EMPLOYMENT TRIBUNALS

Claimants: Mrs J Frudd
Mr I Frudd

Respondent: The Partington Group Limited

HELD AT: Manchester **ON:** 18 and 19 January 2018
24 January 2018
(in Chambers)

BEFORE: Employment Judge Horne

REPRESENTATION:

Claimants: In person
Respondent: Ms A Del Priore, Counsel

JUDGMENT

In this judgment:

(1) "The claim period" means 30 June 2009 to 29 June 2015.

(2) "The open season" means 1 March to the first Monday in November each year.

(3) "The Park" is Broadwater Caravan Park.

(4) "Time on call" means those times when the respondent's duty rota required the claimants to be on call.

The judgment of the tribunal is that:

1. For the whole of the claim period during the open season, both claimants were employed on time work during some of the time whilst they were on call.

2. Their hours of time work during time on call in the open season were:

2.1. on every evening where there was no security guard working at the Park, between 5.00pm and 10.00pm; and

2.2. on every evening where there was one or more security guards working at the Park, between 5.00pm and 8.00pm.

3. The claimants were not employed on time work during time on call at any other times during the claim period.

REASONS

The issue for determination

1. This is a claim for unpaid wages. It was originally presented by both claimants on 29 June 2015. Linked to this claim is a complaint of underpayment of holiday pay. Both elements are based on the claimants' contention that they were not paid the National Minimum Wage for time that they spent on call.

2. The claim raises a question which is simple to ask but hard to answer: Was their time on call "time work" for the purposes of the National Minimum Wage Regulations 1999 and the National Minimum Wage Regulations 2015? It is common ground that, if it was all time work (as the claimants contend), the claimants were not paid the National Minimum Wage. Conversely, the claimants accept that if none of that time was time work (which is what the respondent argues), the claimants were paid at least the National Minimum Wage and their claim must fail.

3. During discussions both at the start of the hearing and in closing submissions, all parties agreed that this was not an "all or nothing" case. It is open to the Tribunal to find that some periods of time on call counted as time work and some did not.

4. This case has been heard and determined by the Tribunal once before, but the judgment was successfully appealed to the Employment Appeal Tribunal whose judgment is reported at [2017] ICR 1186. No doubt with the benefit of that appeal and the subsequent detailed judgment of Simler P, both Mrs Frudd and Ms Del Priore demonstrated an impressive working knowledge of the legal principles which greatly helped me to identify the real issue in the case.

5. Mrs Frudd confirmed that the claimants' case rests entirely on the definition of "time work" in regulation 30 NMWR. She does not argue that the claimants fell within the deeming provision in regulation 32. Thus the claimants set the respondent the challenge of proving that the claimants were not actually working during their time on call. If they were merely "waiting to work" as Ms Del Prior pithily put it, they were not employed on time work at those times.

Evidence

6. I was referred to an agreed bundle of documents which ran to some 503 pages.

7. Mr Ward, Mrs Walsh, Mrs Challis and Mr Challis gave oral evidence for the respondent. The claimants then gave evidence on their own and each other's behalf.

8. This is a convenient opportunity for me to record my impressions of the witnesses who gave evidence. Broadly speaking, I accepted that all witnesses were trying

to tell me the truth. Ms Walsh's evidence I found to be particularly robust. Mrs Challis seemed to me to give evidence in a straightforward manner and, to the extent that she was able to give a first-hand account of what she had seen and heard, I accepted her evidence. With that same qualification I accepted the evidence of Mr Challis. Mr Ward's evidence needed to be approached with some caution. As recorded in my findings of fact, the relationship between Mr Ward and the claimants was under significant strain by the time the claimant's employment ended. Mr Ward has an ongoing employment relationship with the respondent and a vested interest in the Tribunal finding that wardens were free to leave the Park. Mrs Frudd seemed to be giving an honest account of events which, when given in sufficient detail, I was able to accept. As for Mr Frudd, I accepted parts of his evidence, but was wary about what he said about Mr Ward for the reasons I have already given. I also thought that in relation to Saturday nights, Mr Frudd's evidence was a little exaggerated and further undermined by the absence of any reference to it in his witness statement.

Facts

9. The respondent owns a number of caravan sites including Broadwater Park near Fleetwood. The Park is situation 0.6 miles from Broadwater Village, 1.4 miles from Fleetwood, and 2 miles from Cleveleys.

10. Within the perimeter of the Park are 309 caravan pitches. About 240 of these are usually occupied by privately owned caravans. Some 15-20 caravans are usually available for hire, although it would be rare for all of those caravans to be fully occupied. The remaining pitches are either empty or occupied by caravans for sale. It is common ground that this is a relatively quiet caravan site. A significant proportion of the privately owned caravans would be vacant at any one time. Long-term residents tend to know their way around and do not need regular assistance.

