Appeal No. UKEAT/0367/14/DM

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 23 February 2015

Before

HER HONOUR JUDGE EADY QC

(SITTING ALONE)

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(1) MR W EDWARDS
(2) MR A MORGAN — APPELLANTS

ENCIRC LIMITED — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MS BETSAN CRIDDLE (of Counsel) Instructed by: Walkers Union Solicitors 26 Nicholas Street Chester Cheshire CH1 2PQ
For the Respondent	MR ANTONY SENDALL (of Counsel) Instructed by: Messrs Hill Dickinson LLP No 1 St Pauls Square Liverpool L3 9SJ

SUMMARY

WORKING TIME REGULATIONS

TRADE UNION RIGHTS - Action short of dismissal

Working Time Regulations 1998 ("WTR") Regulation 2(1)(a) and (c) - "working time"

Trade Union and Labour Relations (Consolidation) Act 1992 section 146 - detriment

The Employment Tribunal having dismissed the Claimants' claims of breach of the **WTR** and of detriment, the following questions arose on the appeal:

(1) When attending meetings at their workplace in their capacity as a representative of a recognised trade union or health and safety representative, were the Claimants working, at their employer's disposal and carrying out their employer's activities or duties? Alternatively,

(2) Did the time spent at such meetings fall to be treated as working time by virtue of the provisions of the recognition agreement between the trade union and the Respondent in this case? In any event,

(3) Were the Claimants subjected to a detriment when the Respondent refused to grant them a daily rest period of at least 11 hours between the end of those meetings and the beginning of their night shifts?

Held: **WTR** Regulation 2(1)(a) requires that each of the three elements it sets out must be satisfied for time to be "working time" (applying **South Holland District Council v Stamp** [2003] UKEAT/1097/02), so: the worker must be working *and* at the employer's disposal *and* carrying out his activities or duties. That said, it was appropriate to have regard to the aims of the **Working Time Directive** 2003/88/EC and the purposive approach to working time adopted by the European Court of Justice.

The Employment Tribunal had found that the Claimants had been "working" when attending at the meetings in question (following **Davies v Neath Port Talbot County Borough Council** [1999] ICR 1132 EAT). It had, however, erred in adopting an unduly restrictive approach to the question whether the Appellants were at their "employer's disposal". That did not require the Claimants to be under the employer's specific control and direction in terms of the carrying out of their activities or duties at those meetings but allowed for a broader approach; where an employer has required an employee to be in a specific place and to hold him/herself out as ready to work for the employer's benefit (which might include attending at trade union or health and safety meetings; allowing for a broad understanding of "benefit", see **Davies**) that might be sufficient.

The Employment Tribunal similarly erred in adopting an overly narrow, contractual approach to the requirement that the worker is "carrying out his activity or duties". There was no requirement that the activity or duties were solely those for which the Claimants were employed under their contracts of employment. If engaged in activities that were (in the broader sense, see **Davies**) for the benefit of the employer, arose from the employment relationship, and done with the employer's knowledge, at and in an approved time and manner, that could be sufficient.

Given those conclusions under Regulation 2(1)(a) **WTR**, it was unnecessary to reach any concluded view on the other two questions arising on the appeal.

The parties being unable to agree as to the factual basis of the case before the Employment Tribunal, this matter would be remitted to the same Employment Tribunal for reconsideration in the light of the Judgment of the Employment Appeal Tribunal.

HER HONOUR JUDGE EADY QC

Introduction

1. I refer to the parties as the Claimants and the Respondent, save where there is a need to differentiate between the Claimants, in which case I do so by name. The appeal is that of the Claimants against a Judgment of the Liverpool Employment Tribunal (Employment Judge Wardle, sitting with members, on 23 and 24 June 2014 - "the ET"), sent to the parties on 7 July 2014. Before the ET, the Claimants were represented by their solicitor, Mr Madders; before me by Ms Criddle of counsel. The Respondent was represented below by its solicitor, Mr McNally, but now by Mr Sendall of counsel. By its Judgment, the ET dismissed the Claimants' claims of breaches of the **Working Time Regulations** ("WTR") and of unlawful detriment on grounds related to trade union membership or activities.

2. The Claimants' appeal raises three questions: (1) When attending workplace meetings as a representative of a recognised trade union or as a health and safety representative, were the Claimants working, at their employer's disposal and carrying out their employer's activities or duties? (2) Does the time spent at such meetings fall to be treated as working time by virtue of provisions of the Recognition Agreement in this case? (3) Were the Claimants subjected to a detriment when the Respondent refused to grant them a daily rest period of at least 11 hours between the end of those meetings and the beginning of their night shifts?

The Background Facts

3. The Respondent manufactures glass containers for the food and beverage industries. Both Claimants are employed at its Elton site in Cheshire, as part of the Operations Glass Manufacture unit. Mr Edwards is described as an IS Operator, employed to ensure that the

glass containers are made to a satisfactory standard. He is also an employee health and safety representative. Mr Morgan is employed as a night-shift operative engaged in the running and control of a machine that produces glass containers; he is also a trade union shop steward. The Respondent recognises the trade union Unite in relation to three separate bargaining units, of which the operations Glass Manufacture is one. The Recognition Agreement in respect of that bargaining unit is dated 1 July 2013.

