Appeal No. UKEAT/0034/16/DM

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 2 June 2016

Before

HER HONOUR JUDGE EADY QC

(SITTING ALONE)

BATH HILL COURT PROPERTY MANAGEMENT LIMITED — APPELLANT

MR A COLETTA — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR MARK GREEN (of Counsel) Instructed by: Ashfords LLP Ashford Court Blackbrook Park Avenue Taunton TA1 2PX
For the Respondent	MS BETSAN CRIDDLE (of Counsel) Instructed by: Paris Smith LLP 1 London Road Southampton Hampshire SO15 2AE

SUMMARY

NATIONAL MINIMUM WAGE

*National Minimum Wage - **National Minimum Wage Regulations 1999** - regulation 4 - salaried hours work*

The Respondent employed the Claimant as one of two Head Porters for a block of residential flats. When he was on shift, he was required to stay on site overnight (in a flat in which he lived) to provide emergency cover and to be a point of contact as required. The Employment Tribunal found that this "on call" duty constituted salaried hours work for the purposes of regulation 4 **National Minimum Wage Regulations**.

On the Respondent's appeal against that finding.

Held - *dismissing the appeal*

The question whether the Claimant had been at work when "on call" overnight was a matter of assessment for the Employment Tribunal. Allowing that there was a permissible distinction to be drawn between those workers who were working - that is, doing the job for which they were employed - simply by being present and those for whom that was not the case, the Employment Tribunal had reached a permissible conclusion on these particular facts (**Whittlestone v BJP Home Support Ltd** UKEAT/0128/13 applied).

HER HONOUR JUDGE EADY QC

Introduction

1. I refer to the parties as the Claimant and Respondent, as below. This is the Full Hearing of the Respondent's appeal against a Judgment of the Southampton Employment Tribunal (Employment Judge Salter sitting with lay members, Mr Cross and Mr Stewart, on 23 and 24 July 2015; "the ET") sent to the parties on 9 September 2015. The Claimant was then represented by his solicitor, but now appears by Ms Criddle of counsel; the Respondent was and remains represented by Mr Green of counsel.

2. By its Judgment the ET, relevantly, found that during his night shifts the Claimant was "at work" for the purposes of the **National Minimum Wage Act 1998** ("NMWA"). The Respondent appeals against that ruling. The issue raised by the appeal is whether the ET was entitled to find that the Claimant was undertaking salaried hours work within the meaning of regulation 4 of the **National Minimum Wage Regulations 1999** ("NMWR") during each period from 7pm to 7am when he was described by the Respondent as being "on call". The Claimant resists the appeal contending that the ET correctly directed itself as to the approach it was to adopt, reaching a permissible conclusion on what was a particularly fact-sensitive question.

The Background Facts

3. The Respondent is a management company for two blocks of residential flats called Bath Hill Court, at which, from February 2000, it employed the Claimant as one of two Head Porters both living, at no charge to them, in their own flats on the premises. The Head Porters had initially worked a four-day shift pattern (four days on, four days off) but, as from March 2013, that

changed to a three-day pattern. When working, their hours were from 7am to 7pm but they were also required to remain on call and on the premises between 7pm and 7am the following day.

4. Although other Porters were employed during the day at Bath Hill Court, the only night cover was that provided by the Head Porters, who could be contacted on a landline number provided to residents, with emergency contact details for the "Duty Porter" - the Night Porter on duty - also being provided on the entry phone system for the flats. The Head Porters were also required to be on site as emergency cover, not least for the purpose of responding to lift alarms if activated or in case immediate emergency access was needed to a flat.

5. In a statement to its insurers, the Respondent had further represented that "*Access to the blocks … is via an intercom system past the porter's desk, one of whom is on duty at all times*". As the ET found, between 7pm and 7am the Porter "*on duty*" - as referenced in the Respondent's statement to its insurers - could only refer to the Head Porter on duty, who, when on shift, would be required to stay on site, save that it had been agreed they could go to a local garage some five minutes away to get a pint of milk or newspaper; had a Head Porter otherwise left the premises whilst on shift that could have resulted (as the ET found) in disciplinary action.