11. The Park's site licence requires, amongst other things, that "the site shall be provided with an electrical supply sufficient in all respects to meet all reasonable demands of the caravans situated on them". Contrary to the claimants' interpretation, the licence does not require the respondent to ensure that each individual caravan is constantly connected to the electricity supply. Rather, it relates to the overall electrical capacity for the site as a whole.

12. Guests hiring caravans are given a leaflet setting out what they can expect during their stay. Under the heading "Reception" the leaflet states:

> "When reception shuts we do have a warden on call who will help you at any hour of the night with any queries. You will find the number on the reception door and your caravan keyring and will also be given it on arrival"

13. This information is replicated on the respondent's website.

14. The respondent's Managing Director is Mrs Challis. Her husband is employed by the business as a General Manager. During the period that is relevant to this claim, the Park was managed by Mr Challis, Mr Boardman, Mr Foster, then Mr Ward.

15. The calendar for the Park is divided into two seasons. The open season runs from 1 March to the first Monday in November each year. During the open

season, owners and other key holders have 24 hour access to their caravans. During the closed season, which accounts for the remainder of the year, the Park gates are locked after 4.30pm.

16. During most of the time that is relevant to this claim, caravan owners were given the option to purchase an alarm for their caravan. The service was provided by a company known as Ramtech. When the alarm was set, it could be triggered by a break-in (which never actually happened) or by the occupant entering the caravan and failing to deactivate the alarm. When an alarm was triggered, it would activate a remote pager held by the on call warden or receptionist. They would then attend the caravan to investigate. The range of the pager was between four and seven miles. By far the most common cause of alarm call-outs was the customer accidentally omitting to deactivate the alarm on arrival at the caravan. Occasionally customers would deliberately trigger the alarm in order to get priority service or to test the response time. Genuine emergencies were extremely rare. Because of this fact, the respondent stopped its subscription to Ramtech in about December 2014.

17. On purchasing the alarm, customers were given a leaflet from Ramtech explaining how the system worked. It contained this sentence:

> "If your alarm is activated, the Park security team will be alerted immediately so that they can respond."

18. The leaflet did not specify the response time in minutes. The context, however, clearly implied that the "security team" would respond promptly. In practice, the respondent instructed the on call team to respond within 15 minutes. No member of staff was ever disciplined for a late response to an alarm call. That said, there is no evidence of any occasion of a member of staff taking longer than 15 minutes to respond. The alarm would keep alerting the pager until it had either been reset at the caravan or deactivated remotely using the computer system at reception. Only receptionists were able to carry out this latter task. This problem was more theoretical than practical. Most call-outs resulted in the alarm being deactivated at the caravan.

19. The claimants began working for the respondent on 8 June 2008. Mr Frudd was employed as a Warden; Mrs Frudd as a Receptionist. They were jointly recruited as a team and provided with a caravan in which they were expected both to live.

20. The claimants were one of three Warden/Receptionist teams, who were all co-habiting married couples. The other two couples were Mr and Mrs Lineker and Mr Ward and his wife, Roxanne. (It is unclear what Roxanne's surname was so I will continue to refer to her by her first name). Mr Ward was acknowledged to be the most senior Warden on site, sometimes referred to as the "foreman". He was later promoted to manager. Roxanne was promoted to Head Receptionist in 2013.

21. During the early days and weeks of his employment, Mr Frudd was shown the ropes by Mr Ward. As he showed Mr Frudd round the Park, he told Mr Frudd that he would be expected to carry out a check of the Park whilst on call if security were not working that night. He was also required to check the Park during winter months.

22. Following successful completion of their probationary period, the claimants were given a joint contract of employment. Here are some of its relevant provisions:

> "Joint Appointment
>
> Your appointment is a joint appointment; the company recognises that both of you will contribute as a team to the success of the business…Each of you will be treated as being responsible for the acts and omissions of the other;…Each of you accepts personal liability and responsibility to ensure that the particular thing is done or not done, as the case may be.
>
> …
>
> This contract of employment annuls any previous agreement whether verbal or written given to you at any time.
>
> …
>
> You are required to reside on the premises in caravan accommodation…in order properly to perform [your] duties.
>
> …
>
> Hours of Work
>
> [Definitions of the open season and closed season; and a requirement to take an unpaid lunch break which during the open season was one hour and during the closed season was half an hour].
>
> …
>
> You will also be required to enter your name on a rota for the purpose of being on call to deal with customers' enquiries or requests for assistance after completion of your shift whether the shift in question finishes at 4.30pm, 5.00pm or 8.00pm. You will be on call until 8.00am the next day.
>
> Whilst on call you will also be required to cover the alarm pager and attend the relevant caravan. You will be paid for emergency call-outs in the open season from 10.00pm until 7.00am and in the closed season from 5.00pm until 8.00am at the rate of £7.50 per person per call-out."

