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*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

CASE STATED BY AN INDUSTRIAL TRIBUNAL UNDER ARTICLE 22 OF THE INDUSTRIAL TRIBUNALS (NORTHERN IRELAND) ORDER 1996

BETWEEN:

SAMUEL BLAKLEY

Claimant/Respondent;

and

SOUTH EASTERN HEALTH AND SOCIAL SERVICES TRUST

Respondent/Appellate.

HIGGINS LJ, GIRVAN LJ AND COGHLIN LJ

GIRVAN LJ

Introduction

[1] This matter comes before the court by way of a case stated from an Industrial Tribunal. The respondent, Mr Blakley ("Mr Blakley") made two complaints to the Industrial Tribunal on 22 June 2008. In his first complaint he claimed that he had not received adequate periods of compensatory rest while carrying out "on call" duties for his employer, the appellant ("the Trust") under regulation 24 of the Working Time Regulations (Northern Ireland) 1998 ("the 1998 Regulations"). Secondly, he complained that he had

suffered unlawful deductions of wages, contrary to Articles 45 and 55 of the Employment Rights (Northern Ireland) Order 1996 ("the 1996 Order"). He claimed that the hours he spent on-call all fell to be treated as "working time" within regulation 2 of the 1998 Regulations.

[2] Following the hearing of the complaints on 11 and 12 November 2008 the Tribunal by a unanimous decision on 6 January 2009 upheld Mr Blakley's complaints. It held that the Trust was in breach of its obligations under Article 24 of the 1998 Regulations by failing to provide for the equivalent period of compensatory rest which is required in order to safeguard the workers' health and safety. It also held that Mr Blakley had worked throughout his on- call period and was entitled to be paid overtime as appropriate. The Tribunal concluded that he had suffered unlawful deductions of wages and was entitled to be compensated accordingly. The Tribunal did not determine the amount due and invited the parties to make submissions on the question of remedies including submissions on the appropriate rate of pay to be made to the claimant for his on-call hours and whether he was entitled to be paid for all the hours he was on-call including the hours when he was sleeping.

The Questions in the Case Stated

[3] The Trust, being aggrieved by the Tribunal's decision requisitioned a case stated and the Tribunal has stated a case posing three questions, namely -

(1) Was the Tribunal correct in law in determining that the ad hoc arrangement for compensatory rest applied by the Trust did not constitute adequate compensatory rest within the meaning of Regulation 24 of the 1998 Regulations.

(2) Was the Tribunal correct in law in determining that all the time spent "on call" by the respondent constituted "working time" within the meaning of Regulation 2 of the 1998 Regulations and consequently that the respondent was entitled to be paid for all his time on call?

(3) Following its decision in relation to question (2), was the Tribunal correct in determining that the respondent had suffered unlawful deductions from wages, given that the appellant had conceded the respondent's contractual right to be paid overtime.

The factual background

[4] Mr Blakley was employed by the Trust as an estates officer working at various hospital sites in Northern Ireland. A rota was established in order to cover out of hours on-call service. This meant that Mr Blakley was usually on call one week in every six. His on-call duty commenced at 4.00 pm on Friday and finished at 8.45 am on the following Friday. The Tribunal found that between 1 April 2007 and 11 January 2008 Mr Blakley received an average of 44 calls for each of the weeks when he was on call.

[5] When on call Mr Blakley was provided with a pager, a mobile phone and laptop computer containing an emergency manual. He had records to complete with details of calls received and action taken. On receiving calls during the on-call hours the following options were open to him:-

(a) taking no action if the matter was of a minor nature;

(b) arranging an appropriate tradesman to attend the site and deal with the problem;

(c) arranging for a tradesman already on the site to attend to the problem; and

(d) attend the site himself.

[6] For each week that Mr Blakley was on call he, in common with all the other estate officers subject to on-call duties, received an allowance originally fixed at £375 per week and subsequently increased. The payment was superannuable. If he actually attended at the hospital premises in an emergency he was entitled in addition to overtime payments in respect of the time taken. The agreement to pay such an allowance emerged from a joint agreement between the relevant union AMICUS and the Trust paragraph 3 of which provided:-

> "Under the terms of this agreement estate officers will be paid a salary complement of £375 per week payable for any week worked on call. The supplement will be superannuable."

