WRC
An Coimisiún um Chaidreamh san Áit Oibre
Workplace Relations Commission

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ADJUDICATION OFFICER DECISION

Adjudication Reference: ADJ-00012079

Parties:

	Complainant	Respondent
Parties	[redacted]	Paddy Power Betfair Plc

	Complainant	Respondent
Anonymised Parties	Manager	Bookmaker

Representatives	Mandate Trade Union	Arthur Cox Solicitors

Complaint(s):

Act	Complaint/Dispute Reference No.	Date of Receipt
Complaint seeking adjudication by the Workplace Relations Commission under section 27 of the Organisation of Working Time Act, 1997	CA-00016085-001	30/11/2017

Date of Adjudication Hearing: 26/02/2018

Workplace Relations Commission Adjudication Officer: Maire Mulcahy

Procedure:

In accordance with Section 41 of the Workplace Relations Act, 2015 following the referral of the complaints to me by the Director General, I inquired into the complaints and gave the parties an opportunity to be heard by me and to present to me any evidence relevant to the complaints

Background:

The Complainant, is employed as a manager in one of the respondent's betting outlets since [redacted] and [redacted] prior to that, as a betting assistant. He works 40 hours a week over 7 days.

He is making a complaint under the Organisation of Working Time Act 1997.He has not received his statutory entitlement to breaks throughout the course of his employment.

The Respondent has been made aware of their breaches of the legislation by way of correspondence from Mandate Trade Union. They have also been made aware of this breach orally by staff on numerous occasions. At no point has the respondent responded to these claims.

He submitted his complaint to the WRC on 30/11/17.

Summary of Complainant's Case:

The complainant's representative, Mandate, states that the complainant has not received his statutory breaks as provided for under section 12 of the 1997 Act.

The respondent is on notice that the complainant is not afforded his statutory breaks in accordance with section 12. Mandate wrote to the respondent on 4/9/17 expressing concern at the company's failure to comply with its obligations under the Organisation of Working Time Act 1997 and expressing grave reservations about the respondent's plan to introduce "single manning shops" which would further endanger the complainant's ability to take break periods in accordance with section 12(1) of the 1997 Act.

The respondent makes no reference to rest breaks in their staff handbook, nor is there any information concerning same on display in their stores. The complainant states that the respondent failed to put in place measures which would secure his breaks. As this matter of whether the claimant did or did not get his rest breaks is in dispute, Mandate point to section 25(1) of the Act, the obligations flowing from that section and in the case of non-compliance with said section, the consequential obligations found in The Organisation of Working Time (Records) (Prescribed Form and Exemptions) Regulations with which they submit the respondent failed to comply. It is accepted that there was no clocking in facilities. Regulation 4(1) states

"Where no clocking in facilities exists a form to record the days and hours worked in each week by each employee shall be kept by the employer in the form set out in the Schedule entitled Form OWT 1 or in a form substantially to like effect"

Mandate advise that Respondent has no clocking in facilities nor documentation required by Regulation 4 to prove that the complainant has taken his rest breaks. Lacking such evidence, the respondent is unable to refute the complainant's complaint.

Mandate relied on the decision of **Tribune Printing and Publishing Group v Graphical Print and Media Union (DWT 6/2004)** which stated that it wasn't enough to merely tell employees that they could take rest breaks but that an additional onus rested with employers to put in place measures *"to ensure that that the employee receives those breaks".*

Mandate, in anticipation of the respondent's reliance on **Stasaitis v Noonan Services Group (2014) E.I.R. 173,** distinguish the facts in that case where a security guard, operating in a hut on his own, could take breaks in periods of inactivity. They state that there are no periods of inactivity for the complainant; he is constantly engaging with customers at the counter. The respondent does not meet his responsibilities by providing canteen or tea and coffee facilities. The complainant certainly uses the canteen but only to bring beverages to his desk while continuing to work and be at the disposal of the respondent, attending to customers.

The complainant refutes the respondent's assertion that the EPOS system is one measurement or reflection of the complainant's work. It does not measure periods when he is engaging with

customers or is dealing with other aspects of his role.

The onus lies with the respondent to ensure that the complainant gets his rest breaks and that records are maintained in compliance with the 1997 Act to demonstrate that this has happened. This did not happen in this case.

Respondent had failed to meet his obligations.

Summary of Respondent's Case:

The respondent refutes the complainant's complaint and states that he does get breaks in accordance with section 12 of the 1997 Act. The respondent maintains that "break" is not defined whereas "working "is. The respondent does not schedule fixed breaks as peak times vary from outlet to outlet depending on local racing events or national or international events but encourages employees to take breaks when it suits them and according to the needs of the business. Staff are encouraged to take their breaks at quieter times. Some employees take their breaks off site, others bring in food and use the canteen provided by the respondent. The respondent operates a flexible regime enabling staff to take paid time off for personal needs. Staff work out a roster for breaks in most outlets.

The respondent states that the complainant never activated the grievance procedure.

The respondent maintains an EPOS system (Electronic Point of Sale) which they contend is a somewhat reliable if not exact indicator of breaks taken by staff. This system records the complainant's activity at the till. The respondent submitted a document stating that over a four-month period 1/9/17-31/12/17, the complainant took 19 breaks lasting at least 20 minutes; 15 of these lasted between 20-30 minutes; 4 lasted 30-60 minutes. During these periods there was another employee active on the till.

The respondent argues that they meet the conditions set out in **Tribune Printing and Publishing Group v Graphical Print and Media Union (DWT 6/2004)** which observed that

"stating that employees could take rest breaks if they wished and not putting in place proper procedures to ensure that the employee receives those breaks, thus protecting his health and safety did not discharge the employer's obligation under the Act of 1997".

