Appeal No. UKEAT/0365/14/JOJ

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 9 March 2015
Judgment handed down on 10 April 2015

Before

HER HONOUR JUDGE EADY QC

(SITTING ALONE)

MR S GALE & OTHERS — APPELLANTS

MID & WEST WALES FIRE SERVICE — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellants	MR OLIVER SEGAL (One of Her Majesty's Counsel) Instructed by: Thompson Solicitors Agincourt House 14-18 Newport Road Cardiff CF24 0SW
For the Respondent	MR DAVID MITCHELL (of Counsel) Instructed by: Eversheds LLP 1 Callaghan Square Cardiff CF10 5BT

SUMMARY

WORKING TIME REGULATIONS

VICTIMISATION DISCRIMINATION - Detriment

Employment Rights Act 1996 section 45A(1)(a), (b) and (c): right not to be subjected to detriment on the grounds that a worker has (a) refused (or proposed to refuse) to comply with a requirement which the employer imposed (or proposed to impose) in contravention of the **Working Time Regulations 1998**, (b) refused (or proposed to refuse) to forgo a right conferred on him by those **Regulations**, (c) failed to sign a workforce agreement for the purposes of those **Regulations**, or to enter into, or agree to vary or extend, any other agreement with his employer which is provided for in those **Regulations**.

The Claimant fire fighters contended that they had been subjected to detriment (by reason of their transfers to other stations) on grounds that they had proposed to refuse to comply with a requirement that the Respondent proposed to impose in contravention of the **Working Time Regulations** (section 45A(1)(a)), and/or proposed to refuse to forgo a right under those **Regulations** (section 45A(1)(b)), and/or had failed to sign a workforce agreement or otherwise enter into an agreement to opt-out of the **Regulations** (section 45A(1)(c)).

The Employment Tribunal had clearly found that there had been no requirement that the Claimants sign a workforce agreement/other opt-out and could be no challenge to the dismissal of the claims under section 45A(1)(c).

To determine the claims under sections 45A(1)(a) and (b) the Employment Tribunal first needed to make a finding whether there had in fact been (or would be) a contravention of the **Working Time Regulations** or that the Claimants were refusing to forgo a right under those

Regulations. The Employment Tribunal's reasoning was less than clear in terms of the distinctions between the different statutory provisions. That was, however, in part because the Claimants' cases were unclear in this respect. Ultimately the Employment Tribunal had found that what the Respondent proposed did not give rise to a contravention of the **Working Time Regulations** and that conclusion was not susceptible to challenge on appeal. Moreover, the Employment Tribunal had found that the Claimants had not proposed to forgo a right (to rest breaks) under the **Regulations** before the Respondent had decided to impose the detriments complained of. That being so, it was not a matter that could have materially influenced the decision.

Appeals dismissed.

HER HONOUR JUDGE EADY QC

Introduction

1. I refer to the parties as the Claimants and the Respondent as they were below. The appeal is that of the Claimants against a Judgment of the Cardiff Employment Tribunal (Employment Judge Harper, sitting with members, on 12-13 June 2014 - "the ET"), sent to the parties on 20 June 2014. The parties' representation below was as before me. By its Judgment the ET dismissed the Claimants' claims under sections 45A and 48(1ZA) of the **Employment Rights Act 1996**. The Claimants now appeal.

The Background Facts

2. The Claimants are fire fighters previously employed by the Respondent at the Llanelli Fire Station, albeit that their terms and conditions of employment gave the Respondent wide powers to transfer them within the geographical area in which it served. The duty system traditionally worked at the Llanelli Fire Station was a 2-2-4 system; that is, 28 fire fighters working as four crews on a pre-defined shift pattern of two day duties, two night duties and then four days off. By contrast, working arrangements introduced by the Respondent elsewhere - known as self-rostered crewing ("SRC") - used 14 fire fighters, working as one crew, on annualised hours, where shifts were made up of a whole-time day duty element and a night-time retained, or on-call, element. Under SRC the fire fighters chose at a local level when to work the 128 shifts per annum.

3. Under the 2-2-4 system, at any one time there would be a large number of fire fighters being paid but not actually working. The Respondent took the view that the SRC would be a more effective use of manpower and resources. It therefore put its proposal for a change to the

duty system to the Fire Authority. The plan was approved, and it then went out to public consultation for a 12-week period.

4. The consultation period included a number of meetings with the Fire Brigades Union ("the FBU") under relevant collective procedures. As the ET found, the position of the FBU was that it had no interest in negotiating any alternative system; it sought simply to retain the 2-2-4 system. The Respondent's position was that it was prepared to consult on alternatives to 2-2-4 but any individual fire fighter wanting to remain on the old system could only do so if at a different station, not Llanelli.

