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Judgment: approved by the Court for handing down | *Delivered:* **10/09/10**
*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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BETWEEN:

CLAIRE MARTIN

Claimant/Appellant;

-and-

SOUTHERN HEALTH AND SOCIAL CARE TRUST

Respondent/Appellant.

AND IN THE MATTER OF A DECISION BY AN INDUSTRIAL TRIBUNAL RECORDED ON 14 OCTOBER 2009

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Before: Morgan LCJ, Higgins LJ and Coghlin LJ

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COGHLIN LJ

[1] This is the judgment of the court.

[2] This is a case stated by an Industrial Tribunal from a decision issued on 14 October 2009 after a hearing in Belfast between 30 March and 1 April 2009. Both Ms Claire Martin ("the claimant") and the Southern Health and Social Care Trust ("the respondent") requisitioned the Tribunal to state a case and the Tribunal did so on 7 January 2010. Mr John O'Hara QC and Mr Gerry Grainger appeared on behalf of the claimant while the respondent was represented by Ms Noelle McGrenera QC and Mr Conor Hamill. The court gratefully acknowledges the assistance that it derived from the carefully constructed and detailed oral and written submissions prepared by both sets of counsel.

The background facts

[3] Many of the background facts have been agreed between the parties. The claimant is a qualified State Registered Nurse and, after a period of time working as a nurse in England and Scotland, she took up employment as a

temporary or fixed term nurse in Craigavon Area Hospital in Northern Ireland in 1993. At that time, the claimant's employer was Craigavon Area Hospital Group Trust with whom she subsequently gained permanent employment with effect from 5 October 1998. The claimant's permanent employment was initially as a staff nurse grade D but she was thereafter regraded to grade E with effect from October 2001. The plaintiff's permanent employment contract, confirmed from 27 March 2008, was to work 25½ hours per week.

[4] As part of a major re-organisation of Health and Social Services and Hospital Trusts which took place in or about April 2007 the Craigavon Area Hospital Trust was merged with a number of other Health and Social Care Trusts in the respondent trust.

[5] During the course of her professional career as a nurse the claimant's terms and conditions of employment have varied from time to time but, ultimately, her employment became subject to the terms contained within the "NHS Terms and Conditions of Service Handbook" otherwise referred to as the "Agenda for Change … Service Handbook" ("the Handbook"). The Tribunal identified a number of extracts from the Handbook conditions as being relevant;

> "**Part III: Terms and Conditions of Service**
>
> **Section 10; Hours of the Working Week**
>
> 10.1 The standard hours of full-time NHS staff covered by Agenda for Change will be 37½ hours excluding meal breaks … Working time will be calculated exclusive of meal breaks except where individuals are required to work during meals in which case such time shall be counted as working time.
>
> **On-Call staff**
>
> 27.13 Staff who are on-call, ie. available for work if called upon, will be regarded as working from the time they are required to undertake any work-related activity. Where staff are on-call but otherwise free to use the time as their own, this will not count towards working time.
>
> **Rest breaks**

> 27.15 Where the working day is longer than six hours, all staff are entitled to take a break of at least 20 minutes. Rest breaks must be taken during the period of work and should not be taken either at the start or the end of a period of working time. Employees should be able to take this rest break away from their work station. In exceptional circumstances and by agreement with the worker, where a rest break cannot be taken the unused entitlement should be claimed as a period of equivalent compensatory rest. Line managers should ensure that provision is made to allow compensatory rest to be taken. Existing local arrangements which already provide for breaks of more than 20 minutes (e.g. lunch breaks) will meet the requirements of this provision and no further action will be needed."

[6] During the period with which the Tribunal was concerned the claimant was working a night duty shift in the recovery ward of Craigavon Area Hospital. That shift lasted for 11 hours and 15 minutes commencing at 8.45 pm and concluding at 8.00 am on the following day. The procedures and practices then in force at that hospital entitled her to unpaid rest breaks amounting to a total of one hour and fifteen minutes. Thus, during her ten hours of paid employment on the night duty shift she was entitled to two unpaid breaks, one of 45 minutes and the other of 30 minutes.

[7] The claimant accepted that, owing to the nature of night shift working in the Health Service, her rest breaks had to be taken on the hospital premises. To that end, the nurses at Craigavon Area Hospital used a room that was a short distance down the adjacent corridor from the recovery ward. That room had originally been designated "Surgeons Rest Room" but its use over time had changed to that of the nurses rest room. The room contained facilitates for making tea. Nurses could also take breaks at what was referred to as the "quiet end" of the recovery ward and in an area adjacent to the hospital canteen. The nurses rest room was situated in fairly close proximity to the recovery ward and, for the purposes of its decision, the Tribunal recorded that the claimant spent the majority of her rest time in the nurse's rest room, the recovery ward being regarded as the claimant's work station.