Paragraph 4 provided that that supplement would be amended annually to take account of the national pay award to estate officers.

[7] There was an arrangement between the Trust and tradesmen for compensatory rest depending on when and for how long the tradesmen were

called out. While there had been discussions about such an arrangement between the Trust and estate officers, there was an ad hoc arrangement and no formal agreement under which Mr Blakley and others were able to start later or take time off during the day if they had been called out during the previous night. There was no finding that Mr Blakely had ever been unable to ask for time off or to take time off when he asked for it.

[8] While there was some confusion in the wording of the Tribunal's decision and case stated, the evidence established that when Mr Blakley was on call he did not have to be at the Trust premises nor did he have to be at home. The Tribunal found that Mr Blakley was constrained because he had to be available to deal with calls subject to the need to be readily available in the event of a call but subject to that he could engage in other activities.

The compensatory rest issue

[9] There was an original Working Time Directive 93/104/EC since amended by Directive 2003/88/EC, a directive concerning certain aspects of the organisation of working time. The Directive was passed as a health and safety measure. Within the United Kingdom the Directive was given effect by the Working Time Regulation 1998 and the Working Time (Northern Ireland) Regulations 1998 which are for all material purposes identical to the regulations applicable in the rest of the United Kingdom.

[10] Regulation 2(2) defines the term "rest period" thus:-

> ". . . in relation to worker, means a period which is not working time, other than a rest break or leave to which the worker is entitled under these regulations."

Working time in relation to workers is defined as:-

> "(a) any period during which he is working, at his employers' disposal and carrying out his activity or duties,
>
> (b) any period during which he is receiving relevant training, and
>
> (c) any additional period which is to be treated as working time for the purpose of these regulations under a relevant agreement."

Regulation 10(1) provides:-

> "An adult worker is entitled to a rest period of not less than 11 consecutive hours in each 24 hour period during which he works for his employer."

Regulation 11(1) provides:-

> "Subject to paragraph (2) an adult worker is entitled to an uninterrupted rest period of not less than 24 hours in each 7 day period during which he works for his employer."

Regulation 21 provides:-

> "Subject to regulation 24, regulations 6(1) and (2) and (7), 10(1), 11(1) and (2) and 12(1) do not apply in relation to a worker . . .
>
> (c) where the worker's activities involve the need for continuity of service or production, as may be the case in relation to –
>
> (i) services relating to the reception, treatment or care provided by hospitals or other similar establishments, residential institutions and prisons."

Regulation 24 provides:-

> "Where the application of any provision of these regulations is excluded by regulation 21 or 22, or is modified or is 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."

[11] At paragraph 4.3 of its decision the Tribunal stated:-

> "The respondent's case was that the ad hoc system which applied, whereby the claimant could ask for a late start or for time off if he had had a disturbed night's sleep while on call, was perfectly sufficient: all he had to do was to ask. We do not agree with this reasoning. In the working culture which is prevalent today, it may be perceived as a weakness or a lack of commitment if an employee asks for a period of compensatory rest. If there is a clear policy in place providing for compensatory rest to be made available in certain circumstances, and setting out how this compensatory rest is to be calculated and accessed, this gives clarity for both employer and employee. It allows an employee to avail of their entitlement to compensatory rest without feeling that they are asking for a favour rather than an entitlement. Given that the respondent was able to put in place a clear system of compensatory rest for the tradesmen working for the Trust, we really cannot see why a similar procedure was not put in place for estates officers. It would be simple and straightforward to do so and would be to the benefit of both staff and management."

The Tribunal accordingly concluded that the Trust was in breach of its obligations under regulation 24 in failing to provide for equivalent periods of compensatory rest as required in order to safeguard the worker's health and safety.