5. One issue discussed during the consultations was the question of an opt-out under the **Working Time Regulations** ("WTR"), which would be needed if individual fire fighters were to work both day and night elements of SRC (ET Reasons, paragraph 20). Such an opt-out would be unnecessary if only the day element of SRC was worked. The Respondent's position as communicated to the FBU was that, where individuals wanted to cover the daytime element only, that would be acceptable (paragraph 22). Alternatively, they could continue to work the 2-2-4 system, albeit at a different station. It was the FBU's position (and the Claimants' position before the ET) that daytime-only working simply could not be extended to all those who might want it given the needs of the service and the imperative to drive down costs; the only way SRC could work would be if **WTR** opt-outs were entered into.

6. On 31 October 2012, (FBU drafted) letters were handed to the Respondent from all members of the Llanelli crew, stating their refusal to opt out of the **WTR**. Given the inability to agree a new duty system, the Respondent decided to proceed to implement SRC and, in

November 2012, wrote to the workforce seeking expressions of interest, explaining that those wanting to remain on the 2-2-4 system would be transferred to other stations.

7. A further issue was subsequently raised by the FBU about the issue of **WTR** rest breaks under the SRC system. This was first raised at a meeting on 29 January 2013 and again dealt with under the relevant collective procedures, resulting in the recommendation that the Respondent either collectively agree with the FBU that rest breaks be put in place or itself ensure compensatory rest was provided.

8. Ultimately, the new SRC system was introduced at Llanelli on 8 April 2013. Where employees declined to accept the new system they were transferred to other stations where they could continue to work a 2-2-4 system. Subsequent to the period in which expressions of interest had been invited, but prior to the implementation of SRC, the Claimants had applied to work at Llanelli on the basis that the Respondent had modified some part of the arrangements. By then, however, the Respondent had recruited others to work at the station under SRC.

The ET Decision and Reasons

9. The claims before the ET were of unlawful detriment, in that the Claimants were transferred from Llanelli to other stations. It was contended that this was on the ground of the Claimants' refusal to commit to working a shift system that was unlawful under the **Working Time Regulations**, that refusal being manifest both in the Claimants' refusal to sign an opt-out of their Regulation 4 **WTR** rights and in their assertion of their rights in respect of rest periods under Regulation 10. This is my paraphrasing of the Claimants' case. It is in fact difficult to find a clear statement of the Claimants' case under section 45A of the **Employment Rights Act 1996**, albeit that it would have been helpful if that had been properly pinned down at the outset.

10. Whether conceded expressly or simply by implication, the ET's conclusions appear based on an assumption that the transfers of the Claimants to other stations constituted a detriment.

11. The ET asked whether the decision to transfer the Claimant had been done "on grounds of" one of the prohibited reasons. It reminded itself of the EAT's decision in **Arriva London South Ltd v Nicolaou** [2012] ICR 510, laying down an approach akin to protected disclosure detriment and discrimination victimisation cases. It further noted that the burden of proof was as set out under section 48(2) of the **ERA** (see below). The ET found that:

> **"… the reason that the claimants were transferred is because none of them responded to the expression of interest which had been advertised within the respondent in November 2012. By doing so, and by excluding themselves from the process, this resulted in the transfer away from Llanelli Fire Station. …" (paragraph 32)**

This conclusion was based upon the ET's earlier finding that:

> **"… the reason that the claimants' were transferred was because they refused voluntarily to enter into any new duty system at Llanelli. The claimants were not transferred out of Llanelli because they refused to sign an opt out since they had not at any time been asked by the respondent to sign an opt out they had only been asked to express an interest in their preferred duty system. …" (paragraph 29)**

12. Although the chronology is not entirely clear, the ET also appears to have found the Respondent's position (that is, that those not voluntarily signing up to SRC would be transferred to other stations) was arrived at before it was told of the Claimant's letters refusing to opt out of the **WTR** (paragraph 33). On this basis the ET apparently concluded that the relevant decision was reached without any knowledge of the Claimants' statements of intent. I express this conclusion somewhat tentatively as it is clear that the document referred to by the ET at paragraph 33 was in fact the minute of the meeting of 31 October 2012 (at which the statements of intent were handed in). Moreover, in the ET's findings of fact, the chronology places the relevant decision as *subsequent* to the Claimants' statements of intent.

13. In any event, the chronology was certainly understood by the ET to have worked against the Claimants' case in respect of the rest periods point: the detriment relied on - the transfer away from Llanelli - had already been determined and communicated before the issue of rest breaks was first raised on 29 January 2013 and, thus, could not have been the ground for the Respondent's decision (paragraph 36).