[8] Both parties agreed that there could be, and often were, interruptions to the claimant's work breaks although there was some debate as to the degree and frequency of such events. Ultimately, the Tribunal was not persuaded that the claimant's estimate that some 50% of her work breaks were interrupted was inaccurate. The cause of the interruptions could be quite varied ranging from "significant medical emergencies" to more routine requests for medical equipment. The claimant might also be called upon to

respond to telephone calls and those calls could also range from the more serious to more mundane matters. The Tribunal specifically noted evidence that any "high dependency patient" in the recovery ward had to be attended by at least two qualified members of nursing staff and that the availability of the claimant to be effectively "on call" during her rest breaks appeared to have assisted the respondent in ensuring compliance with its obligations.

[9] The hospital maintained a book referred to as a "Time Owing Book" in which, amongst other matters, a nurse could record the fact that her rest break had been interrupted on account of some medical emergency. As a matter of practice compensatory time would be afforded to a nurse who had recorded such an interruption in the book. A witness called on behalf of the claimant, Staff Nurse Wright, gave evidence to the Tribunal about a shortage of theatre nurses which had resulted in her recording a substantial amount of time owing. Staff Nurse Wright confirmed that she had been entitled to take time off in lieu as and when the opportunity arose. The claimant herself accepted that she had been fully compensated by time in lieu for "every minute" that she had recorded in the time owing book.

[10] In 2006 the claimant raised a formal grievance based upon the argument that, since she was not allowed to leave the hospital premises, her rest breaks resulted in her being effectively "on call" periods for which she should be paid. Both that grievance and the claimant's subsequent appeal were determined in favour of the respondent and the claimant appears to have taken no further action at that time.

[11] On the evenings of 21 and 22 February 2008 the claimant was again working on night duty in the recovery ward and on both evenings she was able to avail of uninterrupted work breaks by arrangement with other staff. However, on both evenings the claimant spoke to the Night Sister/Bed Manager complaining that she was concerned about the possible risk of interruption to her breaks due to the nature of the work. In such circumstances, the claimant requested that cover should be provided so that she could be assured that her breaks would not be interrupted. She was informed by the Night Sister/Bed Manager that, since the hospital was busy at the material time, such cover could not be guaranteed. As a consequence of the failure to provide the guarantee that she had requested the claimant then claimed payment for the breaks upon the ground that they constituted "working time". The respondent refused to authorise such payment and the claimant again instituted the grievance procedure. The stage 1 grievance procedure failed and the claimant appealed but the appeal was once again determined in favour of the respondent. The claimant then initiated the proceedings before the Tribunal.

The Legislative Framework

The Directive

[12] Council Directive 93/104/EC of 23 November 1993 (subsequently amended by Directive 2003/88/EC but not in any material respect) was adopted pursuant to Article 118a of the Treaty to ensure a better level of protection of safety and health of workers and dealt with certain aspects of the organisation of working time. Article 2 of the Directive contained the following definitions:

> "Article 2
>
> Definitions
>
> For the purposes of this Directive, the following definitions shall apply:
>
> (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/or practice;
>
> (2) Rest period shall mean any period which is not working time;"

Article 3 dealt with "daily rest" providing that Member States shall take the measures necessary to ensure that every worker is entitled to a minimum daily rest period of 11 consecutive hours per 24-hour period. Article 4 under a separate heading "Breaks" provided as follows:

> "Article 4
>
> Breaks
>
> 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."

[13] Article 17 of the Directive dealt with "Derogations" providing that Derogations may be adopted by means of laws, regulations, administrative provisions or collective agreements from Articles 3, 4, 5, 8 and 16, inter alia, in the case of activities involving the need for continuity of service particularly with regard to services relating to the reception, treatment and/or care provided by hospitals or similar establishments. The Directive stipulated that such derogations were allowed on condition that compensating rest periods should be granted to the workers concerned or, in exceptional cases where it was not possible for objective reasons to grant such periods, the workers concerned were to be afforded appropriate protection.

The Regulations

[14] The Working Time Regulations (Northern Ireland) 1998 ("the Regulations") were the means chosen to implement the Directive. Article 2 deals with the interpretation of the Regulations and includes the following definitions in sub-paragraph (2):

> "(2) In these Regulations –
>
> 'rest period', in relation to a 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 a worker, means –
>
> (*a*) any period during which he is working, at his employer's disposal and carrying out his activity or duties.
>
> (3) In the absence of a definition in these Regulations, words and expressions used in particular provisions which are also used in corresponding provisions of the Working Time Directive … have the same meaning as they have in those corresponding provisions."

Articles 10 and 11 of the Regulations provide, respectively, for daily and weekly rest periods and generally mirror the provisions of the Directive.