23. Before they signed the contract, Mr Challis told the claimants that it would be acceptable for them to leave the Park whilst on call, provided that they remained contactable at all times. I accept the claimants' evidence that, whatever may have been said to this effect during the probationary period, it was not repeated afterwards.

24. The working relationship between the claimants and the Linekers was friendly and cooperative. From time to time, they would informally cover each other's shifts and on call periods to enable the couple rostered to be on call to leave the Park. Mrs Frudd and Roxanne got on well. Mr Frudd had little contact with her. Between the claimants and Mr Ward, relations became far more strained, although they were not openly hostile. For example, Mr Frudd complained to the then manager, Mr Foster, that Mr Ward was regularly leaving the Park on a Friday whilst on call in order to go fishing. Mr Foster told Mr Frudd that Mr Ward was allowed to do so because he was the foreman. Mr Ward was much more reluctant than the Linekers to cover any shift or on call period that he was not specifically rostered to do. This was partly because they had a young child. By the time the claimants retired in 2015, they had fallen out with Mr Ward to the point where Mr Ward did not attend their retirement party.

25. Early in the claimant's employment, Mr Challis had a practice of informally debriefing on call staff in the mornings. When he arrived at the Park, he would go into the “brew room” and ask the Receptionist or Warden who had been on call the previous night if anything had happened. They would usually say no. Mr Challis trained subsequent managers to follow the same practice, but we accept the claimants’ uncontradicted evidence that this practice was not frequently followed. When they were asked about incidents since the end of their previous shift, they would generally only mention call-outs during the night. Events that had taken place earlier in the evening were less significant from their point of view because, as will be seen, they rarely resulted in any payment. Minor or trivial incidents that happened in the evening therefore rarely deserved a mention.

26. For most of the time to which this claim relates, the claimants were on call on Thursday and Saturday nights each week. Every other week they were additionally rostered to be on call on Monday nights. During the Christmas period, when the Park was completely closed, the claimants would spend four consecutive 24 hour periods on call, as did the other two couples. Exactly where these blocks of four days fell for each couple was negotiated between them and agreed. There was also a small element of shift swapping that blurred the edges of these blocks of days.

27. In 2010 or possibly Christmas 2011, the respondent provided a mobile phone for use by the on call team. From that time the number of the mobile phone was displayed at reception for use out of normal reception hours. Whilst on call the claimants would take the alarm pager and, from 2010 or 2011, the mobile phone.

28. Until the end of 2014, there was a sign at reception stating the times when each team was on call and the location of the caravan where each team could be found.

29. Sometimes a customer would see a member of staff who was not on call, but buttonhole them nonetheless. That avoided the need for them to approach or telephone the on call Warden or Receptionist. When they were telephoned, the claimants were required to assess the nature of the query or request for assistance, and to decide whether they could deal with it and which one of them would be the most appropriate person to respond. They would also have to decide whether the call was sufficiently urgent to require a response then and there or whether it could wait until reception opened in the morning. In practice, they invariably tried to respond to situations straight away.

30. The claimants were not paid at all for minor tasks between 5.00pm and 10.00pm. They were not paid for answering the telephone, responding to alarm calls, or dealing with short enquiries. If a particular call required them to work for more than half an hour or so, the Park Manager would, in his discretion, encourage them to make a claim for paid overtime. Anything less than that was considered by the claimants and managers alike to be “part of the job”.

31. The respondent did not keep any records of the claimants’ activities whilst on call prior to 10.00pm unless there had been a specific agreement to pay them overtime for a lengthy task. I have therefore tried to reconstruct their evening on-call activities based on their oral evidence. Typically the busiest time in the evening was between 5.00pm and 8.00pm. Examples of tasks done in the evening (as opposed to night time) were:

31.1. Showing around prospective customers who were interested in buying a caravan. This did not fall within the strict terms of their written contract as the claimants were dealing only with prospective as opposed to actual customers. Nevertheless we accept the claimant's evidence that the respondent would have regarded the claimants as offering poor service whilst on call if they had simply turned would-be purchasers away.

31.2. Welcoming late arrivals. Customers hiring caravans would not always arrive on time. They were informed that check-in would take place from 3.00pm, but not specifically told that they would not be allowed to check-in after 5.00pm. There was no question of the claimants being able to turn them away. There were at least six occasions when Mrs Frudd had to admit hire caravan guests after reception had closed. She believed that it was “part of the job”. Significantly, I also find that that is what the Park Managers and Mr and Mrs Challis also believed. As they saw it, this was part of what they had to do in return for being provided with free accommodation.

