EMPLOYMENT TRIBUNALS

Claimant: **Mr T Corner**

Respondent: **Lincolnshire County Council**

Heard at: **Lincoln** **On:** **17 and 18 October 2018**

Before: **Employment Judge Clark (sitting alone)**

Representation

Claimant: **In Person**
Respondent: **Mr Webster of Counsel**

JUDGMENT having been sent to the parties on 30 October 2018 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Background

1. The allegations in this claim relate to the Claimant's entitlement to annual leave in his role as a retained fire fighter. That is a part time position. The central issue is the amount of leave entitlement he has in any given leave year. He says that is not compliant with his entitlement under the Working Time Regulations 1998 and also amounts to less favourable compared to a full-time fire fighter.

2. Mr Corner seeks compensation but I have to say at the outset that the thrust of his challenge is, in many respects, put in the abstract and his remedy has at times been expressed in terms akin to seeking a declarity relief as to the contractual rights of retained fire fighters generally. This is not a test case nor, indeed, a lead case but it has touched on potential implications going wider than Mr Corner's own position. Whilst I clearly do have jurisdiction to consider compliance with the law in order to answer his statutory claims before me, there must actually be an underlying claim for me to do so. In other words, I do not have jurisdiction to embark on a hypothetical analysis of compliance with the Regulations in the abstract. Having said that, the part time workers claim is its own claim with its own elements and does not necessarily engage the Working Time Regulations as there may be less favourable treatment whether or not either the Claimant or his comparator's terms and conditions were compliant or not.

3. As is clear from the structure of my judgment, although the Claimant didn't set out specifically each cause of action I have approached his claim on each of the potential routes available in law and, having discussed that with the parties at the outset, have determined that raises the following potential claims under the following provisions:-

    a. Regulation 30 of the Working Time Regulations 1998
    b. Section 23 of the Employment Rights Act
    c. Regulation 5 of the Part Time Workers of Prevention of Less Favourable Treatment Regulations 2000.

Preliminary Matters

4. At the outset, I dealt with some preliminary matters in respect of both my previous connection with the Respondent, albeit some time ago, and the constitution of this Tribunal. In respect of the first, I was for some time regularly instructed by the respondent to act on its behalf on employment and other matters. That relationship ended in 2011 with my appointment to sit in this region. In respect of the constitution, this is a claim which requires a full tribunal to determine matters under the statutory causes of actions now identified. All that needs to be said for the purpose of this extemporary judgment is that those matters were resolved with the consent of the parties at the outset. There was consent on both sides for to me hear the case and written consent has been given by both parties for the claim to proceed before a judge sitting alone.

Issues

5. The issues on the "Wages" claim are whether the Claimant has received less than the wages properly due to amount to a deduction from wages. If so, whether the last was within 3 months of presentation of the claim

6. The issue under the Working Time Regulations is simply whether there was, in fact, a refusal by the Respondent to permit the Claimant to exercise any of his rights under the 1998 Regulations in particular Regulation 13 and 13A and again occurring within the necessary period of time.

7. Finally, the issues under the Part Time Workers Regulations are whether the Claimant has been subject to less favourable treatment as regards the terms of his contract compared with his actual full-time comparator. The comparator was identified as a crew manager working the "Lincolnshire Crew Duty System". There is no dispute in this case that the identified actual comparator is a person employed in a comparable role undertaking work of a broadly similar nature. The central question is, therefore, whether there is less favourable treatment. If there is less favourable treatment, whether it is on the grounds of the Claimant being a part time worker and, if that is the ground, whether it is nevertheless justified on objective grounds.

Evidence

8. I have heard from the Claimant and a Mr Burrows, who is a colleague of his who also works as a retained fire fighter. For the Respondent, I have heard from Mrs Deborah Yeats who is the Area Manager (Corporate Support). I have seen a bundle running to nearly 400 pages and I have considered those

documents within it that I have been taken to. I have heard both parties in submissions. Mr Webster speaking to a skeleton argument.

Facts

9. There isn't a great deal of dispute of fact in this case but I have been taken to a number of points in the background, particularly in the contemporaneous documentation. It is not, however, my role to deal with every point raised blow by blow nor is it necessary to resolve every dispute between the parties but simply to deal with those matters that are necessary to answer the issues I have identified and to put the facts in their proper context. It is on that basis that I make the following findings.

