Appeal No. UKEATS/0053/13/JW

EMPLOYMENT APPEAL TRIBUNAL

52 MELVILLE STREET, EDINBURGH, EH3 7HF

At the Tribunal
On 8 April 2014

Before

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

(SITTING ALONE)

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(1) MR PAUL TRUSLOVE
(2) MISS ELLOUISE WOOD — APPELLANTS

SCOTTISH AMBULANCE SERVICE — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR DAVID HAY (Advocate) Instructed by: Allan McDougall & Co. Solicitors 3 Coates Crescent Edinburgh EH3 7AL
For the Respondent	MR ANDREW BROWN (Solicitor) Anderson Strathern LLP 1 Rutland Court Edinburgh EH3 8EY

SUMMARY

WORKING TIME REGULATIONS – WHETHER ON CALL WAS AT WORK

Ambulance paramedics sometimes worked on-call night shift duty away from their home base station. On such occasions, they were required to take accommodation within a 3 mile radius of the distant ambulance station, at which they were to park the ambulance. They were to meet a target time of three minutes within which to respond to a call. An ET held, applying what it thought to be the close analogy between the facts of this case and those considered by the ECJ in **SIMAP**, that whilst on call under this regime the Claimants were at rest. This was reversed on appeal, since it was clear that the time of the claimants was not their own whilst on this duty. The ET had not defined the principle it was to employ. Had it done so it would have had central regard to **Jaeger**. The central question was whether the employees were on the facts required to be present at a place determined by the employer. They had to be where they were, within narrow limits. They could not be at home. Therefore they could not enjoy the quality of rest which they were entitled to have under the Working Time Regulations.

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

1. This appeal raises the question whether time spent by ambulance paramedics on call, which is contractually required to be spent away from home, counts as working time. If it does, they are entitled to a rest period of not less than 11 consecutive hours in each 24-hour period or an equivalent period of compensatory rest.

2. Employment Judge Christie, at Aberdeen, held that it did not count for reasons delivered on 28 August 2013 and accordingly he dismissed claims for compensation by the Claimants. The question on this appeal is whether, in so deciding, he erred in law.

The underlying facts

3. The Claimants were relief ambulance paramedics, both working normally from a base station at Elgin, Mr Truslove living in Elgin itself, Ms Wood in Buckie, Banffshire. Elgin is manned 24 hours a day on a rotating shift system. There is no on-call duty there. But sometimes Mr Truslove and Ms Wood were required to provide nightly cover at Dufftown and Tomintoul where only a day shift was worked, especially when a local staff member was unavailable to provide that night cover. When covering nights on call, Mr Truslove and Ms Wood were obliged to stay at accommodation of their choice within a three-mile radius of the ambulance station and, although they were not required to wear their uniform while there, they had to seek to achieve mobilisation within three minutes, that being a target and not an absolute requirement. The driver of the pair had the ambulance with him or her.

4. As to Mr Truslove, the tribunal specifically found that he had been assigned to carry out relief work at Dufftown Ambulance Station on 12, 13, 14 and 15 October 2009, working a normal ten-hour duty shift from 8 to 6pm, but thereafter being on call from 6pm until 8am,

before finally finishing at 8am on 16 October. This amounted to 97 consecutive hours. It was followed by days completely off duty: 16, 17 and 18 October.

5. So far as Ms Wood was concerned, specifically the tribunal found that she worked at Tomintoul on Saturday 1 and Sunday 2 August 2009 from 8 to 6pm, on each occasion following that day shift being on call for that station from 6pm to 8am the following morning, finishing at 8am on Monday 3 August, a total of 48 hours. She then worked a voluntary shift swap from 9am to 5pm on that Monday. On a second occasion she had again worked, this time at Dufftown, on a Saturday and Sunday, 29 and 30 August, 8 to 6pm followed by on-call duty 6 to 8am, finishing at 8am on Monday 31 August 2009, again 48 hours, again followed by her working a voluntary overtime shift beginning on Monday, 31 August, this time at 8pm.