The ET's Decision and Reasoning

6. The Claimant's ET claim was presented on 28 November 2014. It fell to be considered under the **NMWA** and the **NMWR**; it was common ground before the ET that this was a salaried hours claim for the purposes of the **NMWR**. Having referred to the relevant statutory provisions and case law, the ET concluded that the Claimant was "at work" for the hours 7pm until 7am on each three- or four-day shift and was accordingly entitled to receive payment for those hours. It

did not consider that the Claimant could only be described as being "at work" for the periods he was actually physically engaged in some specific activity, reasoning as follows:

> **"45. We do not conclude that the Claimant could only be described as being "at work" for the periods he was actually, physically, engaged on some specific activity. Adopting a "realistic appraisal of the circumstances in the light of the contract and the context within which it is made", as Langstaff P instructs us to do in paragraph 57 of *Whittlestone* we arrive at this conclusion as, whilst the Claimant may have been able to sleep through some of these hours if, for instance, he did not receive any calls from resident[s] or their guests from 7pm until 7am, his job was to be present at Bath Hill, he was, we find, akin to a night [watchman] whose role is to be on site, the Claimant here was at the Respondent's disposal and was liable to receive a disciplinary sanction if he left the premises other than for the relatively short period of time required to visit the nearby garage, a period of time which the Respondent permitted him to be absent. His presence on site was what the Respondent required for covering emergencies.**
>
> **46. The fact he was permitted to sleep during this time does not reduce the impact that his employer required him to be present for the entire 12 hour period and to answer calls and any emergencies that arose.**
>
> **47. The fact that the Claimant may have only been called out intermittently or infrequently is irrelevant as the nature of the Claimant's job was, we find, to be at Bath Hill and at work during his shift. For the avoidance of doubt in this case we make no findings on the level of his call-outs. We understand this to be an issue that may be relevant in the Claimant's dismissal and not relevant to our determination in light of our findings above.**
>
> **48. Whilst we do not find it conclusive that the Respondent used the words "on duty" in its insurance policy documentation it is, we think, a factor relevant to our assessment that the Respondent wished to let their insurers know there is someone available for work present on site for 24 hours a day."**

7. Given the ET had found the Claimant was "at work" during the relevant periods, the deeming provisions at regulations 16(1) and (1A) **NMWR** (see below) did not arise for consideration.

The Appeal and the Parties' Submissions

The Respondent's Case

8. By its first ground of appeal, the Respondent contended that the ET erred in failing to consider whether there was a statutory requirement for the Claimant to be present. This was (see the case of **Esparon t/a Middle West Residential Care Home v Slavikovska** [2014] IRLR 598) a "powerful indicator" in determining whether or not he was "at work" during his night shift. This was initially put as a failure to apply the test laid down in **Esparon**, but in submissions Mr Green tempered his argument somewhat, relying on this as a relevant consideration to which the

ET failed to have regard. On that basis, he contended, whilst the absence of a statutory requirement was not determinative of the question whether the complainant was working, just as the existence of such a requirement was a powerful indicator that he was, the absence of that requirement had to be a relevant matter to which the ET should have had regard (and demonstrably so); see the summary attached to the EAT's judgment, per His Honour Judge Hand in the case of **Governing Body of Binfield Church of England Primary School v Roll** UKEAT/0129/15, which identified this as a matter to which an ET had to refer, and - if not present - to state why the absence of a statutory obligation was not material to its conclusion, if that was the case.

9. By its second ground of appeal, the Respondent contended the ET further erred by relying on the fact that the Claimant was required to be present on the premises throughout the night as determinative, when this factor was equally consistent with the conclusion that the Claimant was available for work rather than *at* work (see **Shannon v Rampersad & Rampersad t/a Clifton House Residential Home** UKEAT/0050/15). This was not simply an adequacy of Reasons point, but a question of approach. Mere presence had been held to be insufficient in a number of reported cases on facts not dissimilar to the present. Here the ET had privileged mere presence, when it was required to take into account all relevant factors; factors that had been found determinative in other cases.