14. On those bases the ET rejected the claims.

The Appeal

15. The Grounds of Appeal can be summarised as falling under the following heads:

(1) It being common ground that the new SRC system of working would require the Respondent to procure written opt-outs from the workers, the ET erred in law in falsely distinguishing between: (i) a worker who refuses to work under a shift system because of features that as a matter of law contravene a provision of the **WTR**, and (ii) a worker who refuses to work under the shift system expressly on the basis that it contravenes a provision of the **WTR**.

(2) The ET failed to apply the correct legal test when determining whether the act complained of was done "on the ground" that the Claimants had refused to forgo rights conferred on them by the **WTR**.

(3) In the alternative, the ET gave inadequate reasons for its decision. It failed to engage with the Claimants' case at all and simply made no relevant findings - as it was bound to do - as to whether SRC gave rise to breaches of the **WTR** as the Claimants claimed.

(4) In the further alternative, the ET reached a perverse conclusion.

16. In the Respondent's Answer, issue was taken with the contention that it had been common ground that, in order for the Claimants to work SRC, the Respondent required them to opt out of the **Working Time Regulations**, and it was noted that the ET had not so found (see paragraphs 20 and 22). Moreover the Respondent observed the Claimants had volunteered written refusals to opt out in the absence of any request by the Respondent that they did so.

The Relevant Legal Principles

17. The relevant legislative provisions are found in the **Employment Rights Act 1996**. The right relied on is provided by section 45A, which relates to detriments in working time cases and provides (relevantly) as follows:

> **"(1) A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the grounds that the worker -**
>
> > **(a) refused (or proposed to refuse) to comply with a requirement which the employer imposed (or proposed to impose) in contravention of the Working Time Regulations 1998,**
> >
> > **(b) refused (or proposed to refuse) to forgo a right conferred on him by those Regulations,**
> >
> > **(c) failed to sign a workforce agreement for the purposes of those Regulations, or to enter into, or agree to vary or extend, any other agreement with his employer which is provided for in those Regulations,**
> >
> > **…**
> >
> > **(e) brought proceedings against the employer to enforce a right conferred on him by those Regulations, or**
> >
> > **(f) alleged that the employer had infringed such a right.**
>
> **(2) It is immaterial for the purposes of subsection (1)(e) or (f) –**
>
> > **(a) whether or not the worker has the right, or**
> >
> > **(b) whether or not the right has been infringed,**
>
> **but for those provisions to apply, the claim to the right and that it has been infringed must be made in good faith.**
>
> **(3) It is sufficient for subsection (1)(f) to apply that the worker, without specifying the right, made it reasonably clear to the employer what the right claimed to have been infringed was."**

18. The right to bring a complaint of a breach of section 45A to the ET is then provided by section 48(1ZA) and by section 48(2) it is provided that:

> **"On such a complaint it is for the employer to show the ground on which any act, or deliberate failure to act, was done."**

19. The nature of the protection afforded by section 45A **Employment Rights Act** was considered by the EAT (HHJ Peter Clark) in the case of **Arriva London South Ltd v Nicolaou** (supra) where it was held to be akin to protection against victimisation; the "protected act" being the Claimant's right under the **WTR**, the prohibited conduct arising where the employer subjects the Claimant to a detriment by act or omission on the ground that she has exercised that right. In such cases, the question is why the Claimant received the treatment complained of? The "reason why?" question.

20. In order to answer that question, the protected act need not be the sole cause of the treatment; it is enough that it has a significant influence on the outcome or - post **Fecitt and Others v NHS Manchester** [2012] IRLR 64 CA - whether the protected disclosure was a "material factor" in the employer's decision to subject the Claimant to a detrimental act.

21. In approaching these questions HHJ Peter Clark went on to observe (see paragraph 28 of **Nicolaou**) that the *reason why* question must not be confused with a "but for" test. Whereas a *but for* test might be appropriate in criterion cases (see **James v Eastleigh Borough Council** [1990] 2 AC 751), it is the *reason why* test which prevails where the employer's mental processes (conscious or subconscious) are in issue.

22. As for the ET's Reasons, the **Employment Tribunal Rules 2013** (Rule 62(5)) require that Reasons for an ET Judgment:

> **"… shall: identify the issues which the Tribunal has determined, state the findings of fact made in relation to those issues, concisely identify the relevant law, and state how that law has been applied to those findings in order to decide the issues. …"**

23. The rule provides a guide and not a straitjacket (**Balfour Beatty Power Networks Ltd v Wilcox** [2007] IRLR 63 per Buxton LJ at paragraph 25) and allowance must be made for the fact that the Reasons are directed towards parties who already know the detail of the arguments and issues in the case, not to strangers to the dispute (**Derby Specialist Fabrication Ltd v Burton** [2001] ICR 833 per Keene LJ at paragraph 32).