31.3. Giving keys to sublet visitors. Private owners were informed that they would be allowed to sublet their caravans to other visitors who would be entitled to obtain a key from reception at any time prior to 11.00pm. They were asked to complete a form to enable the key to be issued more efficiently. From time to time, visitors arrived without the appropriate form and Mrs Frudd would attempt to establish their identity and their relationship to the caravan owner before issuing the key. Typically visitors would request keys between the hours of 6.00pm-9.00pm. At the height of the season, this would happen at least once a fortnight and sometimes more often. It very rarely happened during the closed season.

31.4. Conducting the evening check of the Park when there was no security guard present.

31.5. Dealing with incidents of noise or unruly behaviour. If this happened in the immediate vicinity of the claimants’ caravan and they were both at home, the claimants would inevitably have attended to such incidents as concerned neighbours; but there were other times when the claimants would observe such incidents and intervened because it was considered part of their job.

31.6. Responding to alarm calls, which were rarely genuine emergencies.

31.7. An example of an evening activity being considered to be part of the job happened on 4 April 2010. The Mr Frudd was alerted to the possibility that a group of travellers might be heading towards the Park. Mr Frudd parked a tractor across the Park gates and stayed there until it had been confirmed that the travellers had moved on. He missed his evening meal. No payment was made as Mr Frudd was told that it was part of the job.

31.8. On 4 April 2010, Mrs Frudd was called by a security guard at 8.00pm to give first aid to a child who had hurt himself.

32. There was one occasion of the claimants being paid for time spent responding to an incident prior to 10.00pm. This happened on 19 May 2013. The claimants were paid an emergency call-out payment. This was, however, on a day when the claimants were not on call.

33. After 10.00pm, the claimants were paid for emergency call-outs whilst on call. During the last five years of their employment, Mrs Frudd was paid for 18 call-outs and Mr Frudd for 29 call-outs. Some of these payments reflect the claimants both having attended the same incident. The parties have different perceptions of why it was that both claimants were paid for one call-out. It is Mrs Frudd's evidence that both of them were required to attend. Mr Challis took the view that it would be sufficient for one of the claimants to attend, but that they both deserved a call-out payment if they were disturbed during the night because it would affect both of their sleep. I find both perceptions to be genuine. There may well have been incidents where the claimants thought it better that both of them should attend. I am also satisfied, however, that at no stage were the claimants told that two of them would have to attend any call-out at once.

34. It is clear from the above figures that night time call-outs were comparatively rare. They average out at less than one every two months.

35. One of the most common causes of an evening or night time call-out was that a caravan owner or hirer could not get the electricity supply to work. This was usually capable of being rectified by either Mr or Mrs Frudd or indeed a security guard. They would attend at the caravan and see if the circuit breaker had tripped. If it had not, the relevant member of staff would go to the nearest substation and see if they could switch the electricity back on there. If neither of those two relatively simply methods worked, Mr Frudd would attempt a more complicated repair or, alternatively, a contractor would be called out in the morning.

36. Sometimes, either before or after 10.00pm, a customer would request a replacement gas bottle. There were procedures in place designed to prevent this happening. Each caravan owner was advised to keep two gas bottles so that they would have a spare if the first ran out. In practice, because of the cost of the bottles, the caravan owners would only use one bottle at a time, meaning that Mr Frudd would be called out to replace the bottle out of hours. This was a task that only the Warden could do.

37. Emergency call-outs after 10.00pm ought to be recorded on a form which would then be processed by Mrs Walsh. Sometimes, however, the Warden or Receptionist forgot to complete the form. If Mrs Walsh found out the form had been missed but happened to know that the call-out had taken place, she would accept a form filled out by somebody else on the on call staff member's behalf.

38. The respondent engaged security guards to assist with various aspects of the running of the Park. Security guards worked at the Park during Easter school holidays, the May half-term school holiday, the school summer holidays, and October half-term. In addition, during the open season, they also worked on Friday and Saturday nights. Their hours were usually 8.00pm to 3.00am. Typically there would be one guard on the door of the licensed club and another guard, known as Stephen, responsible for the rest of the Park. He would carry out the evening check and be visible to visitors arriving at reception.

39. Whilst on duty, the security guard would take the alarm pager that would otherwise have been held by the on call members of staff. From 2013, the security guard also started taking the mobile phone. At 3.00am, at the end of his shift, the security guard would leave the pager and mobile phone at reception. I accept Mr Frudd's evidence that he was concerned that there was a gap in cover

between 3.00am and 8.00am when the morning shift started. There was nobody at reception to answer the phone. Visitors would, however, still be able to find the caravan where the on call team were sleeping. On Saturday nights Mr Frudd took to sleeping on the sofa in his caravan. I do not accept his evidence that he stayed awake watching reception out of his caravan window. This particular factual allegation is not in his witness statement.