6. For the purposes of this appeal, I was told that further facts had been agreed between the parties: first that staff, when on call, are not permitted to take the ambulance outwith a three-mile radius of the ambulance station concerned without first seeking and getting approval from ambulance control. Secondly, there is morphine, a controlled drug inside the ambulance. Thirdly, a three-minute period is a target. There has been no instance where the target has been missed by on-call staff when there has been a dismissal or discipline for such a missed target. Fourth, the response time of each paramedic is monitored. The monitoring period begins with the time of the summoning call from control to the time when the paramedic responds by pressing the appropriate touchscreen within the ambulance to show that the ambulance is on its way.

7. The tribunal, having considered the parties' submissions, set out the relevant law. The relevant statutory framework is not in dispute. The domestic regulations derive from the **Working Time Directive**. Regulation 2, which echoes the Directive, of the **Working Time**

Regulations 1998 defines working time in relation to a worker as meaning "(a) any period during which he working, at his employer's disposal and carrying out his activities or duties".

8. Regulation 10 entitles him to not less than 11 consecutive hours in each 24-hour period during which he works for his employer. But, by regulation 21, which it was agreed between the parties applied to paramedics, that regulation did not apply but instead was substituted by regulation 24, entitled "Compensatory rest", entitling the worker concerned to an equivalent period of compensatory rest wherever possible.

9. The tribunal asked itself whether the relevant duty was "working time" within the definition in Regulation 2. It considered this a fact-specific issue. At paragraph 64 it examined cases which helped with its determination of this fact-specific issue, in particular those of **SIMAP v Valencia** [2001] ICR 1116, **Landeshaupsadet Kiel v Jaeger** [2004] ICR 1528 and that of **MacCartney v Oversley House Management** [2006] ICR 510, the two first-named being decisions of the European Court of Justice upon the provisions of the parent directive, the last being a decision of the Employment Appeal Tribunal, HHJ Richardson presiding, which sought to apply that law in domestic jurisprudence.

10. It noted, at paragraph 65, that the European Court had not referred to a worker being "at home" in SIMAP, but merely somewhere other than the health centre, that being the workplace in that case where all the duties were carried out, and thought it was the same in **Jaeger** and **MacCartney**. It summarised the position at paragraph 66: that the distinction between those who are required to remain at the workplace and those who are not was not hard to understand and to express, and then referred to a case they called **Blakely** (in fact **Blakley**, that being a decision of the Northern Ireland Court of Appeal, **Samuel Blakley**

v South Eastern Health and Social Services Trust [2009] NICA 62). It thought that an example of:

> **"...the alternative situation, where a worker not being required to remain at a specific location determined by the employer, but to remain contactable and in a position to respond promptly did not mean the whole time was working time."**

11. The distinction hinted at there between those who were required to work and those free to be elsewhere, with reference to one's home, was reverted to in the final and decisive paragraphs of the judgment, beginning at paragraph 72:

> **"...it seemed that the main basis of the complaint was that when at a detached location the claimants could not be at home, or that they were not working set shifts as at a 24-hour station. It is apparently not disputed that for those regular and local workers based at day-only stations, and who perform on call duties whilst at home, mobilising from there if required, there is no claim for the whole time to be regarded as working time, albeit many of the same restrictions on activities must pertain as for those on detached duties.**
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> **73. If that is right, and the tribunal was not called upon to decide otherwise, then the only difference is between living in one's home or not. Certainly, at such times relief paramedics will not have the society of their family members and friends.**
>
> **74. Nonetheless, looking at the whole circumstances, the case seems to me to have more in common with that of [***Blakley***] than with those of** *SIMAP* **and** *Jaeger***. Indeed [***Blakley***] could apparently be called out to any one of 'various hospital sites in Northern Ireland', so that presumably it would not have made much sense for him to be required to remain at any one of them. However, although in addition he was not required to remain at home, he was plainly affected by restrictions involving remaining contactable and able to respond. To achieve that it must readily be taken that he remain in the area.**
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> **75. The present claimants lie somewhere between the two. The restrictions affecting them I think were greater than those affecting Mr [Blakley] (3miles; 3 minutes) but, in my view, noticeably less so than for Dr Jaeger and the others where the conditions imposed were more absolute and consequently noticeably more constraining.**
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> **76. This is not without difficulty and differing factual circumstances can begin to create distinctions so fine that they no longer remain sensible; but I am drawn back to** *SIMAP* **and the basis of that decision which involved almost a form of confinement to one specific location. In the end I do not consider the facts of the present case can properly be put on the same basis and thus do not support the proposition that all of the relevant on call time should be regarded as working time. That part of the case as brought accordingly falls to be dismissed."**