24. As for the perversity appeal, it is common ground that this sets a high bar for any Appellant (see the Judgment of the Court of Appeal in **Yeboah v Crofton** [2002] IRLR 634).

Submissions

The Claimant's Case

25. The Claimants contend (as a matter of fact but also on the basis that it was common ground) that the SRC arrangements would not have complied with **WTR** and opt-outs were therefore required. By October 2012, the Claimants had made clear that they were not willing to sign such opt-outs and this was what led to the Respondent's decision that they should be transferred to other stations. To the extent that the Respondent seeks to dispute that there was common ground on this point, Mr Segal QC argues this fails to acknowledge the reality: the working hours that SRC would require could only be achieved with opt-outs and the Respondent's evidence demonstrated only that it might have been able to accommodate one or two individual variations, that was all. SRC was intended to bring about substantial savings, and the Respondent's plan for achieving that was modelled on what had been done elsewhere. The change would, on the Claimants' case, fail to recognise that on-call hours were working time and thus give rise to breaches of the **WTR**. The Claimants' case before the ET was that

the Respondent could not introduce the new SRC system and achieve its ends without thus breaching the **WTR**; that was demonstrated by the contemporaneous documentation and the oral evidence, particularly in cross-examination, with which the ET's Reasons failed to engage.

26. To the extent that the ET did engage with these points, it had done so only in respect of specific cases (see the example given at paragraph 22), finding, on that basis, that the Respondent would have "tried very hard to accommodate any problems". If the position really was that the Respondent could permit anyone to work days only, then the Respondent would never have had to have "tried very hard".

27. Further, the ET failed to apply the correct test, as laid down in **Fecitt** (supra): did the Claimants' refusals to sign opt-outs and/or work a shift system that contravened Regulation 10 of the **WTR** materially influence (in the sense of being more than a trivial influence) the conduct of the Respondent of which complaint was made? Note, further, paragraph 51 in the Judgment of Elias LJ in the case of **Fecitt**:

> **"… where the whistleblower is subject to a detriment without being at fault in any way, tribunals will need to look with a critical - indeed sceptical - eye to see whether the innocent explanation given by the employer for the adverse treatment is indeed the genuine explanation. …"**

28. To distinguish between a worker who refuses to work under a shift system that would contravene a provision of the **WTR** and a worker who refuses to work under that system expressly because it would contravene a provision of the **WTR** was a false distinction. If the ET did apply **Fecitt**, then its reasoning was inadequate. At a basic level the critical issues had to be identified, and the ET's conclusions on each, summarised with the manner of resolution explained (**English v Emery Reimbold and Strick** [2002] 1 WLR 2409).

29. The Claimants' arguments before the ET were ignored. The ET had to consider whether SRC was unlawful and to engage with the reality of what the Respondent was introducing.

30. That led into the perversity appeal. First, on the basis of the ET's findings that the detriment decision was taken in November 2012, when that was five months before implementation and at a time when disputes between the parties were still subject to collective process. Second, it could not possibly be anything other than perverse to find (if the ET had) that the Respondent would permit anyone, who sought to do so, to work days only.

31. Even if one accepted the ET's findings and considered that they were adequately reasoned and even if - contrary to the Claimants' primary case - it was found that the ET had applied **Fecitt**, the decision did not stand up. The ET found that the reason the Claimants were transferred was because they did not express an interest in working SRC but they were not required to do so for section 45A protection to arise. Certainly the Respondent knew of the Claimants' position by the time it made any decisions, albeit that it was unclear from the ET's findings as to when any decisions were actually made. The Claimants had refused (or signified that they proposed to refuse) to comply with any requirement that they work in breach of Regulation 4 or opt out of their rights in that regard. They had each written to that effect and that was much the same as refusing or to proposing to refuse to forgo their right to work a maximum of 48 hours per week for section 45A(1)(a) purposes and/or they had refused to sign a relevant workforce agreement for section 45A(1)(c) purposes. They had also refused or proposed to refuse to comply with any requirement to work in contravention of their rights under Regulation 10 and thus refused or proposed to refuse to forgo a right conferred thereby.

32. On the Regulation 10 point, it was the Claimants' primary case that the detriment did not take effect until 8 April 2013. Even if that was not correct, and it was held that the effective decision was made between November 2012 and January 2013 (so, before the end of 2012), there was an additional point as to whether it was sufficient to refuse to comply with the requirement by refusing to work under a new shift pattern that would, on proper scrutiny, be held to contravene Regulation 10.

