



**EMPLOYMENT TRIBUNALS (SCOTLAND)**

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**Case No: 4102170/2020 (V)**

**Heard by CVP on 19 and 20 October 2020**

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**Employment Judge J Young  
Tribunal Member J McCullagh  
Tribunal Member D McFarlane**

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**Mr James Campbell**

**Claimant  
In person**

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**Forth Valley Health Board**

**Respondent  
Represented by:  
Mr R Davies,  
Solicitor**

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**JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

The unanimous judgment of the Tribunal is:-

(1) to find that the complaint presented to it under Regulation 5 of the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000 is well-founded, and

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(2) to order the respondent to pay to the claimant compensation in the sum of Nine Hundred and Fifty Six Pounds (£956).

## REASONS

1. In this case the claimant presented a claim to the Employment Tribunal complaining of an infringement of his rights under the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000 (“the Regulations”). The essence of his complaint was that as a part-time worker he did not receive a paid break of 15 minutes in the morning compared to a full-time worker. The respondent denied that there had been any infringement of rights under the Regulations. Breaks were determined on length of shift. The claimant was contracted to work an average of 16 hours per week and when he worked 4 hour shifts was not entitled to any break either under contract or on a “complimentary” basis.
2. There was agreement that any infringement of the rights of the claimant would occur in the period 2 April 2018 (when the claimant commenced employment with the respondent) and 15 May 2020 (when he along with others was granted a complimentary paid morning break of 15 minutes when working a 4 hour shift).
3. The issues for the Tribunal at the final hearing were:-
  - (i) Whether the claimant was treated less favourably than a comparable full-time worker in relation to not having a morning break when he worked four-hour shifts between 2 April 2018 and 15 May 2020.
  - (ii) If so, whether this was on the grounds that he was a part-time worker.
  - (iii) If so, whether this treatment was justified on objective grounds.
  - (iv) If the complaint is well-founded what amount of compensation it would be just and equitable to award the claimant.

## 25 Documentation

4. The parties had helpfully liaised in providing the Tribunal with a Joint Inventory of Productions for the hearing paginated 1-89 (J1-89). That included a Statement of Agreed Facts at J19/20.

## Evidence

- 30 5. At the hearing the Tribunal heard evidence from the claimant who was employed as a Phlebotomist by the respondent; Joanne Noble also a

Phlebotomist with the respondent; Gayle Hutchings, Senior Charge Nurse with the respondent with responsibility for the management of the Day Care, Phlebotomy and Outpatient Antibiotic Treatment Services; and Alison Howitt, Operational Manager for General Medicine, General Surgery and Medical Services with the respondent.

6. From the documents produced, relevant evidence heard and admissions made the Tribunal were able to make findings in fact on the issues.

### **Findings in fact**

7. The respondent is responsible for the provision of a large number of health services to a population of around 288,000 across Central Scotland. The claimant was employed by the respondent as a Phlebotomist at Forth Valley Royal Hospital in the period 2 April 2018 until 27 July 2020 when he resigned. He had previous employment with Scottish Ambulance Service for approximately 34 years.
8. The work of the claimant was to take blood samples from patients in in-patient areas of Forth Valley Royal Hospital. During his period of employment there were approximately 22 Phlebotomists employed on varying shifts and hours of work. Having regard to the custom and practice of the respondent in relation to workers employed by them, a full-time worker works 37.5 hours per week. One colleague of the claimant (MMcB) was a full-time worker on a shift which lasted eight hours from 07:30 until 15:30 with a 30 minute unpaid break for lunch and a 15 minute paid “complimentary break” in the morning.
9. The respondent operated a six-week rota for the claimant and his colleagues and within that rota there were shifts of varying lengths. The claimant was contracted to work an average of 16 hours per week. On weekdays he worked four-hour shifts between 07:30 and 11:30 without a break. He also worked two weekends within every six-week rota. On those weekends he worked both Saturday and Sunday. The working hours on those days comprised a six-hour shift between 07:30 -13:30. When working this shift of six hours the claimant and colleagues who also worked a 6 hour shift were granted a 20 minute complimentary break.