4. On Wednesday, 11 September 2013, an inaugural site health and safety representatives' meeting was held. Mr Edwards, as one of the appointed health and safety representatives, attended. The meeting started at approximately 1pm and finished at approximately 4pm. That week Mr Edwards was scheduled to work three 12-hour shifts on Tuesday, Wednesday and Thursday between 7pm and 7am. As the health and safety representatives' meeting took place outside his scheduled working hours he was paid by the Respondent for those hours. He was also excused his Tuesday night shift and was allowed to start his Wednesday night shift at 10pm rather than 7pm. That still meant, however, that only six hours passed between Mr Edwards' attendance at the health and safety representatives meeting and his night shift.

5. On Friday, 20 September 2013, Mr Morgan attended a trade union meeting in his capacity as a shop steward. The meeting was convened to discuss a pay rise and did not itself involve management. That week Mr Morgan was scheduled to work four 12-hour shifts on Friday, Saturday, Sunday and Monday between 4pm and 7am. So he was not in work on the Thursday night but came in for the trade union meeting, which started at 9am and finished at 4pm. He too was permitted to start his Friday night shift at 10pm rather than 7pm, giving him an interval of nine hours between the end of the meeting and the start of his night shift.

6. The issue of how time spent at such meetings was to be treated for **Working Time Regulations** purposes had previously been raised by the Unite Regional Officer, Mr Daley, with the Respondent's then HR Director, Ms Hemphill. Mr Daley argued that trade union shop stewards should be provided with 11 hours' rest between the carrying out of trade union duties and attending on shift. Ms Hemphill responded that the Respondent did not believe union duties or activities amounted to working time for the purposes of the **Regulations,** albeit that the Respondent agreed that those attending a meeting the next day would be allowed to leave shift early if working the previous night and start their shift late if working the next night.

7. Mr Daley had rejoined by contending that the Respondent would be in breach of the **WTR**, specifically to the right to 11 consecutive hours of rest in any 24-hour period. He also considered this potentially to be in breach of the obligation to maintain trust and confidence and of the Respondent's health and safety obligations and to subject the Unite representatives to an unlawful detriment, contrary to section 146 of the **Trade Union and Labour Relations (Consolidation) Act 1992** ("TULRCA"). Ms Hemphill disagreed. She referred to the definition of working time at Regulation 2(1) of the **WTR** and argued that the circumstances did not meet that definition: the representatives were not working; they were not carrying out the duties of their specific role; they were not at the Respondent's disposal.

The ET's Decision and Reasons

8. The ET first had to determine whether the Claimants' attendance at the health and safety (Mr Edwards) or trade union (Mr Morgan) meetings constituted working time for the purposes of Regulation 2(1) of the **WTR**; specifically, whether it was:

> **"(a) any period during which [the worker] is working, at his employer's disposal and carrying out his activities or duties"**
>
> or:

> **"(c) any additional period which is to be treated as working time for the purpose of these Regulations under a relevant agreement".**

9. It being accepted that the Claimants might both be said to have been "working", in the ordinary meaning of that term, the ET considered the first part of the definition under Regulation 2(1)(a) to be satisfied.

10. Turning to the second part of the definition for Regulation 2(1)(a) purposes - whether or not the Claimants were at the employer's disposal - the ET noted that the meetings in question were held on the Respondent's premises and the Claimants had been required to clock in and out in order to attend, albeit that was for pay and for health and safety reasons. The ET did not consider this was the same as being at the Respondent's disposal, holding:

> **"21. … in order to satisfy this part of the definition … the claimants had to show using the ordinary meaning of disposal in this context that they were available to be used by the respondent whilst conducting their roles as employee representatives. …"**

11. Using the ET's collective knowledge and experience it considered that the Claimants, as employee representatives, had in fact been at the meetings to represent the interests of their fellow employees and as such were:

> **"… beyond the control and direction of their employers in the sense of the employer's ability to require them to forsake their representational role in the interests of the company. …"**

That being so, the ET concluded that the second part of the definition had not been satisfied.

12. For completeness, the ET went on to consider the third element of the definition under Regulation 2(1)(a): whether the Claimants were carrying out their activities or duties. In this regard the ET considered that:

> **"… such phrase meant the activity or duties in respect of the role for which the claimants were employed." (paragraph 22)**

In this case the ET observed that:

> **"These duties … revolved around the production of glass containers. [The Claimants] were contracted to carry out these duties as an IS Operative and Night Shift Operative respectively and quite clearly whilst attending union meetings outside of their working hours they were not undertaking any activity or duties falling within those for the purpose of which they are employed. …"**

The ET therefore concluded that the third limb of the definition was also not met.

13. The Claimants' case was also put on the alternative basis, that, by virtue of the Recognition Agreement of 1 July 2013, their activities met the definition of working time for the purpose of Regulation 2(1)(c) of the **WTR**. The Respondent accepted that the Agreement, which applied to the bargaining unit in respect of which the Claimants were employee representatives, was capable of constituting a relevant agreement for the purpose of 2(1)(c). The ET noted, however, that the Agreement was silent on the performance of union duties outside normal working hours, on the issue of pay for those duties or the issue of rest periods in respect thereof. Although there was reference to the Respondent providing reasonable facilities to assist the union representatives in carrying out their legitimate representational duties and responsibilities, the ET did not consider that such a reference, having regard to its lack of specificity, was capable of being construed as bringing any period spent by the union representatives outside of normal working hours at union meetings within the ambit of the definition. It therefore concluded the Claimants did not meet the requirements of the definition under Regulation 2(1)(c).