The Respondent's Case

33. On behalf of the Respondent it was submitted that this was fundamentally not a case concerning its compliance with the **WTR** or even with the Claimants' purported section 45A **ERA** claims but was all about the FBU's implacable insistence on retaining the 2-2-4 system.

34. More specifically, the Respondent denied that it was ever common ground that, in order to lawfully employ fire fighters working SRC, it had to procure written opt-outs. The ET had found (paragraph 20) that an opt-out was not required if only the day element of SRC was worked. The difficulty was that the Claimants' stance became a self-fulfilling prophecy: because so many of the Claimants refused to engage with the new system, the Respondent had to advertise for replacements from its retained fire fighter cohort. Thus, by the time the Claimants did express an interest, there were no opportunities available.

35. Moving to the specific points raised on the appeal, the statutory basis of the Claimants' claims had been confused throughout. The relevant provisions were section 45A(1)(a)(b) and (c) **ERA**. Section 45A(1)(b) related to the Claimants' proposal to refuse to forgo their rights to rest breaks under Regulation 10 **WTR**. Section 45A(1)(a) and (c) would have to relate to their refusal to work more than 48-hour week under Regulation 4 or a failure to enter into an opt-out

agreement under Regulation 5 to exclude the maximum weekly working time under Regulation 4. It should be noted that section 45A(1)(c) was more narrowly drawn than section 45A(1)(a) and (b); it required that an employer had sought that an employee enter into a Regulation 5 agreement before the protection from detriment could arise. So far as the Claimant's section 45A(1)(c) claims were concerned, the insurmountable problem for them was that the ET had found that at no point had the Respondent ever required them to enter into such an agreement (see paragraphs 32 and 33 of the ET's Reasons).

36. As for the claims under sections 45A(1)(a) and (b) the Respondent agreed these could be prospective. Section 45A(1)(a) would be engaged if there was a requirement imposed or proposed to be imposed in contravention of Regulation 4. If that provision was in play, the first question for the ET was whether the Respondent had imposed, or proposed to impose, a requirement in contravention of the **WTR**, albeit that the Claimants' actions meant that their contention in this regard could not be tested. The Respondent's primary position was that ultimately it could be taken that the ET had made a finding of fact that there was no contravention or proposed contravention of the **WTR** because it had found that the Respondent was offering work on a days-only basis and although the Claimants challenged that, their case had not been put so high as to suggest the Respondent's position was a sham. In the alternative, and to the extent it was argued that the ET had failed to carry out the necessary exercise in this regard, it had to be understood that the focus of the claims below had been on the refusal to sign opt-outs or the FBU's refusal to enter into a workforce agreement. In any event the ET's focus was on the causation point - the *reason why* - and that provided a complete answer to the claims: it had applied the correct *reason why* test, and it can be taken that it had **Fecitt** in mind.

37. As for the claim under section 45A(1)(b), that could only relate to the protection under Regulation 10 (rest breaks), and the ET expressly found that no issue regarding rest breaks had been raised until after the Claimants had been told of the transfers away from Llanelli. As for the suggestion that the Claimants did not have to expressly raise their entitlement in order to obtain the protection of section 45A(1)(b) that could not be right. There had to be some assertion of right, and see the commentary in *Harvey on Labour Law and Industrial Relations* II Detriment/6 Working Time at [158], drawing (by analogy) on the cases of **Mennell v Newell & Wright (Transport Contractors) Limited** [1997] ICR 1039 CA and **Miles v Linkage Community Trust Ltd** [2008] IRLR 602.

38. Given the way the Claimants' claims had been put before the ET, the reasons given were adequate to enable them to understand why they had lost. Moreover the perversity argument was simply not tenable. The ET was entitled to reach the view that it did as to when the detriment decision was taken and as to the Respondent's intention to permit anyone who sought to do so to work days only.

The Claimants in Reply

39. Whilst accepting in principle how the Respondent had analysed the provisions of section 45A **ERA**, this made no difference on the facts of this case. The Claimants' case had clearly been put under section 45A(1)(a) and (b) as well as (c), so the ET had to get to grips with the constituent elements of those statutory provisions. It had to reach a view as to whether SRC imposed a requirement that was in contravention of the **WTR**. The Claimants' case on perversity was that it was perverse of the ET to find that the detriment predated the raising of the Regulation 10 concerns. The additional cases relied on by the Respondent, such as **Miles v**

Linkage Community Trust Ltd were not of relevance. But, if felt to be so, the Claimants reserved their position to argue at any higher level that such cases were wrongly decided.