10. The unpaid break of 30 minutes for lunch and 15 minute complimentary paid break in the morning for a full time worker also applied to another colleague of the claimant (MR) who worked 35 hours a week and so was a part-time worker. She worked shifts which were 7.5 hours long each day (inclusive of breaks). She was not included in the weekend working.
11. A further colleague of the claimant (GC) worked 07:30-14:00 Monday to Thursday and 07:30-11:30 on Friday as a part-time worker. During Monday-Thursday shifts which comprised 6.5 hours she was entitled to a 30 minute unpaid break plus the complimentary morning paid break of 15 minutes. The claimant's position was that this colleague (GC) was also granted a 15 minute break on a Friday shift when she worked a four hour shift between 07:30-11:30. This was denied by the respondent but for reasons after explained the Tribunal found that GC did take a break of 15 minutes on a Friday morning during her shift and that the respondent was aware of her taking that break.
12. The claimant was paid at the hourly rate of £10.54 per hour. The 15 minute paid break in the morning for a full-time worker and certain part-time workers and the 20 minute break for the claimant on a Saturday/Sunday were "complimentary breaks" meaning that there was no contractual or statutory entitlement but were allowed by the respondent. It was explained by Ms Hutchings that the system operated by the respondent was to allow a "complimentary break" to those who worked full-time (37.5 hours per week) and to those part time workers whose shift length was at least six hours if working part-time. Those who worked a four-hour shift were not entitled to the "complimentary break". That had been the system when she became responsible for the Phlebotomy service in December 2015. The cut off for her for any break entitlement was six hours. If a Phlebotomist (part time or full time) worked for that period then there would be granted a 15 minute complimentary break. She denied that GC took a break on a Friday when she worked a four-hour shift.
13. The issue of morning breaks being granted to certain co-workers but not to the claimant became a source of irritation for him and he raised a concern with Ms Hutchings by e-mail of 8 October 2019 (J29/30). He indicated in that e-mail that his concern was "rest breaks between the hours of 09:15

and 10:00” which it appeared were only available to the “full time staff, (GC) included”. He indicated that allowing that break only to the “full time staff” was unacceptable and was favouritism. He wished breaks to be afforded to all Phlebotomists.

- 5 14. The claimant was advised that the provisions regarding breaks were not to be revised and thereafter he invoked the Grievance Procedure. Various matters were raised in that procedure but so far as breaks were concerned the grievance was put as:-

10 “Part time staff are undervalued and unsupported and feel they are not allowed to have a rest during their working hours. Full time staff will take two breaks in the day the first break is approximately 0900 in the peak of activity. Breaks should be looked at to ensure that all staff are treated in a fair and consistent manner.” (J32)

15 A document entitled “Action Plan” was developed in relation to the issues raised in the grievance (including breaks) consequent on an initial meeting on or around 22 October 2019.

15. A further meeting took place on 23 December 2019 on the grievances raised inclusive of the issue of staff breaks. At the meeting the claimant was accompanied by his representative and his colleague Joanne Noble.
- 20 16. At that time the claimant passed to Ms Howitt a letter intimating a “retrospective claim” for working 15 minutes each weekday from 2 April 2018. In this letter he indicated that “full time staff were taking a fifteen min morning break” which he considered was “unofficial but discovered in October 2019 that our line manager Gayle Hutchings condones this break
- 25 to the full time staff and another member of staff that works six hours Mon-Thur and four hours Friday. Under NHS terms and conditions staff working 7.5 hours are awarded one 30min unpaid break between the third and fifth hour, they are not entitled to a paid break in the morning in addition to this. This paid break should be available to all staff or no staff, by only affording
- 30 this to the full time staff and a member of staff who works six hours shows blatant favouritism. This amounts to open discrimination towards the staff who work four hours.”