10. That fed into the third ground of appeal, that the ET further failed to take into account relevant matters. Specifically, (1) it expressly excluded from consideration the fact that the Claimant was rarely called upon, and (2) it failed to take into account the distinguishing feature that the Claimant was at his home during his night shifts (in contrast to the position of the Claimants in care home cases cited by the ET). More specifically, the case of **British Nursing**

Association v Inland Revenue [2003] ICR 19 could be distinguished from the present case because in that case the complainants were undertaking the same work throughout whereas here the Claimant's activity changed. In other cases (which included the present), the frequency of actual working activity and the times on which the worker was called upon to actually work, had been considered a relevant factor (see for example **Shannon**). Although the ET was correct to start with regulation 4 **NMWR**, regulation 16 - and the assessment of actual working and working activity - was not irrelevant to considering whether the complainant was working for regulation 4 purposes; the distinction laid down by the EAT in **Wray v JW Lees & Co (Brewers) Ltd** UKEAT/0102/11 was not the right way of deciding whether or not regard should be had to regulation 16. In **Wray** the facts were such that it was sufficient to ask the question whether the worker was required during the night to perform certain tasks or undertake certain responsibilities, but that was not the right approach in all cases. As the EAT had recognised in **Roll** (see paragraph 43), the real issue was whether - by the terms of the contract - the worker was working during the night, with an obligation to undertake tasks and responsibilities if they arose. In carrying out that assessment in cases such as the present it was relevant to have regard to regulation 16 and thus to the fact that the Claimant was in his own home and to the actual frequency of the times when he was called upon to carry out actual activity.

11. By its fourth ground of appeal, the Respondent contended the ET took into account an irrelevant matter, specifically the Respondent's statement to its insurers when that (1) merely stated that there was someone on duty - something the ET had understood as available for work, which would suggest it was not sufficient to demonstrate the Claimant was working throughout the night period in any event; and when (2) the ET should have limited itself to analysing what the nature of the Claimant's work was rather than what was said about it to a third party.

The Claimant's Case

12. For the Claimant, in addressing the first ground of appeal, Ms Criddle argues that there can be no general test requiring an ET to consider whether there was a statutory obligation for an employee to be on the premises when deciding whether she or he was working. The relevant question was why did the employer require the worker to be at their place of work during the night shift? In this case, the answer was simple: it was because the Respondent undertook to provide 24-hour porterage for its residents and, thus, the Claimant was required to be present, to answer calls from the entry 'phone system, from his landline and from the lift alarms and was not allowed to leave the premises, save for very limited purposes, on pain of disciplinary action.

13. As for the second ground, the ET did not regard the requirement to be on the premises as determinative of the issue whether the Claimant was working; it took into account the nature of the work that the Claimant was required to undertake and made an important finding that he could have been disciplined for leaving. There was no substance to the Respondent's criticisms that the ET failed to consider relevant factors.

14. Turning to the third ground of appeal: first, once the ET had determined that the Claimant was working throughout the night shift, the precise extent that he was called upon was properly to be regarded as irrelevant (see **Wray**); second, the fact that the Claimant was in his service flat during the night shift was not a distinguishing feature (see the case of **MacCartney v Oversley House Management** [2006] IRLR 514) - the relevant question was whether the requirement placed on the worker whilst in that accommodation was such that he was to be regarded as working.

15. Equally, there was nothing in the criticism that the ET took into account an irrelevant factor (ground 4). The ET was entitled to take into account a representation made by the Respondent to its insurers, which had suggested it had someone working at its premises throughout the night. That representation was consistent with the reality of the position as found by the ET. More generally, regard needed to be had to the entirety of the ET's reasoning including, importantly, the findings of fact that preceded its conclusions. Those findings demonstrated that the ET was well aware that the Claimant was provided with accommodation on site, that he sometimes received calls and sometimes had an uninterrupted night, but was equally aware of the very limited ability of Night Porters to leave the premises and the risk of disciplinary action if they did so. It was also aware - and had detailed evidence before it, largely from the Respondent - of the reasons why the Claimant's presence on site was required and the nature of the calls upon him during the night. Ultimately this was a question of fact for the ET and it had reached a permissible conclusion which could not be disturbed on appeal.

The Relevant Legal Principles and Conclusions as to the Approach to be Adopted

16. The relevant legislative provisions are found in the **NMWR**. By regulation 4, "salaried hours work" is defined as follows:

> **"(1) In these Regulations "salaried hours work" means work -**
>
> **(a) that is done under a contract to do salaried hours work; and**
>
> **(b) that falls within paragraph (6) below.**
>
> **…**
>
> **(6) The work done under a contract to do salaried hours work that falls within this paragraph, and is therefore salaried hours work, is work in respect of which the worker is entitled to no payment in addition to his annual salary, or to no payment in addition to his annual salary other than a performance bonus."**

17. By regulation 16 **NMWR**, it is subsequently provided, under the heading "*Working time for the purposes of the National Minimum Wage*", that:

