases "wherever possible" in (a) and "in exceptional cases in which it is not possible" in (b). On that basis the Tribunal's finding at para. 12.33 (see para. 31 above) was fatal to its case. However, that argument is only good if she is right on the prior point of whether uninterrupted breaks are necessary. If, as I would hold, they are not, it was indeed "possible" to allow the Claimant to take an equivalent period of compensatory rest.

48. I therefore believe that Judge Shanks was wrong to allow the appeal on the basis that he did. It is accordingly necessary to consider the two additional grounds advanced in the Claimant's Respondent's Notice (see para. 41 above). I take them in turn.

49. As to the first, this again depends on the finding made by the Tribunal at para. 12.23 of the Reasons. The point, as developed by Ms Ling, is that regulation 24 (a) requires the employer to accord the employee an equivalent period of compensatory rest "wherever possible" and that para. 12.23 finds in terms that it would be "possible" for Network Rail to provide relief so that he could take a full *Gallagher* break. This seems to be a variant of the point addressed at para. 47 above and is bad for essentially the same reason. Once it is established that a period of compensatory rest

under regulation 24 (a) need not be identical to a rest break under regulation 12 it is irrelevant that such a break could in fact have been provided.

50. As to the second – that the Tribunal did not give "adequate consideration to or reasons for its conclusion" – Ms Ling submitted that the Tribunal's Reasons consist essentially of a recitation of the evidence, albeit with some findings of primary fact, and that there is no proper analysis of the dispositive issues. It is fair to say that the Reasons are rather more narrative than analytical, but in my view they clearly address and decide the crucial questions and give adequate reasons for doing so. The Tribunal's essential finding is that the pattern of work at all the boxes where the Claimant worked was such as to allow him ample periods of at least five minutes, amounting in aggregate to more than 20 minutes even at Oxted, during which he had no tasks to perform and was free to leave his workstation, though not the box. In so far as that is a finding of fact it is fully explained by its acceptance of the Lowe/Hack report (supported by the evidence of Ms Lowe) and its rejection of the evidence of the Claimant (which, it has to be said, was highly implausible): see paras. 26-27 above. In so far as it is a judgment that such breaks satisfied the requirements of regulation 24 (a) it is clear that the Tribunal made its own common sense assessment of equivalence, bearing in mind the views of Systems Concepts, Ms Lowe and Mr Hack and the Office of the Rail Regulator, together with the fact that the Claimant was unique in taking the position that he was not afforded adequate rest. I can see no error of law here.

51. For those reasons, I do not believe that there was any error of law in the ET's decision on the regulation 24 (a) issue.

52. It follows that it is unnecessary to consider Network Rail's ground 2, which relates to the "no refusal" issue and the associated limitation defence. At an earlier stage of the proceedings it seemed as if the former issue might depend on choosing between two decisions of the EAT on the meaning of the phrase "refused to permit" in regulation 30 of the WTR – *Miles v Linkage Community Trust Ltd* [2008] UKEAT 0618/07, [2008] IRLR 602, and *Grange v Abellio London Ltd* [2016] UKEAT 0130/16, [2017] ICR 287 – and if that had remained the case there might have been some advantage in our deciding the no refusal issue in any event. But Mr Burns made it plain that he accepted that *Miles*, which was not followed in *Grange v Abellio*, was wrongly decided, and his challenge to the decision of the EAT was on points peculiar to the present case. In those circumstances I would not consider the point further.

53. I would allow the appeal and restore the decision of the ET dismissing the claim.

Lord Sales:

54. I agree.

Lady Justice Asplin:

55. I also agree.