14. For those reasons the ET held there was no breach of the **WTR**. It then considered the claims of unlawful detriment. For these purposes the ET found that the act or deliberate failure to act by the Respondent in this case was the refusal to accept that the attendances by the Claimants at the two meetings gave rise to a right to 11 consecutive hours' rest before

commencing their next shift. It asked whether this had caused detriment to the Claimants. Given its conclusion that the Claimants' attendances did not constitute working time for the purposes of the **WTR** so as to activate the right, the ET could not see how this amounted to a detriment, particularly given the concessions - albeit short of providing 11 consecutive hours' rest before starting the next shift - the Respondent had made.

15. Given that conclusion the ET did not go on to consider the additional questions raised in the case (whether the claims had been brought in time or as to whether the Claimants had established a *prima facie* case for the purpose of section 146).

The Appeal

16. The Grounds of Appeal can be summarised as follows:

(1) The ET erred in failing to find the Claimants met all three elements of Regulation 2(1)(a) **WTR**; specifically, it wrongly adopted an unduly restricted interpretation of the Regulation and failed to construe the definition purposively under EC law and applying the Convention.

(2) The ET failed to have any or any proper regard to relevant and material evidence and/or reached a perverse conclusion.

(3) Alternatively, the ET erred in failing to conclude that the terms of the Recognition Agreement brought the time spent by the Claimants at the meetings in question within the definition of working time for the purposes of Regulation 2(1)(c).

(4) Further or in the alternative, the ET erred in its approach to the Claimants' claims of detriment under section 146 **TULRCA 1992**; either, because it erred in its approach to the definition of working time (see above) and thus its conclusion in

respect of the detriment claim was vitiated, or, in any event, in not finding that the Claimants had suffered detriment as a result of the refusal of rest for a period equivalent to that required under the **WTR**.

17. For its part the Respondent resists the appeal, largely relying on the ET's reasoning but observing that the Claimants had not raised any point under the **European Convention on Human Rights** below.

The Relevant Legal Principles

18. I start with the relevant legislative provisions and with section 2 of the **Health and Safety at Work Act 1974** (as amended), which relevantly provides:

> **"(4) Regulations made by the Secretary of State may provide for the appointment in prescribed cases by recognised trade unions (within the meaning of the regulations) of safety representatives from amongst the employees, and those representatives shall represent the employees in consultations with the employers under subsection (6) below and shall have such other functions as may be prescribed.**
>
> **…**
>
> **(6) It shall be the duty of every employer to consult any such representatives with a view to the making and maintenance of arrangements which will enable him and his employees to co-operate effectively in promoting and developing measures to ensure the health and safety at work of the employees, and in checking the effectiveness of such measures.**
>
> **(7) In such cases as may be prescribed it shall be the duty of every employer, if requested to do so by the safety representatives mentioned in subsection (4) above, to establish, in accordance with regulations made by the Secretary of State, a safety committee having the function of keeping under review the measures taken to ensure the health and safety at work of his employees and such other functions as may be prescribed."**

19. The relevant Regulations made by the Secretary of State under these provisions are to be found in the **Safety Representatives and Safety Committees Regulations 1977**, in particular Regulations 3, 4(1) and 9.

20. The **WTR**, by Regulation 2(1), provides the definition of working time for the purposes of the Regulations (see above). At Regulation 10(1) it is further provided:

"10. *Daily rest*

(1) [An adult worker] is entitled to a rest period of not less than eleven consecutive hours in each 24-hour period during which he works for his employer.

(2) Subject to paragraph (3), a young worker is entitled to a rest period of not less than twelve consecutive hours in each 24-hour period during which he works for his employer.

(3) The minimum rest period provided for in paragraph (2) may be interrupted in the case of activities involving periods of work that are split up over the day or of short duration."

21. The **WTR 1998** is the domestic implementation of European directive 2003/88/EC, the **Working Time Directive** ("WTD"). I proceed on the presumption that Parliament intended to implement the **WTD** both fully and accuracy (**Bear Scotland Ltd v Fulton** [2015] IRLR 15 EAT, paragraph 64). In fact the definition of working time under Regulation 2(1)(a) of the **WTR** is copied verbatim from the **WTD**. The requirements it lays down are conjunctive: all three elements of (a) must be satisfied in order for the period to constitute working time (**South Holland District Council v Stamp** [2003] UKEAT/1097/02); the worker must be working *and* at the employer's disposal *and* carrying out his activities or duties.