17. Joanne Noble had also raised the issue of breaks with the respondent management. She worked 20 hours per week having commenced employment on or around 24 April 2018. Her working hours were 07:30-11:30 Monday-Friday and 7:30-1:30pm if on the weekend rota. She worked one weekend in six. She was not granted a break in the morning if working 07.30- 11.30. She raised the issue of breaks with Ms Hutchings. She also worked with GC who she considered was “classed as full time in the way management treated her” albeit she was a part-time worker on six-hour shifts Monday/Thursday and a four-hour shift on a Friday.
18. Her observation of matters was that MMcB (full-time), MR (35 hours a week) and GC (28 hours per week) all took breaks between 9:15 and 10:00am approximately each morning. She had witnessed this on various occasions when she was looking for the “page holder”. Between 9:15am/10:00am she would usually find those colleagues in the tearoom. When she first commenced work she thought that there was an entitlement for a break and took a break along with full-time staff but then understood she was not allowed a break and ceased. It was also explained that part of the equipment supplied to Phlebotomists was a computer on their “trolley” to “sign on and off” and to plot the number of bloods taken with print-off labels then being attached to the phials for testing by the lab. That included an “audit button” which would display the name of the colleague and number of bloods taken by that individual. She advised that for her “personal development” she would utilise that screen to monitor her progress but would also be able to observe the activity of others. From that she was able to observe that MMcB MR and GC took regular morning breaks each weekday. She spoke to Ms Hutchings in July/August either 2018 or 2019 about this matter but no action was taken. She also advised Alison Howitt at the grievance meeting of 23 December 2019 of this issue.
19. Ms Hutchings advised that GC being on a four-hour shift on a Friday should not take a break and denied knowing that she did take a break but agreed that she had not carried out her own investigation into that matter. Ms Howitt relied on information from Ms Hutchings on the issue of breaks and had no knowledge of her own as to whether or not GC took a break on a Friday but agreed the assertion had been made.

20. The claimant had obtained information of bloods taken by Phlebotomists over the period 3 February-7 February 2020 (J46/68). He had plotted that information showing per day the times at which blood had been taken by individual Phlebotomists and the times at which those bloods had been taken (J69/70). This showed that Monday-Friday (3 February – 7 February 2020) breaks had been taken by MMcB, MR and GC for periods of around 45 minutes/60 minutes each morning between 09/10:15 each day. The information showed that MR and GC who it was acknowledged worked together, took breaks together. In particular, GC along with MR took a break on Friday 7 February 2020 between 9:24 and 10:17. Ms Hutchings while not acknowledging that she was aware GC took a break at that time accepted that the information provided “looked as if it was a break”.
21. It was put to Ms Hutchings that she used similar information as an audit tool to monitor performance of Phlebotomists. She denied that this information was used for that purpose but only to record which individual had taken bloods in the event of any issue arising on bloods taken which would require investigation.
22. Subsequent to the meeting on grievances of 23 December 2019 it was intended that a further meeting be held in February/March 2020 to review the position but a meeting arranged for February 2020 required to be cancelled due to the restrictions imposed by the Covid pandemic.
23. Ms Howitt then prepared her outcome on the grievances raised which were contained within a letter of 23 April 2020 sent to the interested parties in May 2020 (J86/89). So far as breaks were concerned it was stated that to ease concerns over workload all staff had been advised that no breaks should be taken before 11am and “Whilst not an entitlement, I can now confirm that with immediate effect, all staff will be granted a 15 minute break after 11am to ensure equity and fairness. Any staff working more than 6 hours are entitled to a minimum of 20 minutes each day under Working Time Regulations, which is usually an unpaid lunch break.” Accordingly, as from date of intimation of the letter (15 May 2020) all the Phlebotomists were granted a 15 minute paid break in the mornings regardless of the length of shift.

24. The claimant had assessed the compensation he sought in terms of an e-mail to the respondent's representative on 13 July 2020 wherein he advised that he claimed a "financial award based on 15 minutes for each day worked since my commencement of employment within the department on the 2nd April 2018 to 15th May 2020 ...." which "equates to 363 days x 0.25 hours x £10.54 (Hourly rate) = £956". He advised that he had excluded any sickness period, holidays taken and weekends worked given that on those weekends worked a 20 minute break was allowed in the morning.

### **Submissions**

10 *For the claimant*

25. The claimant submitted that the respondent had showed more favourable treatment to full-time staff and so had breached the Part-time Workers Regulations. He did not believe that the treatment could be justified on objective grounds. There was no legitimate reason why the part-time workers were treated differently and a blind eye had been turned to breaks. There was no particular need for extra breaks to be granted to full-time workers and the part-time workers were thus being treated less favourably.