The respondent employs additional staff as necessary to ensure that the complainant gets his breaks.

The respondent relied on the High Court judgement of Mr. Justice Kearns in **Stasaitas v Noonan Services Group Ltd. (2014) E.L.R. 173. Kearns J,** in this case involving a security guard operating out of a security hut on his own, did not stipulate that the employer must set fixed break times. He accepted that the employee could elect to take a break in periods of inactivity.

The respondent in addition states that they met the requirements set down in **Hughes v Corporation of Commissionaires Management Ltd. (2011) EWCA Civ 1061 CA**, in that they chose their own times, their breaks were uninterrupted and they could use the break periods as they wished.

The complainant could and did take his breaks at a time of his own choosing.

The complaint should not be upheld

Findings and Conclusions:

The Law.

I am required to examine the evidence supporting the complaint in the light of the 1997 Act.

Section 12 of the Act, compliance with which is in issue in this case, provides as follows: -

"(1) An employer shall not require an employee to work for a period of more than 4 hours and 30 minutes without allowing him or her a break of at least 15 minutes.

(2) An employer shall not require an employee to work for a period of more than 6 hours without allowing him or her a break of at least 30 minutes; such a break may include the break (3) The Minister may by regulations provide, as respects a specified class or classes of employee, that the minimum duration of the break to be allowed to such an employee under subsection (2) shall be more than 30 minutes (but not more than 1 hour).

(3) The Minister may by regulations provide, as respects a specified class of employees, that the minimum duration of the break to be allowed to such an employee under subsection (2) shall be more than 30 minutes.

(4) A break allowed to an employee at the end of the working day shall not be regarded as satisfying the requirement contained in subsection (1) or (2)".

The Labour court in the case of Nutweave Ltd t/a Bombay Pantry v Kumar, DWT1537 and relying on the dicta of Peter Gibson LJ in Gallagher v Alpha Catering services t/a Alpha Flight Services [2005] I.R.L.R.102) determined that

" For the purposes of the Act a break is a period which the worker knows in advance will be uninterrupted, which is not working time and which he or she can use as he or she pleases".

The evidence submitted on behalf of the complainant is that he often had to be at the disposal of the employer, attending to customers, during his break. This could not be seen to constitute an uninterrupted break. The evidence does not demonstrate that the complainant enjoyed uninterrupted breaks in line with section 12 of the Act for the cognisable period which is 1 June – 30 November 2017. The EPOS document which the respondent asks us to consider does not conform to the type of records demanded in section 25(1) does not measure 'off-till' activity, and fails to demonstrate that the respondent complied with his obligations to provide breaks. The complainant is a manager and the proposition that' off-till 'activity is evidence of having secured a break as opposed to him exercising his managerial or other functions is unconvincing.

The existence of canteen facilities is not evidence that the complainant enjoyed uninterrupted breaks.

Cognisable period.

The cognisable period for the purposes of this complaint is 1 June – 30 November.

Requirement to specify break periods.

Stasaitas v Noonan Services Group Ltd. (2014) E.L.R. 173 was cited as authority for the argument that the Act does not require that breaks be specified in all circumstances. The Complainant in that case who could take his breaks at quieter times was employed in an industry that was exempt, provided certain conditions were met, from the strict application of section 12 of the Act. The Complainant in the instant case was not employed in an industry that comes within the scope of that exemption and so its application to the instant case is questionable.

Evidence of compliance with section 25 of the Act.

Section25 states.

"(1) An employer shall keep, at the premises or place where his or her employee works or, if the employee works at two or more premises or places, the premises or place from which the activities that the employee is employed to carry on are principally directed or controlled, such records, in such form, if any, as may be prescribed, as will show whether the provisions of this Act and, where applicable, the Activities of Doctors in Training Regulations are being complied with in relation to the employee and those records shall be retained by the employer for at least 3 years from the date of their making"

Section 25 (4) states

"(4) Without prejudice to subsection (3), where an employer fails to keep records under subsection (1) in respect of his or her compliance with a particular provision of this Act or the Activities of Doctors in Training Regulations in relation to an employee, the onus of proving, in proceedings before a rights commissioner or the Labour Court, that the said provision was complied with in relation to the employee shall lie on the employer."

The respondent submits that it met the requirements of the Act but offered no other evidence in support of that claim.

The respondent cannot avail of the exemption from compliance with section 25 of the1997 Act as the respondent did not comply with the Regulations set out in The Organisation of Working Time Records) (Prescribed Form and Exemptions) Regulations 2001 Act. These Regulations deal with the obligations flowing from non- compliance with section 25(1). Specifically, the respondent did not comply with Regulation 5(2) (a), (b), (c). **Determination DWT 1627** dealt with a complainant who did not provide details or dates of the alleged infringements of section 12, yet the Labour court concluded that

" the respondent did not provide the Court with records of the breaks taken by the appellant during the cognisable period ".

The court found the that the" respondent breached the Act at section 12 in the cognisable period"

Based on the evidence and for the reasons cited above I find the complaint is well founded.

Decision:

Section 41 of the Workplace Relations Act 2015 requires that I make a decision in relation to the complaint in accordance with the relevant redress provisions under Schedule 6 of that Act.

I uphold this complaint and award the complainant €1000.

Dated: 17th July 2018

Workplace Relations Commission Adjudication Officer: Maire Mulcahy

Key Words:

Section 12; breaks; dispute about provision of breaks; lack of records