



THE EMPLOYMENT TRIBUNAL

SITTING AT: LONDON SOUTH

BEFORE: EMPLOYMENT JUDGE BALOGUN

MEMBERS:
Mrs C Wickesham
Mr G Henderson

BETWEEN:
MR L GRANGE

Claimant

AND

ABELLIO LONDON LIMITED

Respondent

ON: 2 May 2017 & 8 May 2017 (In Chambers)

Appearances:

For the Claimant: Mr Philip Engleman, Counsel
For the Respondent: Mr Thomas Cordrey, Counsel

RESERVED JUDGMENT ON REMEDY

The tribunal awards the Claimant compensation of £750 for breach of his entitlement to rest breaks, contrary to Regulation 12(1) Working Time Regulations 1998.

REASONS

1. This was a hearing to consider remedy in light of the Employment Appeal Tribunal (EAT) judgment of 17 November 2016. The EAT found that the ET's conclusion in its judgment of 31.7.15 that the rest break provisions at Regulations 12(1) and 30(1) of the Working Time Regulations 1998 (WTR) required a request and a specific refusal of that request was an error of law.
2. As the original findings of fact of the tribunal were not appealed, it was not necessary to hear further evidence on liability. We did however hear additional evidence from the Claimant, limited to remedy. References in square brackets are to pages from the original hearing bundles except for those with the prefix "LG", which refer to appendices to the Claimant's remedy statement.
3. The matter has been remitted for the same Tribunal to consider the matter again, with reference to 3 specific periods identified at paragraph 49 of the EAT judgement. Although the dates that the parties have attributed to each period differ slightly, the overall period is the same. We have determined that the period is broken down as follows:

Period 1 – 16 July 2011 to 15 July 2012

- a. This covers the point at which the Claimant commenced the role of relief SQS up until the changes to the SQS working pattern.

Period 2 – 16 July 2012 to 14 July 2014

- b. This covers the date that the new working pattern was confirmed to staff [367] to the date the Claimant lodged his grievance. [60-62]

Period 3 – 15 July 2014 to 14 September 2014

- c. This covers the period from the lodging of the grievance to the commencement of the Claimant's long term sick leave.
4. The Claimant does not seek a remedy beyond 14.9.14 as his long term absence meant that the issue of rest breaks did not arise.
 5. The Claimant seeks compensation for refusal of his entitlement to rest breaks for the entirety of the 3 periods. However the Respondent contends that most of the claim is out of time. Although the time point was not taken at either the original hearing or the appeal, as it is a matter of jurisdiction, the Tribunal is required to consider it.

The Law

6. By Regulation 30(1) WTR, a worker may present a complaint to an employment tribunal where the employer refuses to permit him to exercise a right to time off under the Regulations.

7. Regulation 30(2) provides that a complaint under Regulation 30(1) must be presented before the end of 3 months beginning with the date on which it is alleged that the exercise of the right should have been permitted. Time may be extended by such further period as the tribunal considers reasonable where it is satisfied that it was not reasonably practicable to present the claim within the primary limitation period.
8. By Regulation 30B, the time limit is further extended to facilitate early acas conciliation.

Submissions on jurisdiction

9. It was submitted on behalf of the Respondent that time runs from each discreet occasion on which an employer refuses a worker a rest break. The case: Scottish Ambulance Service v Truslove UKEATS/0028/11/B1 was relied on in support.
10. It was submitted on behalf of the Claimant that the Respondent's limited construction of Regulation 30(2) was not in keeping with the Working Time Directive (WTD) and was contrary to paragraphs 42-48 of the EAT judgment which emphasised the need for employment tribunals to protect the "time off" rights in the real world. Requiring a worker to pay an issue fee every 3 months was not conducive to the exercise of the right. It was further submitted that the Respondent's breach of the Regulations was a continuous act and that, provided there was a complaint falling within the 3 month primary period, all the breaches dating back to the beginning of Period 1 were in time. The Claimant relied on Miles v Linkage Community Trust Ltd [2008] IRLR 602, in particular, paragraph 33, where an 8 month period was accepted as the period over which there was default.