[12] Mr O'Hara QC on behalf of the Trust argued correctly that there was a flaw in the Tribunal's approach in that there was no evidence before the Tribunal and no fact found that Mr Blakley had ever been denied compensatory rest and that in the absence of such evidence no breach of regulation 24 could be established. The Tribunal erroneously concluded that there was required to be a clear policy or agreement in place which allowed the employee to take an agreed period of rest. This is not what the regulation

provides. It requires the employer wherever possible to allow equivalent periods of rest. As another Northern Ireland Industrial Tribunal in Ekin v. United Hospitals Health and Social Services Trust (Case No 3254/01) correctly concluded what is required is "a flexible approach." If an employer consistently failed and refused to permit an employee to take compensatory rest it might well be found that it was pursuing a policy designed to circumvent regulation 24. That, however, was not this case.

[13] Mr McGleenan who appeared on behalf of Mr Blakley in this court, Mr Blakley having appeared on his own behalf before the Tribunal, did not seek to argue that the Tribunal was correct in its conclusion on this issue. The first question posed by the Tribunal in the case stated must accordingly be answered "No".

The issue whether on call time was working time?

[14] Regulation 2(2) was set out at paragraph [10] above. In the present case the relevant provision for consideration is regulation 2(2)(a).

[15] The concept of working time has an autonomous Community law meaning deriving as it does from the Working Time Directive EC 93/104. Article 1 of the Directive provides definitions which are included in regulation 3.1:-

> "Working time shall mean any period during which the worker is working, at the employer's disposal and carrying out his activity or duties in accordance with national laws and national practice."

[16] In Sindicato de Medicos de Asistencia Publica v. Valencia [2000] IRLR 845 ("SIMAP") the European Court of Justice pointed out that working time and rest periods are mutually exclusive. An employee is either working or is at rest, that is to say in a non-working situation. The ECJ stated:-

> "48. In the main proceedings, the characteristic features of working time are present in the case of time spent on-call by doctors in primary care teams where their presence at the health centre is required. It is not disputed that during periods of duty on-call under those rules the first two conditions are fulfilled. Moreover, even if the activity actually performed varies according to the circumstances, the fact that such doctors are obliged to be present and available at the

> workplace with a view to providing their professional services means that they are carrying out their duties in that instance . . .
>
> 50. As the Advocate General also states in point 37 of his opinion, the situation is different where doctors in primary care teams are on call by being contactable at all times without having to be at the health centre. *Even if they are at the disposal of their employer in that it must be possible to contact them, in that situation doctors may manage their time with fewer constraints and pursue their own interests. In those circumstances only time linked to the actual provision of primary care services must be regarded as working time."* (italics added)

[17] The matter was revisited by the ECJ in the case of Landeshauptstadt Kiel v. Jaeger [2003] IRLR 804 when it addressed the issue of doctors who were provided with beds in the hospitals so that they could sleep during on-call periods. The court there said:-

> "63. According to the court the decisive factor in considering that the characteristic features of the concept of working time within the meaning of Directive 93/104 are present in the case of time spent on call by doctors in the hospital itself is that they are required to be present at the place determined by the employer and to be available to the employer in order to be able to provide their services immediately in case of need. In fact, as may be inferred from paragraph [48] of the judgment in SIMAP those obligations, which make it impossible for the doctors concerned to choose the place where they stay during waiting periods, must be regarded as coming within the ambit of the performance of their duties.
>
> 64. That conclusion is not altered by the mere fact that the employer makes available to the doctor a rest room in which he can stay for as long as his professional services are not required.
>
> 65. It should be added that, as the court already held in paragraph 50 of the judgment in SIMAP, *in contrast to a doctor on standby, where the doctor is required to be permanently accessible but not present in the health centre, a doctor who is required to*

> *keep himself available to his employer at the place determined by him for the whole duration of the periods of on call duty is subject to appreciably greater constraints since he has to remain apart from his family and social environment and has less freedom to manage the time during which his professional services are not required.* Under those conditions, an employee available at the place determined by the employer cannot be regarded as being at rest during the periods of his on call duty when he is not actually carrying on any professional activities." (italics added)

[18] The Tribunal found as a fact that:-

> "The claimant was not required to be on the respondent's premises during his on-call periods: he could be at home and indeed was not required to be there continuously, as he could engage in his activities within limits". (Paragraph 4.6 of the decision).