40. Very occasionally on a night when there was a security guard on duty the claimants were called out after 3.00pm. This happened once in 2012 and once in 2013. Also very occasionally, the claimants would be first to respond to an incident and would ask the security guard for help. The only example given by them was a disturbance that took place close to the claimants' caravan. I would have expected them in any event to have investigated that disturbance and have called security if necessary. Any attentive neighbour would have done the same.

41. In 2014 Mrs Frudd's sister very sadly died. She was given paid time off to deal with the bereavement. This was specifically agreed by her manager. It shed no light on what was required of her at other times.

42. On 4 November 2014 Steve, the security guard, was called out. In turn he called Mr Frudd who attended to the incident.

43. On 7 November 2014, at a Head Office Receptionist's meeting, one of the managers present made the comment, "on call is part of the job". This was followed by the remark, "anyone not pulling their weight are gone". Mr Ward relayed these comments to the staff at the Broadwater Park brew room.

44. The requirement to be on call had a marked effect on the claimants' leisure time in the evenings. Whilst they could make meals for themselves and enjoy a meal together in the caravan, they rarely invited guests for fear of disruption. Mrs Frudd would have liked to babysit her grandchildren but did not do so whilst on call, in case the claimants were both called out and had to leave the children alone in the caravan.

45. There is a dispute about whether the claimants or either of them were permitted to leave the perimeter of the Park whilst on call. I accept that, on one or more occasions, Mr Ward saw one or both of the claimants leaving the Park in their car. This happened on a night when the claimants would ordinarily have been on call. What I do not know is whether there had been any shift-swapping arrangement between the claimants and the Linekers on those occasions. Overall I accept the claimant's evidence that, whilst on call, they both stayed within the confines of the Park unless they had specific permission to leave.

46. It was practically possible for the claimants to leave the Park and travel to Broadwater Village, Fleetwood or Cleveleys and remain contactable both via the mobile phone and the pager. I also accept, however, that this is not something that they actually did. My finding of fact goes a little further. I am persuaded that the claimants were obliged to ensure that, whilst on call, at least one of them was physically within the Park boundary. This is consistent with the ET3 responses initially presented by the respondent. It also reflects the evidence of Mrs Challis. Moreover, it is consistent with the reality on the ground. It would make sense for there to be a person physically present within the Park to be able to respond promptly to any calls on the telephone or any direct approaches to the caravan. Only one of them would need to be there. Many of the call-outs would involve a

task that either of them could do on their own. If, exceptionally, the nature of the task was such that they both had to do it together, or only one of them was capable of doing it (such as changing gas bottles or using the reception computer system), it would be relatively straightforward for one of the claimants to contact the other using their private mobile telephones.

47. Many of the jobs that the claimants did whilst on call were capable of being down by either claimant on their own. These included:

    47.1. Resetting the circuit breaker at the caravan or substation;

    47.2. Responding to noise on site, children's horseplay or other unruly behaviour;

    47.3. Responding to an alarm call as described;

    47.4. Issuing keys to sublet visitors who had the required form.

48. There were other activities which were not interchangeable and only one of the claimants could do. These included:

    48.1. Checking details on the computer in order to admit undocumented visitors or in response to police enquiries; these tasks could only be done by the Receptionist.

    48.2. Clearing drains and replacing gas bottles; only the Warden could carry out these tasks.

49. My finding is that these latter tasks were relatively rare. Most of the call-outs could be attended by either claimant on their own.

50. The claimants retired on 2 June 2015 and left the caravan.

Relevant Law

51. Section 1(1) of the National Minimum Wage Act 1998 provides:

    > "A person who qualifies for the national minimum wage shall be remunerated by his employer in respect of his work in any pay reference period at a rate which is not less than the national minimum wage."

52. Section 2 of the 1998 Act conferred power to make regulations. The National Minimum Wage Regulations 1999 ("the 1999 Regulations") were in force from the start of the claimants' employment until 6 April 2015. From that date until the claimants' employment terminated, the relevant regulations were the National Minimum Wage Regulations 2015 (NMWR). I accept the respondent's analysis that the 1999 Regulations were not materially different from NMWR. It is sufficient, therefore, to set out the relevant provisions of NMWR without specifically citing its predecessor regulations.

53. Regulation 30 of NMWR provides, relevantly, with my emphasis:

    > "Time work is **work**, other than salaried hours work, in respect of which a worker is entitled under their contract to be paid-
    >
    > (a) By reference to the time worked by the worker;…."

54. At the heart of the present dispute is the word, "work". It is to be contrasted with the phrase, "hours when a worker is available" in the deeming provision in

regulation 32 NMWR. As already indicated, the claimants do not attempt to bring themselves within this provision.

55. A distinction is to be drawn between cases where an employee is working merely by being present at the employer's premises and those where the employee is merely available for work.