10. The Respondent is the local fire and rescue authority for Lincolnshire. It is a large employer with a developed employment policy framework. It has access to in-house and other professional advisers. It adopts nationally negotiated terms and conditions and negotiates its own local variations, practices and procedures with an organised staff side representation. The Claimant has been employed since 1993. Since 2011 he has been employed as a Watch Manager at Saxilby Fire Station on the retained duty system. The role of a retained fire fighter is someone who makes themselves available for a certain period each week during which they will remain on standby within a 5 minute journey time of their allotted fire station and in a position ready to respond to emergency fire and rescue calls. The Claimant has also from time to time undertaken additional full-time roles and worked on the "whole time duty system" along-side his "retained duty system" duties. The last of those episodes ended in 2016 since when he has worked only on the retained duty system and it is in respect of that recent employment that the issues in this case arise. He is long serving and experienced and I have no reason to doubt he would not fare well were he to seek a position on a full-time basis but he chooses not to on the basis that he prefers the circumstances of his current role.

11. The deployment of fire fighters generally is managed through 5 national duty systems, shift duty, day duty, flexible duty and others and those are supplemented or modified by a number of other duty systems at local level. I understand there are 6 in operation with this Respondent including the "Lincolnshire crewing duty system", "watch commander" and "organisational development" and others. The various systems are complex, in some cases exceptionally so, as is the manner in which employees are rostered and even more so when it comes to how they take leave. For the purpose of this claim it is necessary only to understand the "retained duty system" and how it operates against the system applied by the comparator, that is the "Lincolnshire crewing duty system". I find, and to be fair the Claimant readily accepts, that the reason there are the number of different duty systems that there are is solely because of the need for the service to respond in an efficient manner to any number of possible emergencies in the course of carrying out its statutory functions.

12. The retained system can have any permutation of working days and hours within it over the 7 days of the week. So much so that of the 400 individuals that this Respondent has engaged in the retained system, I am told that there are nearly 400 different permutations. How one is deployed is clearly a matter of individual choice within some broad guidelines. The principle driving factor is the commitment put on the retained fire fighter to provide call out in

what is essentially a standby service. From that I can infer retained firefighters come from all sorts of different walks of life, with all sorts of different personal and professional commitments which means some may be able to offer only certain periods of time to provide that standby cover whereas others, such as the Claimant, can provide much more. A clear example was hearing from Mr Burrows who at times when he was not otherwise employed in his other job is usually expected to provide cover for not less than 90 hours per week over 3 or 4 days. Others are, however, able to offer much more and in the Claimant's case he has recently increased the amount he can offer and is effectively available 7 days a week, 24 hours a day. That is 168 hours of standby per week. Saying that out loud causes me to pause and observe how the issues in this case at times come across quite odd conceptually in respect of how it can be that somebody who commits to work literally to the maximum available hours in a week is nonetheless in a position of being a part time worker.

13. During the agreed standby hours, anyone working the retained duty system is free to do whatever they wish to occupy their time subject to remaining within a 5 minute call out of their allotted station. In return, where they offer 120 hours of more they are paid 10% of the applicable salary for their grade or post. If they offer less than 120 hours they are paid 7.5%. That amount is paid week in, week out whether or not the retained fire fighter is called upon to respond every day or not at all. Consequently, there is no additional payment for someone like the Claimant who makes himself available 168 hours than there would be were he available for only 120 hours. However, the more time one is on call means there is clearly greater opportunity to be called upon to work and thereby earn the additional pay from the additional hours worked. The payments including disturbance payments are paid in addition to the retainer and all payments for work actually done are exactly the same as they would be for the whole time fire fighter, save of course that the whole time fire fighter is not entitled to a disturbance payment or the percentage retainer.

14. All retained fire fighters are expected to work a period of 3 hours per week for training irrespective of call outs. As I said, time spent responding to calls is paid at the prevailing rate for the grade and there may be other legitimate claims that can be made in respect of training or administration and, indeed, payment for annual leave. What's more, to the extent that it could ever be possible to compare a retained fire fighter with a whole time duty system in truly like for like circumstances, it would show that the retained fire fighter would in fact receive over 10% more than the whole time firefighter by way of the retainer and the disturbance payments.