[15] "Rest Breaks" are dealt with in Article 12 of the Regulations which provides as follows:

> "12.-(1) Where an adult worker's daily working time is more than six hours, he is entitled to a rest break.

> (2) The details of the rest break to which an adult 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 for not less than 20 minutes, and the worker is entitled to spend it away from his work station if he has one."

Special cases are dealt with by Article 21 which, insofar as is relevant, provides as follows:

> "21. Subject to Regulation 24, Regulations 6(1), (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 similar establishment …"

Article 24 provides for equivalent periods of compensatory rest to be taken, wherever possible, in cases in which the application of the Regulations is excluded, inter alia, by Regulation 21 or modified or excluded by means of a collective agreement or workforce agreement.

The Decision of the Tribunal

[16] The Tribunal gave careful consideration to the issue as to whether the "rest breaks", the subject of these proceedings, could properly be regarded as "on call" time as discussed in a number of authorities including, in particular, the ECJ cases of Sindicato de Medicos de Asistencia Publica (SIMAP) v Constelleria de Sandidad eY Consumo de la Generalidad Valenciana [2000] IRLR 845 and Landesshauptstadt Keil v Jaeger [2003] IRLR 804 ("the SIMAP and Jaeger cases"). Having done so, the Tribunal concluded that, in reality, the three components necessary to constitute working time, namely, (*i*) working, (*ii*) at her employer's disposal and (*iii*) carrying out… activity or

duties, were present during the claimant's rest breaks in a manner that could not be distinguished from the "on call" doctors in SIMAP and Jaeger. The Tribunal accepted that there was clear and largely uncontroverted evidence of a material risk that the claimant's rest breaks would be interrupted and, in such circumstances, in the context of the domestic and ECJ jurisprudence, the Tribunal concluded that the claimant's "rest breaks" could not, in practical terms, be differentiated from "on call" working time.

[17] The Tribunal then proceeded to examine the significance of Regulation 21(*c*). In the course of its deliberations the Tribunal had regard to a number of domestic authorities dealing with the relevance of Regulation 21(*c*) and, in particular, the case of Gallagher and Others v Alpha Catering Services Limited [2005] IRLR 102. Having done so the Tribunal expressed its findings in the following terms at paragraph 23 of the decision:

> "23. In this case, the Tribunal has noted that there was little distinction between the workers activities and the employer's activities, both necessitating the provision of care services in a hospital environment and the need to provide for continuity of service in relation to the treatment and care provided to patients. However, as was observed in Gallagher, certainly the exemption provided for by Regulation 21C of WTR (Working Time Regulations) was intended to be applicable to the activities of the worker. That much is not in contention. However, did the claimant in her particular situation fall within the exemption? According to WTR, if the provisions of Regulation 24 are met, and an equivalent period of compensatory rest is afforded, Regulation 12 of WTR is deemed complied with. Certainly, the facility existed, formally, to enable the claimant to take equivalent compensatory rest breaks if there was an interruption of any rest break. There was nothing preventing the claimant from claiming compensatory rest. This has been commented upon by Mr Hamill in his submission; if she chose not to do so, that was a matter for her. Looking at all of this, the respondent in the Tribunal's determination had complied with WTR insofar as the respondent had put into place a compensatory rest system for those workers to whom the WTR Regulation 21(*c*) exemption applied."

[18] Accordingly, on the basis that the claimant was a health care professional working in a hospital environment engaged in activities that did involve the need for continuity of service relating to the reception, treatment

or care provided by hospitals the Tribunal concluded that Regulation 21(*c*) applied to her situation.

Discussion

[19] It is common case that during the shifts that are the subject of these proceedings the claimant enjoyed uninterrupted breaks and that on all previous occasions she had been afforded satisfactory compensatory rest in return for any breaks that had been interrupted. However, the primary submission advanced by the claimant is that, because they could not be guaranteed to be uninterrupted, the periods afforded to her by the respondent as "rest breaks" should properly be regarded as "working time". In support of that submission the claimant relies upon the analogy with "on call" duty discussed by the ECJ in SIMAP and Jaeger and, more recently, by this court in Blakley v South Eastern Health and Social Services Trust [2009] NICA 62. That submission appears to have found favour with the Tribunal which recorded, at paragraph 18 of the decision that:

> "The claimant, as would be any health service professional, was bound by the code of professional conduct and ethics of their profession as well as by her contractual terms. That reality therefore dictated that the claimant as a health service professional participated in a working arrangement that rendered her readily available throughout the rest breaks to deal with work-related matters, both great and small in terms of clinical significance."

Combining the risk of interruption with the fact that the claimant was required to remain on the premises the Tribunal reached the conclusion that, during the rest breaks, the claimant was effectively "on call" and, in accordance with the ECJ decisions, the breaks should be regarded as "working time".