56. *Whittlestone v. BJP Home Support Ltd* [2014] ICR 275, EAT, concerned a sleep-in carer. Holding that she was working merely by being present at the employer's premises, Langstaff P observed:

> "[16] Thus the cases, as I shall show, note that where a person's presence at a place is part of their work the hours spent there irrespective of the level of activity are classed as time work. Difficult cases may arise where a worker is obliged to be present at a particular place. That presence may amount to their working. Conversely it may not. An example of the latter might typically be where a requirement is imposed upon an employee to live at or near a particular place but it is not necessary for that employee to spend designated hours there for the better performance of the contractual duties. This is unlikely to be time work: presence facilitates work but it is not itself work. Conversely where specific hours at a particular place are required, upon the pain of discipline if they are not spent at that place, and the worker is at the disposal of the employer during that period, it will normally constitute time work.
>
> …
>
> [57] The question of whether a person is working "is to be determined on a realistic appraisal of the circumstances in the light of the contract and the context in which it is made…
>
> [58] …she would have been disciplined if she had not been present throughout the period of time; she could not for instance slip out for a late night movie or for fish and chips.
>
> [59] …The fact that her physical services were not called upon during the night were on the basis I have expressed irrelevant since her job was to be there…

57. The tribunal must endeavour to ascertain the true agreement between the parties. This must be gleaned from all the surrounding circumstances. It open to a tribunal to find that the parties did not truly intend to be bound by a provision in a written agreement: *Autoclenz v. Belcher* [2011] UKSC 41.

58. Substance is more important than form. Labels such as "on call" are unlikely therefore to be of assistance.

59. In the appeal from which this case is remitted ([2017] ICR 1186), Simler P made clear that the critical question is whether "time work" included those hours where the claimants were present and required to be present during what was described as "the night shift" (that, is the time on call). The question at issue is fact-sensitive and demands a multi-factorial analysis. No single factor is determinative and the weight each factor carries will vary according to the facts of a particular case. Amongst the factors that are potentially relevant are:

(i) The employer's particular purpose in engaging the worker may be relevant to the extent that it informs what the worker might be expected or required to do: for example, if the employer is subject to a regulatory or contractual requirement to have someone present during the particular period the worker is engaged to be present, that might indicate whether and the extent to which the worker is working by simply being present.

(ii) The extent to which the worker's activities are restricted by the requirement to be present and at the disposal of the employer may be relevant. This may include considering the extent to which the worker is required to remain on the premises throughout the shift on pain of discipline if he or she slips away to do something else.

(iii) The degree of responsibility undertaken by the worker may be relevant: see *Wray v J W Lees & Co (Brewers) Ltd* at [13] where the EAT distinguished between the limited degree of responsibility in sleeping in at the premises to call out the emergency services in case of a break-in or a fire on the one hand, and a night sleeper in a home for the disabled where a heavier personal responsibility is placed on the worker in relation to duties that might have to be performed during the night.

(iv) The immediacy of the requirement to provide services if something untoward occurs or an emergency arises may also be relevant. In this regard, it may be relevant to determine whether the worker is the person who decides whether to intervene and then intervenes when necessary, or whether the worker is woken as and when needed by another worker with immediate responsibility for intervening.

60. One question that has arisen in this particular case is the relevance of the frequency or otherwise of the claimants' call-outs. I interpret *Whittlestone* as saying that **if** a person is working merely by being present, the fact that they are not called upon to perform any particular activities is irrelevant. There may indeed be cases where a person is working even if they are never disturbed. But I do not understand Langstaff P to be saying that the frequency of activity is completely irrelevant to the question of **whether** their presence amounts to work. Frequency of activity will affect the multi-factorial analysis prescribed by Simler P. There are cases where the frequency of disturbances may help to determine what the employer's purpose was in requiring the employee to be at the premises (Factor (i)). Take, for example, a bar manager who is required to live above a pub. For convenience of pronouns I imagine him to be a man. If he is required to sleep at home in the expectation that he will be regularly beset by bar staff asking for help between 10am and 1am, his mere presence at home between requests is likely to be work, even if he is at home, because that is the purpose of requiring him to be there. If, on the other hand, the manager is required to sleep at home, but both the manager and employer know that he will rarely be disturbed, it is more likely that the main purpose of his being there is because that is where he would sleep anyway: the occasional disturbance is merely incidental. Factor (ii) is also engaged. If disturbances are rare, the impact of being present at the

employer's premises will have a lesser restriction on the employee's leisure. They are much more likely to be able to "switch off" between activities. Conversely, having to be on the alert to deal with regular queries is in itself a restriction of the employee's free time.