12. Thus what tipped the balance for the Judge was the combination of what the judge said in paragraph 74 and that in 76, that the basis for the **SIMAP** decision involved almost a form of confinement to one specific location, coupled with the contrast with **Blakley**, in which it had readily to be taken that Mr Blakley remained in the area (not therefore in a specific location, one presumes) and therefore not working when at that time he was on call. There was no discussion in the judgment of the purpose to be served by the regulations and directive, despite

their origin in EU provision, and despite the fact that this might be an obvious starting point in deciding how to apply the law to the facts. A factual comparison, without having a proper basis from which to approach the comparison, is always liable to produce an unsatisfactory result.

13. The Appellants raised three grounds in their notice of appeal, only two of which were pursued before me: an argument that the conclusion reached was wholly perverse not being pursued as such, (though parts of Mr Hay's argument, as Mr Brown who appeared for the Respondents observed, did shade into arguing a form of perversity).

14. The first ground was that the tribunal wrongly considered and applied what it had identified as the ratio in **SIMAP**. It took, in effect, the wrong approach. Mr Hay complained at the start of his argument before me that it had not set out the principles in **SIMAP,** as further developed in **Jaeger**, as the star to steer by, notwithstanding that decisions of the European Court of Justice demonstrate a dynamic growth in the jurisprudence such that it is in general important to refer to the latest iteration of it and that which it can tell domestic courts.

15. Broadly, he argued that there was a distinction to be made between being at work and being at rest, and that a tribunal when deciding which of the two it was, each being exclusive of the other, should perform an assessment of the overall regime put in place by the employer and the expectations placed on the employee during the period. He submitted that the quality of the time said to be rest time was relevant to whether it was indeed rest time. The purpose of the provision was broadly to ensure the health and safety of the individual. There must be, he submitted, freedom or liberty to pursue one's own private life or interests, taking time away from the demands of employment upon the individual. He thought that it might be possible to sum up the approach, though broadly, by asking the question whether the time was the employee's own. **Jaeger** had broadened out **SIMAP**. He drew principles or factors from

Jaeger, in particular from paragraphs 52, 53, 57 and 65. **SIMAP** was a case in which the question was whether time spent on call by doctors who worked at primary healthcare centres in Spain were working within the meaning of the definition of "working time" when they were on call. The conclusion reached by the Court of Justice at paragraph 52 of the judgment is that time spent on call by doctors in primary healthcare teams must be regarded in its entirety as working time and, where appropriate, as overtime within the meaning of **Directive 93/104,** if they were required to be present at the health centre. If rather than being required to be present at the health centre, they had merely to be contactable at all times, only time linked to the actual provision of primary care services had to be regarded as working time. That distinction between being at the healthcare centre on call or elsewhere on call was built upon in **Jaeger**, which concerned the case of hospital doctors, who were required to be physically present at a hospital but permitted to take what was described as rest whilst there, including being permitted to sleep in accommodation especially provided for the purpose at the hospital, but whilst there, and even whilst asleep, being liable to be called out to perform their health duty. The court saw no relevant distinction in principle between that situation and that it had earlier considered in **SIMAP**: but in **SIMAP** the court had not expressly ruled on the effect of the fact that doctors performing on-call duty could rest or sleep when present, as required, at hospital. At paragraph 63 in **Jaeger** the court said this:

> **"...the decisive factor in considering that the characteristic features of the concept of working time within the meaning of Directive 93/104 are present in the case of time spent on call by doctors in the hospital itself is that they are required to be present at the place determined by the employer and to be available to the employer in order to be able to provide their services immediately in case of need. In fact, as may be inferred from paragraph 48 of the judgment in *Simap*, those obligations, which make it impossible for the doctors concerned to choose the place where they stay during waiting periods, must be regarded as coming within the ambit of the performance of their duties."**

16. At paragraph 65 the court introduced what Mr Hay described as a "qualitative" element:

> **"It should be added that, as the Court already held at paragraph 50 of the judgment in *Simap*, in contrast to a doctor on stand-by, where the doctor is required to be permanently accessible but not present in the health centre, a doctor who is required to keep himself available to his employer at the place determined by him for the whole duration of periods of on-call duty is subject to appreciably greater constraints since he has to remain apart from his family and social environment and has less freedom to manage the time during which his professional**

> **services are not required. Under those conditions an employee available at the place determined by the employer cannot be regarded as being at rest during the periods of his on-call duty when he is not actually carrying on any professional activity."**

17. At paragraph 69, a paragraph later to be identified – correctly, in my view – by HHJ Richardson in **MacCartney** as containing the central reasoning of the court, the Court of Justice gave its conclusion:

> **"Directive 93/104 precludes national legislation such as that at issue in the main proceedings, which treats as periods of rest periods of on-call duty during which the doctor is not actually required to perform any professional task and may rest but must be present and remain available at the place determined by the employer with a view to performance of those services if need be or when he is requested to intervene."**

18. It linked that, in paragraph 70, to the health and safety purposes of the directive. The question posed by asking whether time was the employee's own allowed a tribunal to consider whether the employee was positioned so that he could unshackle himself from the rigours of the employer's control. Mr Hay was faced with the case of "**TransOcean**" - that is **Russell and Others v Transocean International Resources Ltd and Others** [2011] UKSC 57 - as to which Mr Brown, to whose submissions I shall come, argued that it was to the effect that qualitative considerations could not determine whether time was working time or rest time. He answered that the point in issue was very different. The question before the Supreme Court was whether time which was agreed to be a rest period gave sufficient rest, qualitatively assessed, for it to permit the employer to count the period as satisfying an employer's obligation to provide for a break. **SIMAP** and **Jaeger**, noted Mr Hay, were not cited. He relied upon the fact, returning to his principal argument that, in **MacCartney, Jaeger** had consciously been applied, and it had been pointed out that **South Holland District Council v Stamp** EAT/1097/02, a decision of the Appeal Tribunal of 3 June 2003, otherwise unreported, could not survive the decision of the Court of Justice made in **Jaeger** in the following year. Thus, a case decided after a consideration of **SIMAP** but before **Jaeger** reached a decision which was, in the view of this tribunal, altered by the effect of **Jaeger** (see paragraphs 57-59). Thus,

submitted Mr Hay, **Jaeger** was the case to which this tribunal should have had regard, and they paid regard to an impermissible extent to **SIMAP** without considering the effects of **Jaeger** upon the principles in it. He attacked the reasoning by reference to the facts of **Blakley**. The tribunal had been quite wrong in considering that the facts there were similar to those in the present case. This was his second ground of appeal, that the facts and circumstances of the Appellant's cases were erroneously thought to be closer to the type of restraints imposed on Mr Blakley in that case.