Discussion and Conclusions

40. The detriment complained of in these cases was the transfer of the Claimants to fire stations other than Llanelli. Neither advocate can expressly recall whether this point had been conceded, but equally both accept that it was not in issue; the Respondents accepting before me (if not before the ET) that such transfers could amount to detriments. It is not entirely clear whether there was a finding to that effect on the part of the ET. The first line of paragraph 30 suggests that there was no detriment, but then the conclusions section seems to accept that there was. In any event, I can proceed on the basis that detriment had been established.

41. The question for the ET was thus whether this was on the ground of one of the prohibited reasons laid down by section 45A(1) of the **ERA 1996**. The first stage of that assessment was for the ET to identify the relevant ground - the protected act or acts (to adopt the approach in **Arriva**) - in contention: did the act or acts relied on fall within section 45A and, if so, under which provision? It might be thought that was a straightforward question. In order to understand the ET's findings, however, the reasoning has to be unpacked to some degree.

42. The Claimants' case before the ET (see the Further Particulars), put the claims under section 45A(1)(a) (b) and (c) but there was no specific particularisation other than that. There appears to have been some degree of focus in the evidence on whether or not the Respondent had required the Claimant to sign opt-out agreements (at least that seems to be how the ET understood the evidence), or on the position of the FBU itself. In closing submissions before the ET Mr Segal QC summarised the Claimants' case as follows:

> **"25 The effective cause of Cs being forced to transfer was because (on the ground that) they had refused or proposed to refuse to comply with a requirement imposed by R in contravention of WTR and had refused or proposed to refuse to forgo their rights conferred by Regs 4 and 10."**

43. It was important for there to be clarity as to how the Claimants' case was being put because the different provisions of section 45A relate to different things, and that can be important in terms of the findings the ET has to make. I agree with Mr Mitchell (for the Respondent) and with the editors of *Harvey*: section 45A(1)(a) is concerned with a worker's refusal to comply with a requirement that would contravene a duty otherwise owing under Regulations 1 to 9 of the **WTR**; section 45A(1)(b), on the other hand, is concerned with rights conferred on workers under the **Regulations**, for example to daily rest breaks under Regulation 10, and section 45A(1)(c) concerns a refusal to sign an agreement permitting an opt-out from **WTR** protection (relevantly, under Regulation 5 in relation to Regulation 4 protection).

44. I also agree with Mr Mitchell that section 45A(1)(c) requires some actual - not simply threatened - failure to sign; the worker will have been asked to sign such an opt-out and will have declined or otherwise failed to do so. To the extent that the Claimants were putting their cases under section 45A(1)(c), therefore, the ET clearly found that there had never been a relevant request on the Respondent's part that the Claimants sign an opt-out. At most, the Claimants had pre-empted any such request by signifying that they would not do so if asked; but that had not arisen. Section 45A(1)(c) looks at what has happened, not what might happen in the future. That being so, the findings of the ET at paragraphs 29 and 32 provide a complete answer to any claim under section 45A(1)(c), and I cannot see that there is any proper basis of challenge in that regard.

45. The focus of the submissions before me, however, has (perhaps understandably) been on sections 45A(1)(a) and (b), which are more loosely worded, allowing for a prospective approach; looking forward at that which the worker proposes to do in respect of the employer's imposition of a requirement or proposed imposition of a requirement, or, in respect of the removal of a right under the **WTR**.

46. On these provisions, I was initially concerned that the ET lost sight of the distinctions that exist between these and section 45A(1)(c). When apparently addressing the section 45A(1)(a) complaint, the ET returns to the issue of the opt-outs (relevant to section 45A(1)(c)), see, for example, the ET at paragraph 30:

> **"30. As a result of the foregoing analysis none of the claimants were subjected to any detriment. No act or any deliberate failure to act by the respondent was done on the ground that the worker refused or proposed to refuse to comply with the requirement which the employer imposed or proposed to impose in contravention of the Working Time Regulations 1998. At no time had the claimants requested to work the day and night duties under the SRC and at no time were they required to sign an opt out by the Respondent."**

47. Ignoring the suggestion that the Claimants had not been subjected to any detriment (which was not the Respondent's position and does not seem to be a finding that the ET then makes in its conclusions section), within that paragraph the ET apparently sidesteps the question whether the Respondent was imposing or proposing to impose a requirement in contravention of the **WTR**, (although, on one reading of the paragraph, it could be said to have assumed that it would, but that the Respondent had not then subjected the Claimants to detriment on that ground). It then moves into a statement about whether the Claimants were required to sign an opt-out (a section 45A(1)(c) issue). The fact that the Claimants had not been required to sign opt-outs by the Respondent certainly went to section 45A(1)(c) but it was not an answer to section 45A(1)(a). That is not to say that opt-outs might not be relevant to section 45A(1)(a) - there will be no contravention of the **WTR** if a worker is only working more than a 48-hour week having agreed to an opt-out - but the ET here first needed to make a finding as to

whether the Respondent was imposing, or proposing to impose, a requirement in contravention of the **WTR** (or, for section 45A(1)(b) purposes), as to whether the Claimants were refusing, or proposing to refuse, to forgo a right afforded by the **WTR**).