> **"(1) … time when a worker is available at or near a place of work for the purpose of doing salaried hours work and is required to be available for such work shall be treated as being working hours for the purpose of and to the extent mentioned in regulation 22(3)(d) and (4)(b) …**
>
> **(1A) In relation to a worker who by arrangement sleeps at or near a place of work … time during the hours he is permitted [to sleep] … shall only be treated as being salaried hours work when the worker is awake for the purpose of working."**

18. Where, therefore, the worker is engaged on salaried hours work, regulation 4(1) will apply. Where an ET is not satisfied that the worker is engaged on salaried work for the purposes of regulation 4(1), the worker might still be deemed to be working by operation of regulation 16, subject to the exceptions allowed by that regulation.

19. In **Burrow Down Support Services Ltd v Rossiter** UKEAT/0592/07 (Elias J - as he then was - presiding), the EAT followed the approach laid down by the Court of Appeal in **British Nursing Association v Inland Revenue** explaining (there referring to regulation 15 - the equivalent to regulation 16 for time work purposes; there being no material distinction between the provisions for these purposes):

> **"13. His Lordship held that regulation 15 was a red herring and ought to have had no relevance to the case at all:**
>
> > **"Regulation 15 only arises in a case where a worker is not in fact working but is on call waiting to work."**
>
> **14. As this analysis makes plain, the original regulation 15 is a deeming provision. It is treating as time work to be time work periods when an employee is in fact not working but only available for work.**
>
> **15. The exception, which was relied upon by the employer, ensures that certain cases when the employee is available for work will not count as time work because it is taken out of the deeming provision. However, once it is determined that for the whole period of the shift the worker is actually working, he falls firmly under the scope of regulation 3 as a time worker. His status is not that of someone who is available for work but rather someone actually working. It follows that there is no scope for regulation 15 to operate. If that regulation is inapplicable then so is the exception. The claimant is relying on work actually done, not work deemed to be done by virtue of regulation 15."**

20. At one stage in oral argument it appeared that Mr Green might be suggesting that regulation 16 should be the starting point for an ET, at least in cases where the worker was not actively working throughout the period in question and was at home. Accepting, however, that

this was not the approach laid down by the authorities, he clarified that he was in fact arguing that an assessment whether the worker was working, for regulation 4 purposes, needed to take into account the totality of the **NMWR**, including the specific deeming provision and exceptions under regulation 16.

21. I am not persuaded that is correct. The approach Mr Green seeks to articulate seems to ignore the function of regulation 16 **NMWR**, which is to make provision for certain requirements upon a worker to count as salaried hours work, subject to specified exceptions; adopting the approach laid down in **Burrow Down**, I do not read it as usurping regulation 4 in defining what is salaried hours work. Even if Mr Green is understood as making the rather more basic point that the factors referenced by regulation 16 are not irrelevant when carrying out the assessment required under regulation 4 (so, allowing that whether the worker is permitted to sleep or carry out other activities, whether they are in their own home, and how often they are actually called upon to carry out particular duties for their employer, might all be relevant factors), that still runs the risk of elevating particular factors into a kind of checklist; it moves away from the actual wording of regulation 4. As HHJ Peter Clark observed in **Shannon v Rampersad & Rampersad t/a Clifton House Residential Home** UKEAT/0050/15 (see paragraph 19), the assessment of whether a worker is at work for the purposes of regulation 4 **NMWR** is particularly fact-sensitive; these various factors may or may not be relevant to assessing, in any particular case, whether the worker is carrying out work under a contract to do salaried hours work - it will depend on the particular circumstances relevant in that case.

22. That, it seems to me, is an inevitable observation given the need for a fact sensitive assessment in this context. Thus, in **MacCartney v Oversley House Management** [2006] IRLR 514 (HHJ Richardson presiding over a three member EAT panel), the fact that the Claimant - a

Residential Manager in a care home - could remain in her own flat and "*the likelihood of her being telephoned and called out was very substantially less than the likelihood of a doctor being called out while at rest in a hospital*" (see paragraph 48), did not mean she was not working. That was so because - unless the likelihood of call out was "*so insignificant as to be trifling*" - the EAT did not consider that "*the extent to which the worker is likely to be called out (which might fluctuate from time to time) can be decisive of the question whether he or she is working*" (paragraph 48). See also, **Whittlestone v BJP Home Support Ltd** UKEAT/0128/13, in which it was allowed that the complainant might still be working even if "*there was no evidence that … she ever woke from her sleep in order to provide any specific care*" (paragraph 5).