22. Albeit for different purposes, in **Davies v Neath Port County Borough Council** [1999] ICR 1132, the EAT allowed that attendance at trade union meetings can constitute work. In **Davies**, the Claimant, a part-time worker within the Council's Meals on Wheels Service, became a trade union health and safety representative and attended two trade union courses in that capacity. Allowing she was thereby entitled to paid leave pursuant to section 168 and 169 **TULRCA 1992**, the question arose as to whether she was to be paid on a full-time or part-time basis. That, in turn, raised the question whether her attendances on the courses amounted to work for the purposes of what was then Article 119 of the EC Treaty. The EAT noted that the ECJ, in the German case of **Arbeiterwohlfahrt Der Stadt Berlin v Botel** [1992] IRLR 423, had held that training for staff council functions was work for the employer in the broad sense that staff committees safeguard staff interests and promote harmonious working relationships in

the interests of the business. Whilst trade union work was not strictly comparable to German staff committee work, the EAT considered it was analogous; the differences were not such as to take Ms Davies' courses outside the scope of **Botel**. Specifically:

> **"Attending a training course organised by a recognised trade union is still related to the employment relationship and is safeguarding staff interests which is ultimately beneficial to the employer. Health and safety representatives require training for the better performance of their duties. Training may be made available either by the union or the employer. In each case the training of the representative facilitates the execution of the health and safety representatives' duties which is of direct benefit to the employer and fellow employees. Such a representative must be an employee and their functions and training stem wholly from their employment relationship. Attendance at the training courses is work within the meaning of article 119 because it was by reason of the existence of an employment relationship. …"**

Submissions

The Claimants' Case

23. Picking up on the approach of the EAT thus laid down in **Davies**, Ms Criddle submitted that the reasoning went beyond simply looking at the question of work: the EAT had allowed that attending the courses was of benefit to the employer, and it was work because Ms Davies' attendance arose from the employment relationship. It was, further, right to take that approach having regard to the purpose of Article 119. Applying a purposive approach meant going further than simply testing to see whether the construction was a permissible one; it had to be Directive- and Convention-compliant, see Lord Millett's observation in **Ghaidan v Godin-Mendoza** [2004] 2 AC 557, that the standard approach to construction requires that legislation is interpreted in a way that gives effect to Convention rights and it is only where so doing gives rise to what would be seen as an abnormal construction that section 3 of the **Human Rights Act** comes into play (see also the approach described by the EAT in **Bear Scotland**). The only limitation on a purposive construction is that the court cannot construe the legislation in a way that goes against the very grain of that legislation.

24. Further, the Claimants relied on the approach of the ECJ to the question whether time spent on-call could constitute working time for the purposes of the **WTD**. In the on-call cases,

mere presence at the workplace was sufficient notwithstanding that the employees were not carrying out any particular duties and, indeed, might be sleeping and only actually called upon to perform duties for less than half the time they were present; they would still meet the definition of working time for these purposes (see **Landeshaupstadt Kiel v Jaeger** [2004] ICR 1528 and **SIMAP v Conselleria de Sanidad y Consumo de la Generalidad Valenciana** [2001] ICR 1116). In **SIMAP** the court, taking a purposive approach, had held that:

> **"48. … the characteristic features of working time are present in the case of time spent on call by doctors in primary care teams where their presence at the health centre is required. It is not disputed that during periods of duty on call under those rules, the first two conditions are fulfilled. Moreover, even if the activity actually performed varies according to the circumstances, the fact that such doctors are obliged to be present and available at the workplace with a view to providing their professional services means that they are carrying out their duties in that instance."**

25. The Court had seen working time as being directly opposite to rest time: when not on rest the doctors were working; their presence on-call was sufficient. Working time and rest time were not terms to be defined by the member states; they were Community concepts and had thus to be defined in conformity with EU law.

26. The Claimants also relied on the Judgment of the ECJ in **Commission of the European Communities v UK** [2007] ICR 592. The Commission had challenged the guidance provided by the then DTI in respect of the **WTR** where it was said, in relation to minimum rest periods:

> **"… employers must make sure that workers can take their rest, but are not required to make sure that they do take their rest."**

27. That guidance was held to misrepresent the position under the **WTD**. The purpose of the **WTD** was to lay down minimum requirements throughout the Community, for the benefit of workers, to improve living and working conditions. Thus:

> **"41. … in the light of the essential purpose of Directive 93/104, which aims to effectively protect the safety and health of workers, each worker must, inter alia, enjoy adequate rest periods, which must not only be effective in enabling the persons concerned to recover from the fatigue engendered by their work, but also preventive in nature, so as to reduce as much as**

possible the risk of affecting the safety or health of employees which successive periods of work without the necessary rest are likely to produce: *Jaeger*, para 92.

42. A member state which, in the national measure implementing Directive 93/104, provides that the workers are entitled to certain rights to rest and which, in the guidelines for employers and workers on the implementation of those rights, indicates that the employer is nevertheless not required to ensure that the workers actually exercise such rights, does not guarantee compliance with either the minimum requirements laid down by articles 3 and 5 of that Directive or its essential objective."

28. The Claimants further placed reliance on the rights afforded to them under Article 11 of the **European Convention on Human Rights**, which provides:

> ***"Freedom of assembly and association***
>
> **"1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.**
>
> **2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State."**

29. Specifically, on the enjoyment of Article 11 rights, the Claimants relied on **Demir v Turkey** [2009] 48 EHRR 54 where the European Court of Human Rights made clear that Article 11 rights had to be respected as a matter of substance, and thus the right to bargain collectively with the employer has become one of the essential elements of the Article 11 right.

30. Dropping down into the domestic health and safety legislation, the Claimants relied on section 2 of the **1974 Act** and the **Regulations** made thereunder, which provided the statutory underpinning of the work of the health and safety representative.