26. While it was said that the reason for non-grant of breaks to part-time workers was based on length of shift it was the case that GC was allowed a break when she worked four hours on a Friday. As a worker who worked four hours a day he was a part-time worker and he was being treated less favourably. Management should have ensured that everyone was treated equally and that the same terms and conditions should apply.

27. The fact that breaks had been allowed as from 15 May 2020 on the basis of "equity and fairness" proved his case. He submitted that was an admission of guilt.

*For the respondent*

28. Mr Davies for the respondent indicated that the issues were:-

- Whether the claimant had been treated less favourably than a comparable full-time worker in not having a morning break when he worked four-hour shifts prior to 15 May 2020.



- If so, whether that was on the grounds that he was part-time.
- If so, whether that treatment was justified on objective grounds.

29. The claimant had not given notice of any claim about length of breaks being variable or the time of day in which breaks were taken.

5 30. It was submitted that for his claim to succeed the difference in treatment must be solely due to the claimant's part-time status and that must be the respondent's subjective reason for the treatment (***Gibson v Scottish Ambulance Service*** EATS/0052/04 as approved in ***McMenemy v Capita Business Services Ltd*** [2007] IRLR 400). While it was appreciated that  
10 certain English cases had indicated that part-time status may be "one of the reasons for less favourable treatment" or "the effective or predominant cause" the Scottish authorities should be preferred in requiring that the "sole reason" was part-time status.

15 31. The claimant in this case accepted that he got a break when he worked a six-hour shift at weekends. However he did not get a break when he worked a four-hour shift during the week. Thus his case must be that the less favourable treatment is that when working a four-hour shift he did not get a break whereas a full-time comparator did get such a break.

20 32. It was submitted that the reason why the claimant did not get a break in the morning was not because he was part-time but because of his shift length - namely it being of four hours duration.

25 33. Thus it was submitted the claimant's case must be that when he was working four-hour shifts the less favourable treatment was that he would not get a break. But the claimant immediately ran into problems on that basis because there was no full-time comparator who worked a four-hour shift. The submission was that the comparator (full-time worker) who worked an eight-hour shift was not a "comparable full-time worker". Her circumstances were materially different because of her shift length. Therefore it was submitted that the claim fell at the first hurdle as the claimant was not  
30 treated less favourably than a comparable full-time worker.

34. While the claimant may have perceived other colleagues as being "treated as full-time workers" that was of no moment. The question was whether

they met the statutory test. Only issues affecting MMcB as a full-time worker were relevant.

- 5 35. So far as the four-hour shift work by GC on a Friday was concerned there was no evidence that this was condoned by management or that she took that break when she worked on a Friday. Neither Ms Howitt nor Ms Hutchings had day-to-day contact such that they could observe this.
36. Those who worked a six-hour shift did get the break which would show that the overriding factor as to whether you got a break or not was shift time rather than whether or not an individual was a part-time worker.
- 10 37. That was the clear reason given by Ms Hutchings. She had not created this system but she practised the custom.
38. So far as the grievance decision by Ms Howitt was concerned it was submitted that the breaks had not been put in place because of any discrimination and any implied acceptance of guilt was rejected.
- 15 39. If the “reason why” was part-time status then the claimant and his part-time colleagues would probably not have got the break when they worked the longer shift. The reason for the break was not because of part time working but because of shift length.
40. In so far as there was any allegation of colleagues taking morning breaks of up to an hour then that was irrelevant as regards this claim. The claim of which notice had been given was specifically about the fact that morning break was taken by a full-time comparator when the claimant did not get any break. Thus there was no relevance to be attached to lengthy breaks (if it was established that such breaks were taken).
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- 25 41. The Tribunal was invited to conclude that the claimant was not treated less favourably than a comparable full-time worker in relation to not receiving their morning break when he worked a four-hour shift.
42. Even if he was then having regard to the subjective reason of the respondent this was not on the ground that he was part-time but because he worked a shift of a particular length i.e. four hours. Those working longer shifts (six hours) did receive a morning break.
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43. If compensation were to be awarded then there was no acknowledgement that the method of computation by the claimant was “just and equitable”. It was agreed that his gross hourly rate ran at £10.54 per hour. However, no alternative proposal as to remedy was proffered.