48. In stating that the ET needed to make a finding as to whether the provisions of the **WTR** were, or would be, engaged in respect of a claim under section 45A(1)(a) or (b), I draw comfort from the fact that section 45A(2) expressly provides that this would not be required for the purpose of section 45A(1)(e) and (f), where the worker has brought proceedings or made an allegation that their rights have been infringed. The fact that this point is made expressly in respect of section 45A(1)(e) and (f) suggests that it is a necessary preliminary question for the purposes of section 45(1)(a) and (b).

49. This distinction might be seen as strengthening the Claimants' later argument in the present case that they did not need to have expressly asserted a breach of Regulation 10 to be able to rely on section 45A(1)(b); it would be sufficient if they had made it clear that they would not forgo their **WTR** rights and for the Respondent to have subjected them to a detriment on that basis. Thus, if a right under the **WTR** was engaged, all the Claimants would have to demonstrate - on their case - was that they had made it clear they would not forgo that right. I return to this point when I specifically consider the separate arguments pursued in respect of the section 45A(1)(b) claims, below.

50. For the purpose of the claims under section 45A(1)(a), however, the position is rather more straightforward. Apart from a slightly confusing recitation of the chronology at paragraph 33 of the ET's Reasons, it would seem clear that the Respondent's decision to transfer the Claimants away from Llanelli station was finalised after it had been provided with their signed

notifications of their unwillingness to opt out of the obligation otherwise imposed on the Respondent under Regulation 4 of the **WTR**. The questions for the ET can thus be stated as follows: (1) by proposing to introduce SRC, was the Respondent proposing to impose a requirement in contravention of the **WTR**? (2) if so, had the Claimants refused, or proposed that they would refuse, to comply with that requirement? (3) and, if that were the case, did those refusals, or proposals to refuse, materially influence the Respondent's decision to transfer the Claimants to other stations?

51. On that last point I note in passing that the Claimants' case was put on the basis that the test laid down in **Fecitt** was indeed the correct test; Mr Segal QC was not seeking to suggest that this was a criterion, or "but for", case.

52. I turn then to the first question: what did the ET find as to whether the proposal to introduce SRC amounted to a proposal to impose a requirement in contravention of the **WTR**?

53. The ET certainly found that the new system proposed by the Respondent could accommodate those who could not work both days and nights. The Claimants argue, however, that this might be read as a finding as to the exceptional cases, not the requirement of SRC more generally, see (at paragraph 22):

> **"The tribunal heard evidence from Richard Price who has a disabled child. Having heard the evidence of the respondents the tribunal is satisfied that had any such difficulties for Mr Price or any of the other fire-fighters at Llanelli been made apparent to the respondent then the respondent would have tried very hard to accommodate any problems. …"**

54. The Respondent urges, however, that I should read the ET's finding on this point more broadly, observing in particular that paragraph 22 continues as follows:

> **"… The respondent made it clear to the FBU that where individuals wished to cover the daytime element only that would be acceptable."**

55. It was the Claimants' case throughout the consultation with the Respondent and before the ET that implementation of SRC would give rise to contraventions of the **WTR** unless workers were prepared to sign opt-outs. So the ET had to grapple with that argument and make a finding as to whether what the Respondent was proposing to require at Llanelli would, as a matter of practical reality, amount to a contravention of Regulation 4 **WTR**. I can see that the ET made a finding that the Respondent had not, as a matter of fact, required the Claimants to sign opt-out agreements. Would, however, what the Respondent proposed to introduce amount to a contravention of the **WTR** if the Claimants did not sign opt-out agreements? Could everyone who requested to work days only really be accommodated at Llanelli under SRC, or was that really only an option for the exceptional case, not the rule?

56. I accept that it is not altogether easy to find clear answers to these points in the ET's Reasons. That is, in part, because the Reasons fail to clearly distinguish between the different statutory provisions in play. On the other hand, this was clearly an issue before the ET and was the focus of much of the evidence. Can I simply ignore the ET's express findings of fact (see paragraphs 20, 22 and 24) that the Respondent's proposal would have allowed those who wanted to work daytime hours only (which would not have imposed a requirement in contravention of the **WTR**) to do so? I do not think that I can.