31. Turning to their specific claims, the Claimants noted that the trade union representative holds his or her role by virtue of being an employee. The purpose of the role is to negotiate with the employer and represent the interests of fellow employees. The extent to which the role can be carried out and how it is done is to a large extent dependent on the co-operation of the

employer. There is no absolute right to participate in any particular trade union activities, only to reasonable time off (what is reasonable being a matter for the employer).

32. When defining the nature of the time spent participating in such activities, for **WTD** (and thus **WTR**) purposes, it was either working time or rest time (**SIMAP**).

33. The ET's error was in impermissibly construing each element for the definition of working time literally and without regard to the underlying purpose and/or to Convention rights. The result meant that the Claimants had been working, as the ET allowed, on the Respondent's premises and to the Respondent's benefit and yet had not been entitled to the rest periods required for health and safety purposes.

34. Turning to the individual elements of Regulation 2(1)(a). The requirement to be at the employer's disposal required no more than that the Respondent had determined that the Claimants were to undertake the relevant activity. If more was required - if being at the Respondent's disposal required that the Respondent determine how the activity was carried out - the test was still met on the facts of this case. Specifically regarding Mr Edwards' case, the ET had failed to look at the legislative provisions that underpinned his role and the specific requirements the Respondent had laid down, including a requirement of mandatory attendance at health and safety meetings. As for Mr Morgan and the role of trade union representatives more generally, the ET had failed to have regard to the detail of the Recognition Agreement, which provided:

> **"1. *Introduction***
>
> **1.1. The Employer and the Union have reached this agreement with the aim of establishing and operating policies, procedures and practices which will ensure that the Employer, employees and the Union can work together in a mutually beneficial and harmonious relationship.**

> **1.2. In this joint approach, the Employer and the Union have a common objective in ensuring the efficiency and prosperity of the Employer and in promoting security of employment and advancement of all employees."**

The Agreement further allowed that trade union representatives were members of a joint negotiating committee, which would be "the major forum for relationships between the employer, the union and employees".

35. On the facts of these cases, it should be noted that the Respondent had accepted that the Claimants could start their shifts later by the number of hours they were earlier attending the meetings. It was effectively accepting it had required them to attend the meetings and, as a quid pro quo, they were to start their shifts later. The ET failed to make reference to this or to the fact that the Respondent had itself arranged the meetings. The ET had apparently been concerned that the Respondent could not instruct the Claimants, but that was contrary to the approach of the ECJ in cases such as **Jaeger**: all that was required was that the employer had decided that what the employee was doing was to take place. The employees here could not simply attend trade union meetings without the Respondent's approval; it had to be at an appropriate time, as laid down by the employer (**Robb v Leon Motor Services Ltd** [1978] ICR 506 EAT). The Respondent had approved attendance at the meetings and ultimately could have required the Claimants to leave those meetings if it so chose. The employees might have been able to protest against that but they could not refuse. The most they could do was complain that they had not been given reasonable time off for trade union activities or reasonable facilities.

36. As for activities or duties, the ET had approached this as requiring that it be the activity or duties on which the Claimants were employed. The Claimants disagreed. First of all, "his activities" was, it was submitted, to be construed as requiring a focus on the activities or duties of the employer. Those would include the activities or duties which furthered the Respondent's

interests in establishing and maintaining good industrial relations. The ET's approach was unduly narrow. As for the Respondent's submission that the Claimants were not at the Respondent's disposal because the Respondent could not have required them to undertake their normal contractual duties, the ET made no finding to that effect. If the meeting had coincided with a time when the Respondent needed the Claimants to undertake normal duties, then it could have directed that they did so. Further, there was no requirement that the activities or duties were contractual; there was nothing in the statutory language to suggest that should be the case. Indeed the fact that it was allowed that the worker might be engaged on "activities" pointed away from such a restrictive interpretation.

37. Turning then to the alternative limb (c) argument. As paragraph 24 of the ET's Reasons recorded, the Recognition Agreement was a relevant agreement. The ET found against the Claimants because of what it found to be the lack of specificity of the Agreement. There was, however, nothing in the definition under the **WTR** that required that the agreement specifically laid down what was working time, merely what was to be treated as working time.

38. Here the Recognition Agreement provided that trade union representatives were to be members of the JNC (see paragraphs 3.2 and 5). Thus, when there is time which is necessarily to be spent fulfilling duties as a trade union representative, that under the Agreement was to be treated as working time. Whilst the Agreement did not specifically address the case of health and safety representatives, that was underpinned by the statutory provisions and would fall to be treated in the same way under the Recognition Agreements.

39. As for the section 146 **TULRCA** detriment claim, the ET decided this against the Claimants because it had decided that the time spent at the meetings was not working time and

thus there could be no detriment. If the Claimants won on "working time" (on either limb) the ET's rejection of this claim must fall. Even if the Claimants were not successful on their working time case, the ET had failed to deal with their case, as put in the alternative. The test for detriment was whether, by reason of the act or acts complained of, a reasonable worker would or might take the view that he or she had thereby been disadvantaged in the circumstances in which they thereafter had to work (**Shamoon v Chief Constable of the Royal Ulster Constabulary** [2003] ICR 337). This was not a high test. These Claimants were perfectly entitled to feel a legitimate sense of grievance that they were being deprived of minimum rest periods recognised under the **WTR** when both the activities they were engaged in were for the benefit of the employer.