23. The touchstone has to remain regulation 4 **NMWR** itself: the worker must be engaged on work under a contract to do salaried hours work. I read that requirement as I think HHJ Hand QC did in **Governing Body of Binfield Church of England Primary School v Roll** UKEAT/0129/15 (see paragraph 43); that is, as meaning that the worker is not simply responding to undertake tasks on an ad hoc basis, but is working under the terms of the contract with an obligation to undertake tasks and responsibilities if they arise.

24. That of course raises the question as to what "working" means for these purposes? The answer, again, is that it depends. As was acknowledged by the EAT (Langstaff P presiding) in **Whittlestone**, there is a permissible distinction to be drawn between those people who are working – doing the job they are employed to do - simply by being present and those for whom that is not the case:

> **"16. … 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 contractual duties. This is unlikely to be … 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 … work".**

A And, at paragraph 57 of that judgment, Langstaff P further observed:

> **"57. Work is to be determined upon a realistic appraisal of the circumstances in the light of the contract and the context within which it is made. …"**

B 25. As for the "realistic appraisal of the circumstances" thus required, I do not consider it can be said that any one factor can be elevated into a general requirement. That would be to add a gloss on the language of regulation 4. A statutory requirement to provide the cover for which the worker is employed may be an important consideration - even a powerful indicator (see **Esparon t/a Middle West Residential Care Home v Slavikovska** [2014] IRLR 598) - but it is not something designated as a threshold requirement by regulation 4 and it would be wrong to see it as such (and see the observation of HHJ Peter Clark in **Shannon**, at paragraph 28, to that effect).

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D 26. It seems to me that it was the realistic appraisal of the circumstances (per Langstaff J) that the EAT (HHJ Serota QC presiding) really had in mind in **Esparon**, when it observed:

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> **"53. We would suggest that an important consideration must be why the employer requires the employee to be on the premises. If he requires the employee to be on the premises pursuant to a statutory requirement to have a suitable person on the premises "just in case", that would be a powerful indicator that the employee is being paid simply to be there and is thus deemed to be working regardless of whether work is actually carried out. Unsurprisingly, Mr Choudhury likened the instant case to the on-call cases such as *Hopkins* and *Lauder* while the Claimant likened it to *Hughes*, *Rossiter* and *Anderson*.**
>
> **…**

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> **57. There is no authority for the proposition that the Regulations do not apply if the work in question is not the employee's main job or an adjunct to it and has to be core hours. The proper focus must be on the task actually carried out. In the present case the Claimant was paid to be on the premises and also carried out time work. She was accordingly entitled to be paid at the rate of the national minimum wage, and the Respondent's appeal must be dismissed."**

G 27. In carrying out that appraisal, I do not consider that there is a checklist of factors that *must* be referenced by the ET, stating whether it considered them to be material in that particular case and if not, why not. If the summary to the judgment in **Roll** (and I note that this is something that appears only in the summary, it is not discernible in the body of the judgment itself) suggests otherwise, then I would respectfully disagree. In **Roll**, however, the EAT made clear in its

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reasoning in the body of the judgment (see, in particular, paragraphs 55 and 56) that the question that required remittal to the ET was why the Claimant had been found to be working given the amount of times he had been away (the ET having found that the Claimant was at work when he had gone to the pub, had been away overnight, had attended a football match, and so on); thus, on the facts, the need for the ET to better explain its approach was clear.

Discussion and Conclusions on the Appeal

28. I turn then to the ET's decision in this case and to the specific points raised by the appeal. As I have observed, the exercise undertaken by the ET involved an assessment that was particularly fact sensitive. It was for (per **Whittlestone**) for the ET to carry out a realistic appraisal of the circumstances in the light of the contract and the context. In so doing the ET was obliged to keep sharply focused on the language of the **NMWR**. It had to avoid being misled by terminology such as "on call"; its focus had to be on the nature of the work in question. Adopting that approach, the question for the ET was whether being present was sufficient to amount to work, or was something more required? This was a question of fact and assessment for the ET and its conclusion can only be disturbed on appeal if it can be said to have been made in error of law, to have been truly perverse, or reached in absence of a consideration of a relevant matter or on the basis of irrelevant matters.