Conclusions

61. Before embarking upon the multi-factorial analysis required by the Employment Appeal Tribunal, I should briefly explain why I consider it important to break down that analysis into different periods of time. The question of whether the claimants were working by being on call is a highly fact-sensitive one. Where there are different circumstances prevailing at different times which would significantly impact on the multi-factorial analysis, it seems to me necessary to examine each period of time separately. This is so even if there were some factors in common to all periods of time.

62. In my view it is important to distinguish between periods of time on call before and after 10.00pm. I have a number of reasons for taking this approach:

    62.1. Between the end of their shift and 10.00pm, the claimants were not paid for being disturbed. Dealing with customer enquiries and requests for assistance during this period was a contractual obligation. It was considered by Wardens, Receptionists and Managers alike to be part of the job.

    62.2. After 10.00pm, the contract provided that the claimants would be paid for emergency call-outs. Whenever the claimants were disturbed, the call-out was treated by the respondent as an emergency for payment purposes, regardless of how urgent the call-out had actually been. The day-to-day reality matched this expectation. Call-outs after 10.00pm occurred, on average, no more than once every couple of months.

    62.3. In my view it is inherently more likely that the claimants would be regularly disturbed during the evening than during the night. These were the hours when owners, hirers and visitors would be most likely to be awake and requiring assistance.

    62.4. Visitors requiring keys would generally arrive between 6.00pm and 9.00pm. They were not entitled to a key after 11.00pm.

    62.5. I accept the claimants' evidence in general that their busiest time on call was between the hours of 5.00pm and 8.00pm.

63. I also thought it important to distinguish between the open and closed seasons. During the closed season, the respondent did not envisage that the claimants would be disturbed after 4.30pm except in an emergency. Again, during the closed season they were very rarely disturbed after this time.

64. It also seemed to me that circumstances were materially different and the obligations of the claimants whilst on call were significantly changed, depending on whether or not there was a security guard on site. In particular, the presence or absence of a security guard affected the immediacy with which they were expected to respond to call-outs. The security guard would almost always be the first line of response whilst on duty. The only exception I could find was one where I would have expected the claimants to have reacted as concerned neighbours in any event. Occasionally the security guards would seek secondary assistance from the claimants, but these occasions were rare.

65. By contrast, I did not think it necessary or appropriate to distinguish between Mr and Mrs Frudd when conducting the multi-factorial analysis. Here are my reasons:

    65.1. The contract of employment created joint rights and obligations for both claimants. Each claimant was required to ensure that the other claimant fulfilled their obligations. This meant that, if one claimant was at work, the other could not truly be off duty. They were each obliged to ensure that the other was fulfilling their on call requirements.

    65.2. In her clear and attractive submissions, Ms Del Priore tried to persuade me that the contract did not reflect the true intentions of the parties. I disagreed. Mrs Challis' clear evidence was that she believed that both claimants were required to ensure that at least one of them was present on the premises whilst on call. That is a clear example of joint responsibility. It also reflects the reality. One only has to imagine what would have happened had Mr or Mrs Frudd seriously breached the terms of the contract. The respondent would have been entitled to dismiss that claimant, who could then be required to leave the caravan. That would have left the other claimant living in the caravan by him or herself. The respondent would not have been able to recruit a Warden or Receptionist to live in the caravan with the remaining claimant.

    65.3. In practice, most situations that would arise on call were capable of being handled by either claimant on their own. Exceptions could be dealt with by the claimants ensuring between them that each was contactable by the other.

66. I start, therefore, by examining the times during the open season during the evenings up to 10.00pm when there was no security guard on duty. I address each of the factors in turn:

    66.1. The respondent's purpose in engaging the Warden/Receptionist team was to fulfil an important promise to caravan hirers that the Warden on call would help them round the clock with any queries. In my view, it is unnecessary to reach a conclusion as to whether that promise was legally binding. It was an important element of customer service. The Warden/Receptionist team was also engaged so that the Park could admit visitors and issue them with keys up to 11.00pm. The respondent could not seriously have expected visitors to be turned away if they arrived in the evening. In practice, almost all visitors arrived before 10.00pm. Another purpose of having the Warden/Receptionist team on call was to respond to alarm calls which usually occurred while residents were awake. Again, the respondent had sold alarms on a representation that if the alarm was triggered the pager would sound immediately and the park security team would respond. I have already recorded my view that this implied that there would be a quick response. Whether or not this representation was legally binding is not determinative. It would have been embarrassing to say the least if the alarm had sounded and the respondent had not ensured a call-out within a reasonable time.

    66.2. There was a significant restriction on the claimants' leisure activities during the evenings whilst on call. The absence of any disciplinary action does not weigh heavily in this case. There is no evidence that any of the

Warden/Receptionist teams both left the Park whilst on call. The obligation to ensure that at least one of the claimants was physically present on site was a restriction for both of them. They could not go out together. Occasions when specific permission was given (for example, while the claimant's mother was ill) do not alter the analysis. The mere fact of permission having been sought and granted tends to suggest that the regime was different at other times.