19. **Blakley** was not a case in which there was any formal requirement imposed upon Mr Blakely to be at any particular location whilst on call. He was an estates officer. When on call, he had a pager, a mobile phone and a laptop computer. He had to record the calls he received and the action taken. Although in paragraph 5 in the judgment of Girvan LJ it is said that it was open to him to take no action if the matter was of a minor nature, Mr Brown pointed out that the tribunal from which this was an appeal had found as a fact that he would actually make a note of the call even if that was the only action he took. He could arrange an appropriate tradesman to attend the site, or one already on the site, to deal with the problem or he could attend the site himself. At paragraph 8 Girvan LJ said this:

> **"While there was some confusion in the wording of the Tribunal's decision and case stated, the evidence established that when Mr Blakley was on call he did not have to be at the Trust premises nor did he have to be at home. The Tribunal found that Mr Blakley was constrained because he had to be available to deal with calls subject to the need to be readily available in the event of a call but subject to that he could engage in other activities."**

20. The conclusion of the court is expressed at paragraph 22 in these words:

> **"The Tribunal's primary findings of fact do not support the Tribunal's conclusion that the whole of Mr Blakley's on-call period should be treated as working time. While he had to be contactable during the on-call period he was not required to be at home or to be on the Trust premises. While there were constraints on his freedom of action during the on-call period those constraints were not absolute and during the period of his on-call duty his situation was what the ECJ in *SIMAP* described as 'being contactable' without being obliged to be present and available at the work-place or a place designated by the employer. Accordingly, the proper conclusion to be drawn from the primary facts is that he was only to be treated as working when called on to actually provide services during the period on call. Thus the answer to the second question in the case stated must be 'No'."**

21. For the Respondent, Mr Brown submitted, first, that the decisions reached by the tribunal were essentially factual decisions which the tribunal was entitled to take. The tribunal was not obliged to consider any qualitative element in distinguishing between that which was rest and that which was work. In **Transocean**, at paragraph 21 Lord Hope, giving the judgment of the court, said, in respect of the issue in that case:

> **"I do not think that a qualitative requirement, as an additional test of whether a given period can be accounted as rest within the cycles of time that are identified, is to be found in the wording of the WTD. It is true that the safety and health of workers lies at the heart of the rules that it lays down. But there is no indication anywhere that it was concerned about the quality of the minimum periods of rest, other than to make it clear in the definition of 'rest period' that it means a period which is not working time."**

22. At paragraph 36 he repeated the point:

> **"I do not think that the quality of the periods that are set aside during each cycle determines whether the minimum requirements have been satisfied. I accept that the purpose of the entitlement to annual leave is to enable the worker to rest and enjoy a period of relaxation and leisure, as the ECJ has repeatedly made clear. But the WTD has met that purpose by laying down the minimum periods of rest that must be given in each cycle. As the ECJ said in** *Gomez* **[2005] ICR 1040, para 30, the fact that rest means actual rest is demonstrated by the rule that it is only where the employment relationship is terminated that article 7(2) permits an allowance to be paid in lieu of paid annual leave. But the ECJ has not said that a pre-ordained rest period, when the worker is free from all obligations to the employer, can never constitute annual leave within the meaning of that article. I would hold therefore that 'rest period' simply means any period which is not working time: see article 2."**

23. It was not, submitted Mr Brown, an error of law to whittle down the relevant factors to one, if indeed the tribunal did, though he preferred to see the tribunal as having taken account of all the relevant circumstances. The distinction it was seeking to draw was between those in the workplace and those not. It had regard to **SIMAP** and **Jaeger** and, by having regard to **SIMAP**, a case which had interpreted the European Directive, it had regard to the principles involved.

24. The fact that the tribunal had used the words it did in paragraph 76 did not mean that the tribunal was identifying that the test was whether the employee was confined to one specific location. To refer to the basis of a decision is not to say that it was the only factor of importance. In paragraph 76 the tribunal had further given latitude to what it was considering

by using the word "involved" and, it might be added, "almost a form of confinement", thereby indicating it was making a broad factual assessment, even if this was the feature it singled out for specific mention.