15. However, for obvious reasons the amount of work done on the retained duty varies. In any week, there may be days without a call out, sometimes over consecutive days. At other times, there may be multiple call outs in any one day so that work and total pay varies. The Claimant's recent pay record is consistent with that. Over the last year or so his net monthly earnings have fluctuated between around £1,300 and up to around £2,600. Whilst this case does not directly engage the calculation of payments for annual leave, I find holiday pay is based on a rolling 3 month average earnings, excluding the retainer, and when any annual leave is taken it is paid at that prevailing rate pro-rata to the number of days actually taken at any time. The day rate for retained fire fighters is calculated on the basis of one seventh of that average week's pay. In this particular case before me that causes no issues as the

Claimant is retained over 7 days in any event. Whether it has implications in other cases where the retained fire fighter is available over fewer days per week (but still has daily leave calculated on the basis of one seventh of a week's pay) is a different matter, potentially for another day.

16. The amount of annual leave entitlement for employees on the retained duty system is governed, in the first instance, by the grey book. That is the national terms and conditions for fire fighters and exists as a result of the national collective bargaining process. Leave arrangements are set out at Part C which appears at page 220 of the bundle.

17. Annual leave for employees on the retained duty system is set out at paragraph 3, page 221 and provides that paid leave entitlement is 4 weeks, or 5 weeks for employees who at the start of the leave year have at least 5 years continuous service on the retained duty system. A week's leave means a period of 7 consecutive days free from duty. The taking of such leave in part week or individual days shall be a matter for agreement between the fire and rescue authority and the recognised trade unions. There are a number of aspects of this case which are characterised by rules which are often expressed in terms which are close to impenetrable. Some statements appear not to mean what in practice they are interpreted as saying. This is one. In itself, that rule would seem to suggest retained fire fighters can take 4 (or 5) weeks of 7 days at a time. In fact, it is interpreted as meaning that they can take 4 (or 5) times 7 individual day's holiday, that amounts to 28 or 35 days as applicable. On that there is no dispute. The individual arrangements for taking leave is something which has devolved through local agreement. The local agreement published in 2014 is referred to as a local order and seems to me to be near to meaningless as it is written so far as the arrangements for taking annual leave are concerned in practice. It reads as if leave must be taken in blocks and where it is taken otherwise in blocks that the aggregate is no more than would be the case if the individual took the 4 or 5 working weeks entitlement. It is difficult if not impossible to interpret that in the way that it is applied in practice but, thankfully, that doesn't need to trouble me because it is clear on the documentation and agreed in any event between the parties that the local practice is quite different to that.

18. I have seen the Claimant's holiday record for previous years. I have heard the evidence of the local practices both from the Respondent, Mr Corner and his witness Mr Burrows and I am able to make these findings. Leave entitlement for retained fire fighters is commuted to a number of days, as I have said, by multiplying their 4 or 5 weeks entitlement by 7. Perhaps curiously, but nonetheless it is the case, that formula applies whether the employee provides 7 days cover or fewer (which may explain why when taken, the division is made by 7 also). It seems to be the case that were it possible to provide merely one day's cover when on the retained system, that individual would still become entitled to 28 or 35 days holiday as the case may be per year. In the Claimant's case, he does provide 7 days a week cover on the retained duty and is entitled to 35 days. Secondly, I find leave can be taken in any number of days at a time as agreed between the parties. It can be, and certainly has been, taken as individual days if so desired. When leave is taken the employee continues to receive their retainer in full and they also receive the average payment for the number of days taken according to the 3 month average earnings preceding the leave. For that they get, as I have said, one seventh of the average week's pay for each day taken. Over and above that basic annual leave entitlement, a retained fire

fighter is also entitled to up to 8 public days each year. The contractual term relevant to this was amended in 2011 in a national joint council circular and now states that an employee in the role of station manager or below who is required to work on a public holiday shall be paid double the disturbance and activity payments at Part B, paragraphs 10 to 13. In addition, the employee shall be granted a day's leave in lieu in respect of which the employee shall not be required for duty and shall receive one seventh of their average weekly pay. The entitlement to payment for the enhanced payment and a day in lieu is therefore contingent on them actually being called out over a public holiday. If they are not required to work even though otherwise available they do not receive the additional day in lieu. Where they do become entitled to it, I find in practical terms that it is simply added to the total entitlement. In theory, therefore the Claimant was entitled to take 35 days leave plus up to 8 further days if he should otherwise be called out to work on those public holidays.