[20] In our view it is important to focus upon the purpose and conceptual structure of the Directive together with the implementing Regulations. The Tribunal correctly referred to the need to have regard to the purpose and intent lying behind the Directive and the Regulations. The Directive has its origin in Article 118(*a*) of the Treaty which requires Member States to pay particular attention to encouraging improvements, especially in the working environment, as regards the health and safety of workers and to set as their objective the harmonisation of conditions in that area while maintaining the improvements made. The recitals include the following:

> "Whereas, in order to ensure the safety and health of Community Workers, the latter must be granted

> minimum daily, weekly and annual periods of rest and adequate breaks; whereas it is also necessary in this context to place a maximum limit on weekly working hours;"

Periods of rest and adequate breaks are dealt with separately in the body of the Directive. The definitions of working time and rest period contained in Article 2 are mutually exclusive and minimum periods of daily and weekly rest are laid down in Articles 3 and 5.

[21] However, both the Directive and Regulations acknowledge that it may not be possible to guarantee uninterrupted rest breaks for workers engaged in certain activities and, in particular, those that concern services relating to the reception, treatment or care provided by hospitals or similar establishments. Rather than lay down a similar minimum period for rest breaks Article 4 sets out a more pragmatic requirement in respect of rest breaks where the working day is longer than six hours with a margin of appreciation afforded to collective agreements or agreements between two sides of industry or national legislation. It is essential to recognise that the function of the rest break is to provide an effective safeguard for the health and welfare of workers engaged upon occupations in which the working day exceeds six hours. In order to properly discharge that function it is important to reinforce the need for the rest break to be uninterrupted. That is achieved by Regulation 12(3) and reflected in paragraph 27.15 of the Handbook which emphasises that the break may only be omitted in "exceptional" circumstances by agreement with the worker who should claim compensatory rest. The manner in which the rest break is perceived as being integrated into a working day longer than six hours is illustrated by the same paragraph of the Handbook which provides that:

> "27.15 Where the working day is longer than six hours, all staff are entitled to take a break of at least 20 minutes. Rest breaks must be taken during the period of work and should not be taken either at the start or at the end of the period of working time. Employees should be able to take this rest break away from their work station."

[22] We consider that the Tribunal fell into error in concluding that since, in practice, there was a significant risk that they might be interrupted the claimant's rest breaks consequently should be regarded as working time by analogy with the "on call" duties discussed in the SIMAP and Jaeger decisions. Those cases were concerned with periods of duty that were supplementary to but separate from the doctors' standard working hours and

the decision for the ECJ was whether, on the facts, the restrictions and constraints to which the "on call" doctors were subject were sufficient to render all of the duty working time or only those periods in which they were actively engaged in carrying out their medical duties. In Gallagher no attempt had been made to formally provide for rest breaks, there was no relevant collective or workforce agreement and the tribunal found as a fact that the employees were at all material times at the employer's disposal. In such circumstances it is not altogether surprising that the Court of Appeal rejected the employers' submission that 'downtime', which was fluctuating and unpredictable both in occurrence and extent, could 'retrospectively' and fortuitously constitute a rest break within the meaning of Regulation 12.

[23] However, in this case the arrangements between the employer and the employees, which had been developed to implement the Regulations and paragraph 27.15 of the collective agreement negotiated nationally with the unions most affected, were intended to ensure that, in the interests of safety and welfare, employees should enjoy rest breaks that were uninterrupted subject to "exceptional circumstances" arising from the demand for continuity of the services provided. In our view the provision of such breaks is conceptually quite distinct from "on call" duty in the course of which the employee remains "at the disposal of" the employer. To equate rest breaks with on call duty might well result in some degree of additional remuneration but would effectively destroy their basic purpose as means of ensuring that shifts in excess of six hours could be worked without placing the health and safety of the staff or patients in jeopardy. The evidence gives rise to some concern that the respondent may have permitted practices to develop with the potential to mitigate the health and safety function of the rest break such as requiring attendance to routine telephone calls and routine requests for medical equipment to impinge on the period but no doubt that can be rectified by recourse to the wording of the Regulations and the Handbook.

[24] The Tribunal clearly gave anxious consideration to the question as to whether Regulation 21(*c*) applied to the factual circumstances of this case and, in the course of doing so, it focussed on the duties of the claimant rather than the activities of her employer in accordance with the decision in Gallagher. Having done so, the Tribunal concluded that the Regulation did apply and we consider that was a conclusion that the Tribunal was entitled to reach and not one that was either contrary to the evidence or unsupported by any evidence or otherwise perverse – see Terence Leslie De Winne v Belfast City Council [1993] NIJB 5.

[25] Accordingly, the questions stated by the Tribunal should be answered as follows:

"(*a*) No.
(*b*) No.

(*c*) No.
(*d*) No.
(*e*) No.
(*f*) Yes."