25. He submitted that, had it been able to whittle down the facts and circumstances, so that only one factor mattered, it would not have referred to facts and distinctions being so fine. It would simply have referred to one fact and a distinction which was, as Mr Brown put it, not at all fine, that being whether an individual was or was not confined to one specific location.

26. As to the second ground of appeal, in truth, he submitted, the facts of the Claimants' cases were truly comparable to that in **Blakley**. The judgment of the tribunal was an assessment made on the facts. The tribunal had concluded at paragraph 74 that for Mr Blakley to do his work it must readily be taken that he had to remain "in the area". The tribunal therefore reached the right decision and without error of law.

Discussion

27. It seemed to me that the tribunal did not engage clearly with defining the principle by which it sought to distinguish that which was work from that which was rest. Nor did it focus upon both sides of the coin. In a case such as this, it is important to remember that that which is not work is rest and vice versa. Thus to ask whether a person is at rest within the meaning of the Regulations and Directive is asking if he is not at work.

28. The principles, so far as they can be defined, must be taken from the latest exegesis by the European Court, that being the case of **Jaeger**. In that, there was some considerable discussion of the purpose of the Directive (see paragraphs 45-47), and it was noted that the

genesis of the Directive was in the need to improve living conditions and to provide satisfactory health and safety conditions and working environment for employees.

29. The cases which have troubled the courts have been those in which it has not been clear, as a matter of fact, whether an individual is at work or conversely rest in the particular circumstances. "On-call working" is a particular example. Inevitably, this imposes some constraints, but it also permits considerable liberty. The dividing line between that which is work and that which is rest was drawn in **Jaeger,** and acknowledged in **MacCartney** to be so drawn in the paragraphs which I have cited above in discussing Mr Hay's submissions, in particular 63, 65 and 69. They emphasise that the question is whether the individual is obliged to be present and remain available at the place determined by the employer. It was exactly the same principle which was set out in **Blakley**, at paragraph 22 of the Court of Appeal decision, by reference there to **SIMAP**. The words "being contactable" in the third sentence of paragraph 22 are followed by this: "without being obliged to be present and available at the work-place or a place designated by the employer". Thus each of **Jaeger**, **SIMAP, Blakley** and **MacCartney** requires as a matter of principle that there be a focus upon whether the place at which the employee happened to be was one required by the employer. There may be many circumstances in which a designated place of work is so permissively defined that it amounts to no particular exercise of the employer's entitlement to control the employee in the way he provides his services. An obvious example would be that of being forbidden from going abroad during the time of on-call duty. There may be other examples far less extreme. But it seems to me that, in order to determine what principle should apply regard must be had, as it was in **Jaeger**, even if broadly, to the purpose of the provisions.

30. I accept the utility of the test posed by Mr Hay as to whether the time was one's own. It was a test which, in his submissions, Mr Brown himself utilised. It is, like all such tests, to be

viewed with care, because the statutory question is that posed by the regulation, and it cannot be answered simply by assuming that a test which is useful in some cases is the answer in all. Nonetheless, what it indicates is that if, as it is, the provision as to rest breaks is a health and safety provision dealing with the work environment, then it must be remembered that work in employment is performed in a relationship characterised by control. Indeed without control, and its flip-side, subservience, there can be no employment. If a worker is obliged to be away from home, or even in some circumstances to remain at or within a very close distance from home, time is that much less his own. The time is all the more under the control of the employer. To that extent the worker has less relief from employment and those aspects of it which might be stressful, physically and perhaps more particularly mentally. The relaxation which is available in the company of family and friends (or at least may be) and the pursuit of personal hobbies and the like, all characterised by the exercise of free choice, free from the direction of the employer, is unavailable where an employee remains shackled by his employer to a particular location and is subject whilst there to providing an immediate response to his employer's bidding. Though different regimes underpin different employments, and it may be misleading to attempt to generalise from one to the other, there may be some help to be gained by looking at those instances which have been examined in the courts. The constraints upon the doctors in **SIMAP** who were at rest and those who were at work were different. Both had obligations. Both were not entirely free of their employer's control. But the degree of control over the place in which the work was to be performed, and where the employee was to remain whilst on call, was plainly of a different dimension from that in **Jaeger** when it came to drawing a distinction between rest and work. The employee in **Jaeger** could not be said to be at rest and therefore had to be at work.