19. The Claimant takes issue with the fact that if he wants to take a full week off he has to book 7 days and not 5 or 4 days as the other fire fighters might have to. That, I find, is the case but it is the case uniquely because of the availability that he has offered to the service. Were he working a shift pattern within which provided various set days on and off duty days, there would within any 7 day period be days that he would not otherwise be available for work and, as such, he would not need to book all of that period off. A clear example is that given by Mr Burrows who is available for only just over 3 days per week and need only take 3 or 4 days leave to be away for a whole week. It is significant, therefore, in my findings that the incidents of off duty days in any duty system is what governs the amount of leave needed to be booked in order to be away from the workplace for a calendar week. By analogy a typical office worker working Monday to Friday does not need to book leave on Saturday and Sunday.

20. I have also seen the Claimant's actual leave record which shows the following. In the 2016 leave year, that is January to December, he took 41 days paid annual leave. In this year so far to July, he has already taken 32 days. The records show an entitlement in 2016 and 2018 of 35 days and on each form as each leave is booked, the remaining balance decreases commensurately with the days taken. The record card for 2017 is not before me but I have no reason to believe there was any material difference in how that year's leave was applied and taken. The more recent leave record has annotated in manuscript "35 days plus 8 public holidays equals 43". That of course must be contingent on actually be called out on public holidays which in part at least are yet to have fallen in this year but nonetheless the Claimant accepts as a fact that he has between 35 and 43 days paid leave in each year. The Claimant also accepts that he has not at any point taken leave for which he has not been paid at the prevailing rate. In particular, he does not assert that he has not been paid on the basis that he had otherwise exhausted his contractual entitlement yet believed he had a greater entitlement under any other authority. Similarly, he also accepts that he has not sought to take leave and had the application refused on that same basis of having exhausted his entitlement.

21. I turn then to the comparator. The comparator is said to be a whole time crew manager working on the Lincolnshire crew duty system. It is common ground that that person exists, has been identified and is a valid actual comparator on the same type of contract and undertaking broadly similar work. I don't need, therefore, to identify him personally in the public record. Under his

employment he works full time, that is an average 42 hours per week. He is not free to occupy his time as those on the retained scheme are albeit recognising the fact that they are subject to some restriction in their movements. He has to turn up for work and he is subject to a rolling 24 day roster made up of 5 days on, 3 days off, 4 days on, 4 days off and again 4 days on and 4 days off. His annual leave entitlement, as for all others other than on the retained scheme, is set out at paragraph 2 of Part C of the grey book and shows he is entitled to the following: 25 days leave under Scale A, 5 days leave under Scale B and 3 days for long service. On the face of it, it appears that the comparator is entitled to 25, plus 5, plus 3 making 33 days. That is the headline figure and the figure that all whole time duty staff are entitled to, at least in that grade and in those circumstances, but the headline figure is modified to take account the duties. It is, at best, a figure of time that can be taken *away from the service* but not necessarily what would be the actual *working days*.