At paragraph 2.10 the Tribunal had earlier found as a fact that "although the claimant was not bound to remain at home when on call and could engage in other activities he was limited in his activities to the need to be available to take calls and to respond to them."

[19] The Tribunal at paragraph 4.10 of its decision concluded:-

> "We take the view that an employee who is on call, but not on the employer's premises, is still working by being available and able to carry out duties. The fact that the number of calls may be substantial adds to the argument that the claimant is working while on call, but the lack of them does not change that finding: see the comments of Buxton LJ in the British Nursing Association case. It is the availability of the service which is important to the employer: the fact that a claimant may be able to do other things while on call and not actually engaged in work continuously is not the issue."

[20] Mr O'Hara argued that the Tribunal's conclusion ignored or overlooked the finding of the ECJ at paragraph 52 of SIMAP (in the passage italicised in the citation in para [16] above) which made it clear that if the doctors were

merely contactable at all times when on-call only time linked to the actual provision of primary care services was to be regarded as working time. Mr McGleenan argued that while Mr Blakley did not have to remain at home while he was on call and did not have to be at the Trust premises, he was required to remain immediately and continuously available at a place where he could work. He was employed and equipped to work on his own premises at home dealing with on-call situations.

[21] In support of his argument resisting Mr O'Hara's submissions, Mr McGleenan relied on English decisions in McCartney v. Oversley Home Management [2006] IRLR 514, Hughes v. Jones [2008] UKEAT 0159080310 and British Nursing Association v. Inland Revenue [2002] IRLR 480. In McCartney the claimant was a resident manager with tied accommodation and was required to provide 24 hour cover 4 days a week. She had to be on site within 3 minutes. In Hughes v. Jones the employee was required to live in the residential home where she worked the accommodation being provided as a term and condition of employment. British Nursing Association v. Inland Revenue was a decision about whether people were working for the purposes of the minimum wage regulations. As pointed out in Harvey on Employment Law, section A at paragraph 867/03 there is a schematic difference between the two sets of legislation and the Directive does not underpin the national Minimum Wage Regulations. Properly understood those authorities do not undermine the strength of Mr O'Hara's argument that the ECJ's conclusions show that if an employer must simply be contactable when on call only time linked to the actual provision of primary care services falls to be regarded as working time.

[22] The Tribunal's primary findings of fact do not support the Tribunal's conclusion that the whole of Mr Blakley's on-call period should be treated as working time. While he had to be contactable during the on-call period he was not required to be at home or to be on the Trust premises. While there were constraints on his freedom of action during the on-call period those constraints were not absolute and during the period of his on-call duty his situation was what the ECJ in SIMAP described as "being contactable" without being obliged to be present and available at the work-place or a place designated by the employer. Accordingly, the proper conclusion to be drawn from the primary facts is that he was only to be treated as working when called on to actually provide services during the period on call. Thus the answer to the second question in the case stated must be "No".

The issue of unlawful deductions of wages

[23] By making himself available to be contacted during the period when he was on call Mr Blakley was fulfilling a contractual obligation to be contactable. He was paid at overtime rate when he actually provided a service during that period. For the rest of the period he received an allowance initially of £375 per

week and subsequently increased pursuant to the terms of the collective agreement. This being so, no question of unlawful deductions of wages arises. This would be so whether the on-call period is treated as working time or not. Mr Blakley's claim in respect of unlawful deduction of wages was thus misconceived in any event. Mr McGleenan suggested that when one totals up the hours on call with the hours of work during the rest of the week the resultant hourly rate calculated by dividing his total remuneration by the total number of hours would result in him being underpaid under the Minimum Wages Regulations. The claim was not brought as a claim under the Minimum Wages Regulations and it is unnecessary in this appeal to comment further on a claim that was not before the Tribunal and forms no part of the case stated.

[24] Since Mr Blakley was paid his contractual entitlement and has suffered no demonstrated unlawful deduction of wages the third question must be answered "No".

Disposal of the appeal

[25] For the reasons given each of the questions posed by the Tribunal must be answered "No" and the appeal must be allowed.