40. As for disposal, the EAT could and should substitute its own view on the points at issue save for the remaining issues under section 146 **TULRCA 1992**, which would have to be remitted to the same ET.

The Respondent's Case

41. First addressing the factual basis of the Claimants' submissions, Mr Sendall made the general observation that it was important to remember the distinction between Mr Morgan and Mr Edwards. The **Health and Safety at Work Act** underpinning could only have applied to Mr Edwards as the health and safety representative. As for the suggestion that the time taken off the next shifts corresponded to the length of the meetings and the Claimants attempt to infer that this was a period thus taken out of their working time and the meeting was put in its place. The Respondent did not accept that was the case because both were paid for the time they attended the meetings, thus recognising that they were undertaking trade union activities during

what would otherwise have been their rest time and were also paid for the first hours of the night shifts even though they were not required to attend.

42. More generally, there was no direct correlation between working time and paid time. A worker may be paid even when they were not working: for example when they are on holiday or on sick leave. As for the Respondent's health and safety rules, these could only apply to Mr Edwards, and in truth a proper reading of the provisions in question made it clear that his attendance was not mandatory. Accepting that the evidence might be seen as pointing both ways, Mr Sendall submitted that it could not be assumed that, if Mr Edwards had failed to attend, he would have faced any disciplinary action (although he may have done if he had not attended the meeting but still attended for the night shift late).

43. It should also be noted that the Claimants' submissions before the ET had not taken any point under the **European Convention**. Whilst not saying that the Claimants could not rely on this at all, it should be noted that there was no evidence adduced of any interference with Article 11 rights, and if the court was to find that point at all persuasive, then it would be required to remit the matter on that point to the ET to consider such evidence as there might be.

44. Turning then to the specific points arising under the definition of working time for Regulation 2(1)(a) purposes, as for what seemed to be the Claimants' argument that they had taken on dual roles once they were elected, that could not be the case: they were elected to their trade union roles in such a way that the Respondent could not have objected. There was no variation to their contracts. Whilst to constitute activities or duties for Regulation 2(1)(a) purposes the point may not go so high as to require those activities or duties to be contractual in nature, they did at least have to be activities for the benefit of the employer and, further, they

had to meet the requirement of being at the disposal of the employer at the relevant time. The Claimants were really seeking to elide the different elements of the definition. The finding was that they had not met all three of the requirements, and that was based on the distinction between what was working time and what was resting. If the Claimants were unable to meet all three elements of the definition, then they were resting even if it might not look as if they were resting as that term might normally be understood.

45. The on-call cases did not assist the Claimants: the doctors were on call because they were contracted to be; the nature of the contractual requirement was likely to be determinative. That might be so even where the employee is not physically on the employer's premises but contractually on call. That was why **Jaeger** was decided as it was; the court was satisfied that the third limb was met because the employees were holding themselves available. If the end result in this case looked absurd - as the Claimants suggest - that was simply the consequence of how the **WTD** and the **WTR** treat all time that is not working time as rest time: employees who engage in other activities - even if not "rest" as would normally be understood and even if related to their work - would still be at rest if they were not engaged in working time.

46. As for activity or duties, this clearly meant the employee's activities or duties not those of the employer; that was the natural reading of **SIMAP**. As for whether the Respondent could have required the Claimants to leave the meetings and attend to their normal duties, if so that would be a case where the employees would be or could become at the disposal of their employer but, on the facts of these cases, that would not arise because the meetings did not take place during the Claimants' rostered shifts.

47. For all the Claimants' arguments as to the purpose of the **WTR**, this was an attempt to attack findings of fact by the ET. At most, it was a perversity appeal. The ET did not go into the detail of the arguments as to purposive effect because that approach was not in dispute. The difficulty for the Claimants was that the ET had decided as a matter of fact that these employees were not at the disposal of the Respondent at the relevant time and were not engaged in their activities and duties. Those were questions of fact, and the Claimants would have to meet the high threshold laid down in **Crofton v Yeboah** [2002] IRLR 634 CA in order to make good their appeal. As for the Article 11 point, any such finding would need to take into account the concessions that had been made by the Respondent, the fact that attendance at the meeting was paid and that the employees had a compensatory late start to their shifts.

48. Turning to the alternative case under Regulation 2(1)(c), the Recognition Agreement simply did not do enough: it did not address the issue whether or not particular periods should be treated as working time. The Claimants' appeal in this respect could not get off the ground.

49. On the detriment claims, the ET got it right: if the Claimants could not establish breach of **WTR**, they could not succeed on the detriment.

50. On the question of disposal, if the court was persuaded by the Claimants' argument dependent on the Convention, the matter would need to be remitted. Otherwise the Respondent reserved its position depending on the way in which the court ultimately reached its Judgment.

The Claimants in Response

51. For the Claimants in reply, Ms Criddle said if the purposive approach was common ground, then the ET remained in error by failing to apply that approach. As for Article 11, the

right was engaged because this case concerned collective bargaining rights; there was no need for further findings of fact. The on-call cases relied on by the Claimants, which the Respondent suggested did not assist in this case, included recognition by the Advocate General in **SIMAP** of the difficulties in the definition and thus the fact that it was all the more important to have in mind the purpose of the **WTD**. In that case, the court had rejected the argument that the contractual nature of the requirement would be determinative (see paragraph 50 where it rejected any suggestion that a contractual requirement to be on call but not physically on the premises would constitute working time).