22. In other words, some of the days taken away from service in any block of leave will include days that would not otherwise have been rostered as duty days for that employee. The total leave available to this comparator employee is in terms of days that can be taken away from work is not 33 but 24. Two explanations follow for this. The first is that the scale A holidays are dictated largely by the employer. Subject to any scope to swap scale A holiday allocation as between fire fighters, the leave must be taken in two long blocks during the leave year at times scheduled by the employer. The employee therefore has little choice in how this amount of leave is taken and, as I have already alluded to, it will include within those longer blocks days falling between what would have been duty days which would have otherwise not been off duty days. It is exceptionally difficult to understand this concept to anybody who has not worked for some time within the scope of the grey book but it was explained to me in the context of a more familiar Monday to Friday working pattern (the day duty system) and the example of an employee wishing to take 2 weeks' leave. To anybody else, they would take 5 days one week and 5 days the next week. Under the application of scale A, the two weeks would include a Saturday and Sunday in between the duty days and, as a result, a day duty employee taking 2 weeks' leave under scale A would, in fact, have to book out 12 days leave, and not 10. As painful as it is to try and understand this system, which has subtly different outcomes depending on which duty system is being applied, it seems to me that the scale A and scale B approach is the mechanism for maintaining at least a headline consistency between all wholetime staff irrespective of what duty system they work on. In other words, everyone in the same category receives, in this example, 25 scale A, plus 5 scale B, plus 3 long service days. I should add how scale B and long service days have some measure of restriction but are essentially, although not always, days that are available to be taken at the employee's choice. In addition to the annual leave those working the Lincolnshire crew duty system such as the comparator are also entitled to 8 public holidays. Unlike the Claimant and others on the retained scheme there is no prior requirement that they actually work on the public holiday before coming entitled to it. They are therefore entitled to a further 8 days on top of the annual leave entitlement. In reality for the comparator that is the 24 days leave, plus 8 days away from duty such that 32 days is the total days that the comparator can be away from what would otherwise be working time.

23. Despite the substantial similarities in the work of retained full time crew when on the fire ground and in other respects, there remain some fundamental

differences in the way the Claimant and his comparator are called upon to perform their work. Whilst both potentially provide a 24/7 response one does so on the basis of being on call only, being free to undertake his other activities as he chooses when not called. Whereas the comparator has to commit to the rota to work to with days on duty and days off duty and under no obligation to provide his services outside the time he is rostered or on call within his roster. Similarities are that both rosters seek to provide 24/7 cover for a geographic locality but both achieve it in materially different ways. It seems to me that managing the individual employee entitlements, such as annual leave, under these two different regimes is inevitably going to lead to some differences arising and there is no dispute that in fact those differences do arise. I am reinforced in the conclusion that the cause of those differences is the duty system an employee is engaged on and not their full or part time status as, even where individuals are compared on both full-time bases across the different duty systems, those differences still appear.

24. For example the day duty has, on the face of it, the same annual leave entitlement as the Lincolnshire crewing duty system and yet such employees are entitled to be away from the work place for 37 actual duty days compared to the comparator's 32. It is also common ground, and therefore I accept as a fact, that part timers and full timers within the same duty system receive exactly the same entitlement subject to the pro-rata principle. There is, therefore, agreement that there is no less favourable treatment in respect of annual leave at least within the duty systems as between part timers and full timers. I also find that the full time/part time divide is not clearly drawn between retained and Lincolnshire crewing duty system. I am told that there are full time employees on the retained duty system. It is accepted that there have been and are employees on the Lincolnshire crewing duty system that work on a part time basis. I also accept the Claimant's analysis that, at least as far as his belief is concerned, that a part time worker on the Lincolnshire crewing system would have a ***more*** favourable annual leave entitlement than the full time worker on the retained duty system. That is his belief which seems to turn on its head the notion that part time workers on the retained system are inherently at a disadvantage to full timers elsewhere. I find as a fact that the difference that there is between the two roles cannot therefore be the predominant product of the mere fact of working part time or full time. Something else is operating on the particular circumstances of each employee's terms of employment to create the apparent difference. It is not insignificant in that respect that the Claimant himself explained his sense of injustice as being "because I am on the retained duty scheme, not part time. My issue is the unfairness due to the retained status". The predominant reason for any difference is, therefore, the nature of the duty system that the particular employee works under. In this case the retained duty system.

25. I have considered whether the duty system can be a proxy for full time or part time work and reject that possibility, not least on the evidence that the Claimant accepts as to the existence of full timers and part timers in those other areas.

26. The issues in this claim were known to the employer by 2017. The Claimant raised his concerns in an internal grievance which was dismissed and he appealed that outcome advancing the same basis and that appeal was determined with an outcome in February of this year.