66.3. The claimants had a significant degree of personal responsibility. When called out, they would be expected to deal with a variety of situations themselves and not simply call the emergency services or other providers of assistance.

66.4. I am satisfied that during the evenings the claimants were the first line of response whilst on call.

67. Having examined the factors, I am satisfied that during these periods the claimants, and each of them, were employed on time work simply by being required to be on call, by being physically present at the Park, and by being jointly responsible for ensuring that at least one of them was present. They were not merely waiting to work, they were working.

68. I now turn to on call periods after 10.00pm. My view is that these periods did not count as time work. The multifactorial analysis points away from time work after 10.00pm and in both seasons, whether or not there was a security guard on duty. During the closed season, and at times when a security guard was working, it is harder still to argue that the claimants were working by being on call. I have taken account of the various factors as follows:

68.1. The purpose of having a Warden and Receptionist on call during the night (as opposed to during the evening) was so that they could respond to vary occasional alarms and requests for assistance. Whether or not they were "emergencies" in any technical sense is neither here nor there. All parties knew that the claimants would be very rarely disturbed after 10.00pm. By being on call, the claimants would help the respondent to fulfil its promise to hire customers that a Warden would be on call to help them at any hour of the night with any queries. As in the early evening, the claimants by being on call were the respondent's means of ensuring that there would be a prompt response to alarm pagers; but it was well understood that the need for this to be done would rarely arise.

68.2. At night, the claimants were not free to leave the Park together and thereby suffered some restriction in their lifestyle, but this was at a time when they would usually be sleeping. There would only be any real interference with their activities if they wanted to go away together and stay the night outside the Park. Their lack of opportunity to do this is not something they have complained about in their witness statements. Even if it did intrude on their lives, the degree of intrusion would have been almost the same even if their only obligation was to remain contactable. If they wanted to stay the night together outside a seven mile radius from the Park, they would not be able to respond to the alarm pager, nor would they be able to return to the Park if a customer telephoned them. The claimants have not sought to argue that they were working merely by having to remain contactable.

68.3. The degree of responsibility that the claimants held at night was a little less than it was during the evening. If the claimants were disturbed during the night, they would need to make an assessment of whether they should respond to the incident straightaway or ask the caller to wait until the morning. Any reasonable person trying to make sense of the claimant's obligations would understand that the claimants would be entitled to take into account the fact that the call was in the middle of the night when deciding whether or not to take immediate action. I also think it relevant, though not determinative, that the claimants were not expected to exercise their responsibility nearly as often at night as during the evening.

68.4. At night, as in the evening, the claimants were the first line of response unless a security guard was present.

69. Having looked at the factors separately, I have tried to step back and assess whether, after 10.00pm, the claimants were working or merely on standby to work. My view is that it was the latter.

70. I take the view that during the closed season the claimants did not do time work on call, either before or after 10.00pm. I have taken account of the restriction in the claimants' activities: they could not go out together during the evenings as well as at night, but the evening call-outs were so rare that they would have been able to enjoy their evenings inside the Park with almost complete freedom. Provided at least one of them stayed within the confines of the Park, they would have noticed little difference between an evening on call and an evening on their day off. There were no hire customers to attend to, no evening visitors and very little else to disturb them.

71. I also find that the scales are tipped away from time work at all times when there was a security guard working at the Park. For the reasons I have already given, the presence of a security guard had a marked effect on the immediacy of the response required by the claimants whilst on call. This factor is sufficiently weighty as to mean that the claimants were not working merely by being present on the Park.

72. <u>Consequential Findings</u>

73. My conclusions expressed up to this point ought to enable the parties to work out for themselves whether or not the claimants were paid the national Minimum Wage. It is clear from Mrs Frudd's witness statement that she is aware of the principles on which the National Minimum Wage should be calculated. It may well be that no further hearing is necessary. The parties should attempt to reach an agreed calculation of what the claimants have been paid and what they ought to have been paid. If either party seeks a declaration that the claimants either were or were not paid the National Minimum Wage, there would not necessarily need to be another hearing to enable a judgment to that effect to be given, provided that the parties agree. Likewise, it may well that the parties can reach an agreement on the extent of any underpayment and ask the Tribunal to award damages in that amount based on the agreed figures.

74. In case the parties are unable to reach agreement, a further hearing has been listed to take place on 16 April 2018. There is a pending application to postpone and re-list that hearing which the Tribunal will deal with in due course.

Employment Judge Horne

1 February 2018

RESERVED JUDGMENT AND REASONS

SENT TO THE PARTIES ON

2 February 2018

FOR THE TRIBUNAL OFFICE