57. Although the Reasons are not as clear as they might have been, I think that is because the way in which the Claimants' case was put was equally not as clear as it should have been. Unpacking the ET's reasoning with the relevant distinctions between the statutory provisions in mind, what is apparent is that the ET did not consider that the Respondent's proposals would impose a requirement in contravention of the **WTR**. Day-only working was available (paragraph 22) and day-only working would not require an opt-out (paragraph 20); it would not

give rise to any contravention of the **WTR**. Although the conclusions section of the ET Judgment focuses on the later question - the reason why the Respondent decided to exercise its power of transfer - it is tolerably clear that the ET's conclusion is founded upon its earlier finding of fact that there was no requirement or proposed requirement that would amount to a contravention of the **WTR**.

58. Should I then, as Mr Segal QC urges, find that conclusion to have been simply perverse given the context in which this proposal was being put? The Claimants' position in this regard is that there was no real-world possibility of SRC being introduced without a requirement that those working at Llanelli accept the imposition of a requirement in contravention of the **WTR**.

59. The test for a perversity appeal is notoriously high; I would need to be satisfied that an overwhelming case has been made out that the ET reached a decision which no reasonable Tribunal, on a proper appreciation of the evidence and the law, would have reached (**Yeboah**). Although there was a lack of clarity as to how the Claimants' case was put in terms of the relevant statutory provisions, their perspective as to the unlawful nature of SRC was plainly put to the ET forcefully and clearly. I do not consider that the ET failed to appreciate the argument. From the ET's reasoning, however, a more nuanced picture emerges than that allowed by the Claimants' case. The Respondent was open to discussions with the FBU as to its proposals, but the FBU's focus was solely on retention of 2-2-4. The ET found that, following the FBU's advice, the Claimants "jumped the gun" in terms of the consultation. Given the positions thus adopted, at the point in time when the Respondent made its decision (November 2012), the ET was entitled to conclude that it had not imposed or proposed to impose any requirement that would amount to a contravention of the **WTR**.

60. Mr Segal QC takes further issue with that approach, with the focus on the decision taken in November 2012 rather than when SRC was implemented in April 2013. In my judgment, however, the ET was entitled to look at what was in the Respondent's mind - what materially influenced it - when the decision was made, rather than when that decision took effect.

61. This issue also arises on the argument put under section 45A(1)(b), the claim that the Claimants had been subjected to a detriment on the ground that they had refused or proposed to refuse to forgo their right to rest breaks under Regulation 10 of the **WTR**.

62. The Claimants accept that they did not raise the Regulation 10 rest breaks point before January 2013. Their case on this point is, however, twofold. First, that it was perverse of the ET to find that the detriment occurred before the end of 2012 given that it only took effect in April 2013. Second, that, even if the Claimants had not expressly raised the issue, the fact that they had signified their unwillingness to agree to work to a system that would require them to forgo their Regulation 10 rights was sufficient for section 45A(1)(b) purposes, whether or not they actually specifically made an allegation to this effect.

63. In my judgment the Claimants' case in this respect fails on the facts as found by the ET.

64. The ET found that the Respondent decided to proceed with the SRC system before the end of 2012, after the failure to agree on 31 October 2012, and, as a consequence, had determined and communicated to the Claimants that those who did not express an interest in SRC at Llanelli would be transferred to other stations. To the extent that the Claimants effectively asked the Respondent to revisit that decision when they expressed an interest in staying in Llanelli in early 2013 (before the implementation of SRC in April of that year), that

did not give rise to a further discrete act of detriment when the Respondent stuck to its original decision (because by then it had recruited others to work at the station under SRC). That was simply the continuing implementation of the original decision, which had been made absent any knowledge that the Claimants were raising an issue as to their rights to rest breaks.

65. Should the ET have proceeded on the basis that the Respondent was, by implication, aware that the Claimants were objecting to the removal of rest break rights in general terms albeit that no specific point had been raised? Cases such as **Arriva** cannot assist as there the claim was brought under section 45A(1)(c) and so related to a failure to sign. It may also be observed, in the Claimants' favour, that section 45A(1)(b) can be contrasted with section 45A(1)(e) and (f), which would require proceedings to have been brought or an allegation to have been made.

66. That said, the protection afforded under section 45A(1) has to relate to something: something on the part of the worker has to have materially influenced the employer. Where the protection arises prospectively, there must be something that signifies that the worker proposes to refuse to forgo a right conferred by the **WTR**.

67. Here, until 29 January 2013, there was nothing that would have signified that the Claimants were asserting that SRC would require them to forgo their Regulation 10 rights and that they were not prepared to do so. On that basis, the ET reached a conclusion that was open to it in holding that there could not have been any causation between the assertion of the right to rest breaks and the detriment suffered. The decision had already been made absent any such issue being in the Respondent's mind or (per **Fecitt**), materially influencing its decision.

68. For all those reasons I dismiss these appeals.