29. In the present case, as the advocates before me have each demonstrated, there were factors pointing either way. There was no evidence that the Claimant was constantly being called upon during the night, although that would not be determinative if the nature of his work meant that he was working by simply being present. Equally, this was not a case where the call on the Claimant could be said to be trifling. There was no statutory requirement for the Head Porter be available on site overnight, but there was a representation to the Respondent's insurers that a Porter would

indeed be on duty at all times, and the means by which the Porter could be called upon were readily available to residents and on the entry phone system, and the Porter was relied upon as the contact for lift alarms. The contractual and factual reality was that the Claimant was required to be present at a particular place for the periods in question; he could only leave that place in very constrained circumstances and risk disciplinary action if he was not present. One might ask why was that so? Was it because he was merely required to be available for work if the need arose? Or was it because the Respondent had a requirement for a Porter, the nature of his employment and the context in which he was employed being such that he was - by being present - at work? It is true that the place where the Claimant was required to be present was also his home, such as had been provided to him by the Respondent. I do not consider, however, that the ET lost sight of that fact, which could not, of itself, be determinative as to whether the Claimant was working for the periods in question (see **MacCartney**).

30. I turn then to the specific matters relied on by the Respondent. I do not consider that the ET erred in failing to have regard to the question whether there was a statutory duty or requirement for the Claimant to be present; I do not read the EAT's judgment in **Esparon** as suggesting that this would be a determining factor in all cases. Had there been such a duty, then no doubt that would have been a very relevant factor but the absence of such a duty did not mean that presence was not work. Moreover, to suggest that the ET must, where there is no such requirement, expressly refer to the absence of the duty and indicate where (if anywhere) that went, would be to elevate this into some kind of formulaic tick box exercise; I do not accept that is the correct approach.

31. As for whether the ET saw presence alone as determinative, rather than recognising that it could equally be consistent with merely being *available* to work rather than being *at work*, I do

not consider that it did. The ET not only had regard to the requirement to be present but also to the nature of that requirement - the reason why the Claimant was present. In having regard to the requirement upon the Claimant to be present in order to meet the Respondent's need, the ET was plainly influenced by the fact that the Claimant had to be at his employer's disposal at pain of disciplinary sanction if he left site other than in a very limited way. That was a real-world appraisal of the contractual position; it was rightly at the heart of the ET's assessment.

32. The Respondent correctly observes that the ET did not undertake an analysis of the actual times when the Claimant was called upon, something that would certainly have been relevant if this was a case being determined under regulation 16(1A) **NMWR**. If, however, the Claimant was working simply by being present, then a failure to undertake this task would not be fatal. It was not being suggested that the call upon the Duty Porter was properly to be to be described as merely trifling (per HHJ Richardson in **MacCartney**) and that was certainly not the picture given on the Respondent's own evidence on the ET's findings of fact. Mr Green has, however, suggested that the ET needed to carry out this analysis in order to be able to determine whether the Claimant was working merely by being present. I do not think that is correct (see, for example, **Whittlestone**): save where the call upon the worker is properly to be described as trifling, the actual number of the times that the call is made need not be determinative of the nature of the requirement and whether, in context, mere presence might amount to work.

33. It seems to me that the ET in this case kept its eye on the correct ball. It concluded that this was a case akin to that of the night watchman: it did not matter how many times the Claimant actually had to get up and attend a particular call or emergency, his presence was what the Respondent required. In the circumstances, by simply being present the Claimant was working. And, in context, the fact that the Claimant was at home did not distinguish this from other

working-by-being-present cases. Such a distinction was not recognised as such in **MacCartney** and there is no reason in principle why it should be: if someone is working at home, that is still working. In any event, I do not think the ET failed to have regard to this fact. Reading its reasoning as a whole, it is plain that it was well aware of the circumstances in which the Claimant carried out this work; it did not lose sight of the fact that he was doing so in a flat provided to him as his home.

34. As for the Respondent's statement to its insurer, I think the Respondent protests too much. Given its duty to be truthful in its representations to its insurers, such a statement can properly be taken to represent the Respondent's view of the position at the time. It was part of the evidential background - not determinative of itself, but not entirely irrelevant - and the ET gave it permissible weight.

35. Ultimately this was a matter of assessment for the ET and it reached a permissible conclusion on the facts as it had found them. There is no proper basis on which the EAT might interfere with that conclusion and I am therefore bound to dismiss the appeal.