27. Finally, in terms of fact finding I should also record the basis of the Claimant's general sense of injustice with annual leave and how he puts the disadvantage. He has expressed this in a number of stages through questioning and submissions and indeed in the documents he has prepared to assist me in this matter. It has become clear that the way the perceived disadvantages are articulated is by reference to the amount of leave needed to book in order to take a full week away from the workplace. To illustrate this, the claimant has developed a novel measure to compare different employees based on the employee in each category of roster hypothetically taking their full entitlement of leave starting on 1 January and identifying how far into that year it would take them to exhaust their entitlement and when they would return to work. For him, it is after 5 weeks when he uses his 35 days or slightly longer if his public holiday entitlement was to be counted. For his comparator, he says it is 8.44 weeks into the year and it is that difference that he says is the basis of the less favourable treatment. That difference, as I have already touched on, is explained by the working pattern, not the amount of leave. The claimants position can also be considered against that of his own witness, Mr Burrows. His entitlement on the same retained scheme is also different to the claimant as he gives availability over only 3 or 4 days on average per week. For some curious reason he, as all retained fire fighters do, nevertheless receives the same absolute amount of leave so he gets the same 35 days, plus such bank holidays as he works, which is the same as the Claimant. He is part time compared to the Claimant. The circumstances in which he could take his 35 days' leave means he could be absent for longer than the first 9 weeks of the year. To put this into an even more extreme hypothetical context. If it were possible for a retained fire fighter to offer just one day per week, he too would be in receipt of the full 35 days annual leave per annum and could theoretically take the first 35 weeks of the year off before having to perform his duties and it seems to me this illustrates not just how the time spent away from work in total includes periods that are not otherwise working time but also illustrates the bizarre nature of the way the retained fire fighters' holiday entitlement is distributed.

Discussion and Conclusions

28. The first claim I have before me is one of unauthorised deduction from wages. Section 13 of the Employment Rights Act 1996 sets out the right not to suffer an unauthorised deduction and also the basis for prior authorisation although that is not engaged in this case. Whether there has been a deduction in fact is answered by determining whether that which was paid to the Claimant in any pay period fell short of that which was otherwise properly due to him. If it was there is a deduction. If not there has not been a deduction. That test provides a mechanism in law to engage my enquiry into the application of the Working Time Regulations so far as the entitlement to leave was concerned. However, the only way such an enquiry could have applied was if there had been a situation where the Claimant had taken annual leave in excess of his contract but in circumstances he felt he was entitled to under the Working Time Regulations. If that had happened, and if the employer had allowed him to take that time, but not paid him for it, the question would then arise to be answered. In fact, this is not such a case.

29. The Claimant accepts he has not taken any period of leave for which he has not been paid. He has never fallen into that gap as described and there is no other way, unfortunately, of viewing the facts of this case than to conclude there has not been a deduction from wages. If there is no deduction in fact

then I have no vehicle under that particular cause of action to enquire into the application of the Working Time Regulations and that part of the claim must fail for those reasons.

30. The second cause of action is the claim under Regulation 30 of the Working Time Regulations themselves. That entitles the Claimant to present a claim that his employer has refused to permit him to exercise any of the rights contained in the Regulations. In this case, the rights are those given by Regulations 13 and 13A. That obviously would properly engage me in enquiries into whether or not the employee's actual annual leave was compliant with the entitlement under the regulations in determining, if there had been such a refusal, whether the employer was entitled to refuse leave or whether the employee was entitled to take it.

31. However, once again as a matter of fact the Claimant fairly and frankly accepts that at no time has he sought to take annual leave under either statutory provisions and had such a request refused. There is no evidence, in broader terms, that the Respondent has not permitted him to exercise his rights. In the absence of any event in which the Respondent is said to have refused to permit him to exercise his rights, this claim must fail also.

32. However, I have considered the fact that the Claimant did raise his concerns about his overall annual leave entitlement in the context of his grievance. That grievance was dismissed and then dealt with at an appeal in February 2018 at which it was again dismissed. I have to say I am not entirely satisfied that such a grievance appeal process is necessarily the same as a refusal to permit the Claimant to exercise his rights to annual leave but it is at least arguable and, as the final negative outcome occurs in February 2018, it is arguably within the 3 months of the presentation of the claim such that I can examine the extent of the Claimant's rights under the Working Time Regulations. That, in theory at least, gets the claim off the ground and into this jurisdiction. The difficulty the Claimant has in respect of his rights under Regulation 13 and 13A is that by his own admission he has limited his interpretation of the law to the entitlement as expressed in "weeks" only and not by reference to either the maximum set out in Regulation 13A(iii) or, indeed, the facts of his own actual annual leave history. In other words, he has applied his own formula to the entitlement of 4 weeks + 1.6 weeks in multiplying the resultant 5.6 weeks by 7 to arrive at a total entitlement of 39.2 days.