52. On activities or duties, the Claimants noted the apparent concession by the Respondent that these did not have to be contractual, albeit they would need to be closely associated with the contract. The Claimants argued it simply had to be closely associated with the employment.

Discussion and Conclusions

53. I start with the definition of working time under Regulation 2(1) **WTR** and note that each of the three elements must be satisfied for time to be working time for these purposes (**South Holland v Stamp**): the worker must be working *and* at the employer's disposal *and* carrying out his activities or duties. I further note that it is appropriate to have regard to the aim of the **WTD** (and, thus, the **WTR**), which is to safeguard the health and safety of workers. I duly note and apply the purposive approach to working time as, for example, laid down by the Court of Justice in the on-call working cases, such as **SIMAP** and **Jaeger**. And I keep in mind that respecting the protective nature of the **WTD** is a matter of substance not just form (**Commission v UK**).

54. In **SIMAP**, it is further right to observe, the Court of Justice saw working time as being in opposition to rest time; the two characterised as mutually exclusive. For the Claimants, Ms Criddle sees this as helpful: if not at rest, then the time in question must be working time even if it does not look very much like working (see **Jaeger**). For the Respondent, Mr Sendall equally draws comfort from this distinction: if not working time - in the sense of not meeting each of the three limbs required by the definition - then the worker is at rest for **WTD** purposes, even if the way in which the time is spent does not look very much like rest.

55. In **SIMAP**, the Court of Justice considered that to exclude on-call duty from the definition of working time, when the worker's physical presence was required and the employees were obliged to be available, would seriously undermine the objective of the **WTD**. That said, it is also apparent that the court had regard to the nature of the work in question, looking to see whether the "characteristic features" of working time were present.

56. In the present case, the ET concluded that the Claimants were working. There is no cross-appeal against that conclusion. In attending the meetings in question, both Claimants were carrying out roles and functions that stemmed wholly from the employment relationship and gave benefit (in the broader sense, see **Davies**) to the employer. As Ms Criddle observes, the result of the ET's Judgment is thus that, during the course of the meetings, both Claimants were on the Respondent's premises, working for the Respondent's benefit (as broadly understood) and both then went on to work - again for the Respondent's benefit - on the night shift without the requisite time passing to allow them to have rested, as would be understood (for **WTD** purposes) to be necessary for their health and safety.

57. Is that what the definition of working time entails? On the facts of these cases I do not consider it does. Where then did the ET go wrong?

58. If adopting a similar approach to the EAT in **Davies** (and Mr Sendall has not sought to argue that this would be wrong), attendance at the meetings in question was of some benefit to the Respondent; it was helping it meet its obligations, whether statutory or as a result of the Recognition Agreement or, more generally, in terms of good industrial relations. I do not think that the ET engaged with that point; with the nature of the work that it found the Claimants to be carrying out and how that was, at least in part, to the Respondent's benefit.

59. The question arises as to where that then goes in terms of the definition under Regulation under 2(1)(a). The ET might be right that all that is required for the first element of that definition is that the workers are engaged in doing something. They are not inactive. In **SIMAP**, however, the nature of the work was considered relevant - whether it evidenced the "characteristic features" of working time. If "working" simply means doing something, then the nature of that something - and whether it has the characteristic features of working time - must be relevant to the other parts of the 2(1)(a) definition.

60. Were the Claimants at the employer's disposal? The Respondent says this is simply a question of fact. Adopting "the ordinary meaning of disposal", the ET found (1) the Claimants had not shown that they were available to be used by the Respondent, and (2) the Respondent could not have required them to forsake their representational role in the interests of the company. As the Respondent observes, that conclusion drew on the experience of the ET members and it would be wrong of an appellate court to interfere with findings of fact made by a first-instance specialist Tribunal.

61. In this case, however, I consider the conclusion to have been rendered unsafe by the approach adopted by the ET. Being at the employer's disposal does not require that the workers in question are under the control and direction of the employer - either generally or in terms of the specific carrying out of their activities or duties - throughout the period. That would not be so, for example, in on-call cases where the sleeping employee is hardly acting under the employer's control and direction in any specific or direct sense. "At the employer's disposal" must mean something broader than under the employer's specific direction and control. Following the case-law, it is apparent that, if the employer has already required the employee to be in a specific place and to hold him/herself ready to work to the employer's benefit, that can be sufficient.

62. In the present cases it does not seem to have been in dispute but that the Claimants were required to attend the meetings in question and that the Respondent had decided when and where the meetings were to be held. If I am wrong on that point and the matter was contentious, then further findings of fact would need to be made because the ET had failed to engage with a material matter in its decision making. In any event, what is clear is that the Respondent laid down the rules for the health and safety meeting, which suggested that it was required that Mr Edwards was to attend, and stated how the meeting was to be conducted. Further, the Respondent had specifically provided that the Claimants would then start their next shift late by the numbers of hours they had been in attendance at the meetings. All that seems to me to point to the Claimants having been at the Respondent's disposal, in the general sense that they were required to come into the workplace to attend these meetings when the Respondent had said and thus could not spend what would otherwise have been their rest periods when and where they themselves chose (allowing that they might have chosen to go to some kind of trade union meeting in any event).