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## Conclusions

### Factual issue

44. A factual dispute referred to in the findings concerned whether GC who was on a four-hour shift on a Friday was able to take with the knowledge of her manager a 15 minute paid break on a Friday. The position of the claimant was that the respondent was aware of this and the Tribunal concluded on the evidence heard that was the case. That assessment was made on the following considerations:-

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- (i) Ms Hutchings agreed GC worked alongside her colleague MR who was one of those who had been granted a morning break Monday-Friday each week given her working hours. The evidence from the claimant was that GC joined that break each day and Friday was no exception. It seemed likely to the Tribunal that as MR and GC worked together they would take a break together and that would include a Friday.

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- (ii) There was support for that view from the information provided at J46/68 and the summary sheet at J69/70. This showed that on Friday 7 February 2020 GC and MR apparently enjoyed a break around 9:24/10:17. While that information was limited to one week in February 2020 it did support the claimant’s position.

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- (iii) Ms Hutchings agreed in evidence that the audit information summarised at J68/69 would appear to confirm that GC took a break along with MR on the Friday of that week.

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- (iv) Ms Noble advised that she was aware of GC taking a break along with others inclusive of a Friday from her own observations. She saw her in the tea room. Also in using the laptop on her trolley for her own “personal development” she “could not help but see what others were doing” and that enabled her to see if colleagues were engaged in

taking blood at all times of the day. While she indicated that she could not say that “every day they were all off at the same time” her observation was that this happened on a regular basis.

5 (v) This issue of breaks for some and not others was clearly an irritant to Ms Noble and the claimant. Ms Noble indicated that she had advised Ms Hutchings of GC taking a break inclusive of a Friday and that she had also advised Ms Howitt of that position.

10 (vi) The claimant had raised the issue of GC taking a break with Ms Hutchings and Ms Howitt. The claimant’s letter of 8 October 2019 (J29/30) indicated that breaks were being taken by “full time staff (GC) included”. He had been told (as Ms Noble had been told) that such breaks were “not for discussion”. The assertion to Ms Howitt within the letter of 23 December 2019 (J37) indicated that the breaks to “full time staff and another member of staff that works six hours Mon-Thur  
15 and four hours Friday” were being taken and this was condoned by Ms Hutchings. It was acknowledged by Ms Hutchings that she had made no investigation into that claim. Neither had Ms Howitt made any independent investigation.

20 45. From that information the Tribunal took the view that the weight of evidence preferred the conclusion that GC did take a break on a Friday albeit working a four-hour shift and that Ms Hutchings was aware of the position but turned a blind eye to the break being taken.

### **Legal framework**

25 46. The terms of the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000/1551 include the following terms:-

#### **“2.- Meaning of full-time worker, part-time worker and comparable full-time worker**

30 ... (4) A full-time worker is a comparable full-time worker in relation to a part-time worker if, at the time when the treatment that is alleged to be less favourable to the part-time worker takes place—

(a) both workers are—

(i) employed by the same employer under the same type of contract, and

(ii) engaged in the same or broadly similar work having regard, where relevant, to whether they have a similar level of qualification, skills and experience; and

5 (b) the full-time worker works or is based at the same establishment as the part-time worker or, where there is no full-time worker working or based at that establishment who satisfies the requirements of sub-paragraph (a), works or is based at a different establishment and satisfies those requirements.

10 **5. – Less favourable treatment of part-time workers**

(1) A part-time worker has the right not to be treated by his employer less favourably than the employer treats a comparable full-time worker—

15 (a) as regards the terms of his contract; or  
(b) by being subjected to any other detriment by any act, or deliberate failure to act, of his employer.

(2) The right conferred by paragraph (1) applies only if—

20 (a) the treatment is on the ground that the worker is a part-time worker, and  
(b) the treatment is not justified on objective grounds.”

Reg 8(7)(b) – the Tribunal can order just and equitable compensation.