31. Here, in the present case, the tribunal did not identify as such the correct test and the correct approach, applying **Jaeger**.. I reject as an error of law the argument by comparison

with **Blakley** which the tribunal adopted. A comparison is of no use unless one identifies first what particular factual features are of relevance and materiality. Simply to say that a case has more in common with one case than another case is to answer no particular question. In any event, viewed through the lens provided by **SIMAP** and **Jaeger**, and indeed recognised, as I have pointed out, in paragraph 22 of **Blakley** itself, if the central question of fact is whether the employee is required to be present at a place determined by the employer, then Mr Blakley was not and the Claimants here were. The fact that it must be readily taken that Blakley, for his convenience, might remain in the area was an assumption made by the tribunal. There was some factual basis which might show the assumption to have had some force. But the tribunal's logic went from that in the last two sentences of the tribunal's paragraph 74 to its application of a test at paragraph 76 which is plainly wrong: that is to say, that the test apparently applied in paragraph 76, (I accept Mr Hay's submissions upon this), was to see the case-law as requiring a form of near confinement to one specific location as the distinguishing feature.

32. The specificity of a location seems to me beside the point. It is the specifying of it and the lack of freedom to be anywhere else that is the relevant distinction. I put it in argument that if, for instance, an employee had his month's work divided up into four weekly periods, one of which he spent on call but at home, the next of which he was required to move to a location or somewhere within a mile or so of it, 50 miles away, and then again 100 miles away, and then for the last week 25 miles away, could it be said that he was at rest at each and all of those locations? Mr Brown's answer, as it had to be for the purposes of this appeal, if he were to succeed, was yes. But it seems to me wholly unrealistic in the context of these Regulations, with this purpose, that that should be the answer derived as a matter of principle to be applied to the facts. Rather, the focus must be on the distinction between rest and work: on the approach taken in **Jaeger**, this concerns whether the place at which an employee is required to be present

is or is not determined by the employer. The answer in the present case cannot depend upon whether, within at least narrow limits, the employee was free to move a few hundred yards or even a couple of miles from that base. He had to be where he was. He could not be at home. He could not therefore enjoy the quality of rest which he was entitled to have. As to that, I accept entirely that **Transocean** is binding upon me. It does not deal with the current question. It deals with the issue whether that which already is accepted to be a period of rest also may be treated as a period of holiday. The distinction between rest on the one hand and work on the other has nothing to say in making that distinction. The matter is clear looking at paragraph 21 of the judgment of Lord Hope, where he notes that the tribunal was not concerned about the quality of minimum periods of rest, adding "other than to make it clear in the definition of 'rest period' that it means a period which is not working time". In other words he was not concerned with anything qualitative for the purpose of the decision which the Supreme Court had to make, nor was he saying anything determinative about whether quality made the difference between rest and work, and there is no hint in that paragraph that he thought it did.

33. For those reasons, I accept that the decision of the Judge was in error.

34. Both parties have invited me to exercise the powers of the Appeal Tribunal and to substitute its own judgment. In doing so, I begin by analysing the facts which both parties have prayed in their aid from their respective positions. On the facts as found by the tribunal, taking into account the additional facts which have been agreed for the purpose of this appeal, and applying the principles which I have set out, I have concluded that the time spent by the ambulance paramedics when required to be away from home and required to be at a particular location in a particular place, that is within three miles of the ambulance station, there to respond, if not immediately, at least within a target time of three minutes and to do all they

could to achieve that time, could not be said to be their own time. They were working and not at rest.

35. Accordingly, I allow the appeal and substitute my decision to that effect. I thank the parties for the industry they have shown and their assistance to the court.