63. Although employees might themselves choose not to spend their rest period in an entirely inactive way, "rest" in such circumstances would imply that the time spent would be in the manner of the employees' choosing: their time would still be their own. Here, however, it was not. That seems all the more to be the case when one thinks through the Respondent's continued broader control over the Claimants at this time. If the meetings had taken place during the Claimants' normal shifts, then the Respondent accepts it would have been able to call them out of the meetings to attend work on the line if so required: they would have been at the Respondent's disposal, either to continue in the trade union meetings or to attend what might be said to be their normal duties. Even on the particular facts of these cases, the point holds good. Whilst the meetings were ongoing the Respondent could have required the Claimants to leave early because it could no longer allow them to start their night shifts late. Instead of using that time to carry out work at the meeting the Respondent could have required that the Claimants use those hours to attend work earlier on the subsequent night shift. The Claimants might have been attending trade union meetings, with all that that entails, but they remained at the Respondent's disposal.

64. The point is underlined by the point of the meetings in question; the benefit they brought the Respondent, as recognised in **Davies**. The Respondent was determining what the Claimants could do at these times by requiring that they came on to the premises and engaged in activities which were in part for its benefit. That approach also fits with the rights of trade union representatives under **TULRCA**, which recognises that carrying out trade union activities must be at an appropriate time: that is, at a time agreed with the employer.

65. I consider that the ET erred on this point because it adopted an unduly restrictive approach to the question. It was unduly restrictive, first, because it is not what the Regulation

says - it does not state that "disposal" must be in any direct or specific sense or be linked to the carrying out of particular duties. Moreover, it was unduly restrictive given the nature of the provision in question and its underlying purpose; to protect the health and safety of workers by ensuring that they have adequate rest periods between different periods of working time.

66. I turn then to the third requirement of the definition, that the Claimants were each carrying out "his activity or duties".

67. Ms Criddle argues that the ET erred in seeing this as the Claimants' activities or duties, rather than those of the employer. I see the ambiguity but am not sure that I agree. Equally, however, I am not sure it makes much difference. The ET approached the case on the basis that it must mean the activity or duties for which the Claimants were employed. I think it is possible to infer from the reasoning that, even if it were to be the Respondent's activity or duties, the ET would still have taken the view that this must refer to the Respondent's business - that of glass manufacture - not attendance at trade union meetings.

68. To the extent it is necessary to engage with Ms Criddle's submission, it seems odd to refer to an employer's duties as such; the language of the Regulation does seem to refer to activity or duties engaged in by workers for the employer. That, I would tentatively suggest, would also seem to have been the approach adopted by the Court of Justice in **SIMAP**.

69. Assuming that it regard must be had to the activity or duties of the employee, what is being referred to? Must this be the activity or duties which the workers are employed to carry out under their contract? Mr Sendall initially seemed to urge that the contract would generally be determinative. In oral argument, however, he allowed that this might be putting the case too

high, although he maintained that it would still have to be activities for the benefit of the employer and for which the workers are at the disposal of the employer. Whether or not the workers are at the disposal of the employer is obviously a separate question. Allowing that the activity or duties simply have to be for the benefit of the employer, that does seem to be a different test to that applied by the ET. Indeed, it is hard to read the ET as applying anything other than a contractual test. Moreover, the question remains why attendance at these meetings could not be (following **Davies**) for the Respondent's benefit.

70. The error again stems from the ET's again unduly restrictive approach to the definition. I do not see why Regulation 2(1)(a) should be read as requiring that activity or duties must mean the contractual (on the narrower reading of the ET's Reasons) or (allowing for a broader reading) normal working duties. That would not be consistent with a purposive approach. If engaged in activities that are (at least in part) for the employer's benefit and done with the employer's knowledge and (however broadly) in the manner and at the time of the employer's approval, why is the worker not then carrying out relevant activities or duties?

71. I can see Mr Sendall's objection to the suggestion that the Respondent itself had assigned the Claimants to these duties; they were elected or appointed by those on the trade union/employee side not, by the Respondent. On the other hand, once so elected or appointed, they were thereby carrying out activities and duties that were, in the broader sense, of benefit to the Respondent's business and were doing so because of the employment relationship; they would cease to carry out those roles if they left the Respondent's employment.

72. Thus, in my judgment, the ET erred in its approach to the definition of working time under Regulation 2(1)(a). Given that conclusion, I do not need to reach a view on the Recognition Agreement case and I do not do so.

73. As for the detriment case, my finding in respect of Regulation 2(1)(a) must mean that the ET's Judgment on this cannot stand in any event. That being so, I do not need to determine the alternative way in which the Claimants put the detriment case and, again, I do not do so.

74. As indicated above, it had seemed to me common ground that the Respondent had arranged the meetings I question. If that is right, then I consider that it would be open to me to reach my own conclusions on these facts and, so doing, I would find that there had been a breach of the **WTR** under Regulation 2(1)(a). It may, however, be possible that there is some degree of dispute on this point. If so, then my judgment remains that the ET erred in its approach (and the appeal allowed) but there would then be an outstanding factual issue to be determined which might be relevant to the ultimate conclusion of the case. In that eventuality, the proper course would be to remit the matter to the ET. The parties will be given the opportunity to address me further on this question and on the issue of disposal before I finalise the Order on this appeal.