**Decision**

47. Essentially the Regulations make it unlawful for an employer to treat part-time workers less favourably than their full-time colleagues with regard to their terms and conditions of employment, unless the treatment can be justified on objective grounds. The right applies only if the treatment is on the ground that the worker is a part-time worker. There was no dispute that the claimant in this case was a part-time worker. There was no dispute that a comparable full-time worker was someone who worked 37.5 hours per week. Neither was there any dispute that the claimant worked on the “same type of contract” as his full-time comparator and that he was “engaged in the same or broadly similar work having regard, where relevant, to whether

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they have similar level of qualification, skills and experience” – Regulation 2(4).

48. There has been disagreement within the case law as to whether Regulation 5(2)(a) requires a part-time worker to show that his or her part-time status was the **sole** reason for the treatment complained of, or whether it is sufficient for it to simply be one of the reasons for that treatment. The position in England and Wales is that for a claim to succeed under these Regulations part-time work must be the effective and predominant cause of the less favourable treatment complained of but need not be the only cause – **Carl v University of Sheffield** [2009] ICR 1286. However in Scotland the EAT and Court of Session have held that in order to fall within Regulation 5(2)(a) less favourable treatment must be on the sole ground of part-time status **Gibson v Scottish Ambulance Service** EATS0052/04 and **McMenemy v Capita Business Services Ltd** [2007] IRLR 400.

49. In this case it was not necessary to determine which approach was to be preferred as the submission was that the only reason for the claimant being denied the “complimentary break” of 15 minutes in the morning was because he worked four-hour shifts not because he was a part-time worker. The submission was that the defining characteristic as to whether or not a complimentary break was granted was the length of the shift. If a worker worked four hours or less in a shift then there was no entitlement to a break. Those who worked above that (being in this case six hours or more) were entitled to the complimentary break.

50. The Tribunal consider this submission circular and not well-founded. It seemed to undermine the purpose of the Regulations namely to protect part-time workers from less favourable treatment. A part-time worker by definition was going to work less hours than a full-time comparator. It may be that within the part-time working regime different workers would work different shifts of varying length but they were all part-time workers. It seemed to the Tribunal that a distinction could be made on length of shift to provide objective justification under Regulation 5(2)(b) as to why there was less favourable treatment rather than indicating that part-time working was not the reason for the less favourable treatment. The less favourable treatment only arose because the claimant in this case worked less hours

than the full-time comparator. Certainly the length of that shift might become important as to whether or not a break was being granted but it did seem to the Tribunal that was a matter of “objective justification” rather than an assertion that the reason for the less favourable treatment had nothing to do with the claimant being a part-time worker.

51. Given that from May 2020 those who worked a four-hour shift were to be granted a morning break of course meant that no “objective justification” could be proffered in respect of the period prior to May 2020. The circumstances before and after 15 May 2020 were the same.

52. In any event, even if the length of the shift of four hours was the reason for denying a complimentary break to those who worked four-hour shifts and not because of part time working that was undermined by the finding that the respondent was aware that one of the part time workers (GC) was allowed a complimentary break on a Friday when she worked a four-hour shift. So it could not be said that the defining characteristic was because a worker was on a four-hour shift. That reason having disappeared the only other reason for the less favourable treatment could be that the claimant was a part-time worker. That was the sole reason.

53. On that analysis the claim succeeds and the claimant is entitled to a declaration in that respect.

54. The claimant seeks compensation. The Tribunal considered that it was just and equitable to award compensation. That amount should be whatever the Tribunal considers to be “just and equitable in all the circumstances having regard to:-

- the infringement to which the complaint relates; and
- any loss which is attributable to the infringement (subject to the claimant’s duty to mitigate such loss – Regulations 8(12)) – Regulation 8(9).

55. In this case the calculation made by the claimant was to state that effectively he worked 15 minutes longer than he should have in his shift because he should have been entitled to the 15 minute paid break in the course of his four-hour shift.

56. The respondent's position was that the calculation was arithmetically correct but not that it was just and equitable to award that amount. At the same time no other approach was suggested as being appropriate.

57. The Tribunal considered whether an award in that amount was just and equitable. There was a rationale to it. Matters have been regularised since  
5 May 2020. However for a period the claimant did not get "a paid break" of 15 minutes each day. The claimant's calculation amounts to £956 (J21/22) and that is the compensation awarded to the claimant.

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**Employment Judge:**  
**Date of Judgment:**  
**Date sent to parties**

**James Young**  
**25 November 2020**  
**26 November 2020**