Conclusion

11. Having considered the submissions and reviewed the above authorities; and having also considered other authorities referred to, including Commission of the European Communities v United Kingdom of Great Britain and Northern Ireland [2006] IRLR 888, we prefer the Respondent's interpretation of Regulation 30(2). At para 28 of Trustlove, it was held that time runs from the date on which the Claimant should have enjoyed the relevant statutory rest period. In our view, there is nothing in that judgment or in the language of Regulation 30(2) that provides for the concept of "continuous act" along the lines of section 123 of the Equality Act 2010. On the contrary, it is clear from paragraph 31 that the EAT accepted the respondent counsel's submission that each time a worker did not receive the rest to which they were entitled, a fresh time bar period started to run.
12. The case of Miles was considered by the EAT in Trustlove and the point was made at paragraph 30 of the judgment that Miles was not a decision about time bar but was concerned with the relevant period for calculating compensation under Regulation 30(4), which was agreed by concession. It is therefore distinguishable.
13. The claim was presented on 18 November 2014 in respect of all 3 periods in contention. Taking into account the Regulation 30B extension, only claims for rest periods which should have been enjoyed on or after 6 July 2014 are in time.

14. Applying this to the 3 periods identified above; all of Period 1 is out of time. All of period 2, save for 6.7.14 -14.7.14, is out of time. Period 3 is in time. In the absence of any arguments from the Claimant as to why it was not reasonably practicable to present the out of time claims within the time limit, they are struck out.
15. Turning to the remaining period, which covers 6/7/14 to 14/9/14, we are satisfied from the evidence presented that the Claimant was absent from work due to sickness between 30/6/14 - 31/7/14. [LG17] and between 13/7/14 – 8/8/14. [526]. He was on annual leave between 9/8/14 – 22/8/14 and on 25/8/14. [526]. Clearly, the issue of a rest break did not arise when the Claimant was absent from work therefore these date must be discounted.
16. That leaves only 14 days during the relevant period that the Claimant was present at work. The Respondent concedes that it is unable to show that during the said 14 days, working arrangements were in place that allowed the Claimant to take his rest breaks. We therefore find that the claim under regulation 30(1) in respect of the 14 days only is well founded.
17. Regulation 30(4) provides that the amount of compensation shall be such as the tribunal considers just and equitable in all the circumstances having regard to the employer's default in refusing to permit the worker to exercise the right and to any loss sustained by the worker which is attributable to the matters complained of.
18. It is common ground that the Claimant suffered no financial loss as a result of the breach.
19. It was submitted on behalf of the Respondent that it is permissible for the tribunal to make no award of compensation and that it should adopt that approach in this case given that the Claimant was paid his full salary throughout and has already been compensated by benefitting from the shorter working day pursuant to the SQS agreement. Whilst we have taken this into account, when viewed against all the other factors, we do not consider that a nil award of compensation would be a just outcome in all the circumstances.
20. Whilst we accept that the Respondent was acting in good faith in requiring the Claimant to work to the pattern agreed by the majority of the workforce, as we point out at paragraph 27 of the liability judgment, it was aware of the Claimant's specific need for regular rest breaks. In those circumstances, compelling the Claimant to work to the agreed working pattern without adjustment was unreasonable.
21. Whilst there is no medical evidence before us linking the Claimant's sickness absences to the lack of rest breaks, given his medical condition and the symptoms he described in evidence, we are satisfied that the lack of rest breaks would have had some adverse impact, even if this were limited to discomfort.
22. For these reasons, we consider that this is a case where some compensation is due.

23. There is little guidance on the approach to be taken in assessing compensation under the Regulations and we have looked to similar statutory provisions as a starting point. The Employment Rights Act 1996 contains a number of provisions relating to the right to unpaid time away from the workplace and the only one that contains a specific formula for calculating compensation is in respect of a breach of the right under section 57ZE(1). This entitles an employee who has a qualifying relationship with a pregnant woman or her expected child to take unpaid time off to accompany her to ante-natal appointments. Where a complaint that the right was unreasonably refused is upheld, compensation is calculated by multiplying the appropriate hourly rate by the number of working hours the employee would have been entitled to be absent if the time off had not been refused and doubling it.
24. That approach would not be appropriate in our case. The right under section 57ZE(1) only arises in limited circumstances and for a relatively short period and the formula for calculating compensation probably reflects that. On the other hand, the entitlement under Regulation 30(1) is engaged and arises every day the worker is at work. It is therefore a more substantial right. Furthermore, it is a health and safety measure and so the consequences of a breach are potentially more serious, justifying, in our view, greater compensation than that which would result from the section 57ZE(1) formula.
25. The refusal of the rest breaks was more than a minor inconvenience to the claimant. He told us that because of his underlying medical condition, he needed to regulate his food intake to ensure regular bowel movement otherwise he would have to use laxatives to prevent bleeding. He said that not having a rest break meant that he did not have an opportunity to eat properly, which caused him some discomfort and distress.
26. Taking all of these matters into account, we could consider that a just and equitable award would be £750.

Judgment on Remedy

27. The claimant is awarded £750

Employment Judge Balogun
Date: 18 August 2017