33. It seems to me the correct analysis is this. The Claimant is entitled to 4 weeks' annual leave under the directive and was originally limited to 4 weeks under the original regulations. There is no dispute that the terms of his employment as a retained fire fighter entitle him to this in the written terms and that is irrespective as to how a week is applied in practice. After 5 years' service, he became entitled to 5 weeks' annual leave which equally met the directive and original regulation. The issue then becomes slightly less straightforward after the later amendment to the Working Time Regulations when the right to take additional annual leave was introduced under Regulation 13A. That is expressed as an additional 1.6 weeks and that is the expression the Claimant seeks to rely on. In this case nothing turns on the fact that the 4 weeks entitlement has EU origins and the 1.6 weeks entitlement has domestic origins. The Claimant's case is simply that he says as he has remained at all times entitled only to 5 weeks' annual leave he is 0.6 weeks holiday short of the Working Time Regulations. The Respondent

for its part accepts that if that were all the law said that would be correct. However, it relies on the fact that Regulation 13A(iii) imposes a maximum total annual leave of 28 days in terms of the aggregate of the 4 weeks and the additional 1.6 weeks. The effect of this has been recognised in academic commentaries. I have seen how the IDS Handbook on Working Time deals with this at page 97 and it recognises at the time of the implementation of the additional leave those that work more than 5 days per week did not benefit and were slightly disadvantaged compared to those on 5 or fewer days per week. Similarly, whilst the Regulations do not explicitly reference public holidays it is well known that the origins of the political desire to introduce the additional 1.6 weeks' leave was in order to ensure that employees had their 4 weeks entitlement, plus any public holidays that they worked on but in this case the application of the Claimant's 5 weeks being commuted to 35 days means he actually becomes entitled to substantially more than the Working Time Regulations require. Whilst it is true to say that if the 5.6 weeks was multiplied by 7 in the same way he would be entitled to 39.2 days, that is itself irrelevant in terms of compliance with the regulations. Consequently, I conclude that what he is entitled to under the terms of his contract of employment is no less than that which he is entitled to under the Working Time Regulations or for that matter the directive that underpins them.

34. Consequently, even if I were to accept that the rejection of his grievance in February of this year was sufficient to engage Regulation 3o and mean I was entitled to undertake this enquiry, it would in any event be a claim that I would dismiss. Any refusal contained in that grievance appeal outcome is not therefore a refusal of him exercising his rights under the Regulations.

35. I turn finally to Part Time Workers claim which does not necessarily engage the Working Time Regulations at all. There could be less favourable treatment where both Claimant and comparator comply with the regulations where one or the other does but the other doesn't or where neither do. This doesn't need to refer back to the Working Time Regulations. What needs to be proved by the Claimant is that he is a part time worker and that he has been treated less favourably than the employer treats a comparable full time worker in respect of his contract or any other detriment. This is not a detriment case. It is a contract of employment case. If he shows that there is a relevant comparator which there is and if he shows there is less favourable treatment I then turn to the employer to explain the treatment and it succeeds only if that treatment is on the ground of the worker being a part time worker and, if it is, that it is not justified. I have been referred to various authorities in particular, **Carl v University of Sheffield** which requires an actual, not a hypothetical, comparator and the standard of proof to satisfy the measure of causation is that the part time worker status be the "predominant and effective cause of the treatment". I have also been referred to the House of Lords in **Matthews v Kent and Medway Towns Fire Authority** [2006] which only needs to be mentioned so far as it provides the authority from which the parties are agreed that the identified comparator is in the same contract performing broadly comparable work.

36. The first question is, is there less favourable treatment so far as the equivalent total entitlement to annual leave. I am not satisfied that there is in fact less favourable treatment. Firstly, the comparator is entitled to take 24 plus 8, that is 32 days away from working time in each annual leave year. The Claimant is entitled to take 35 plus as many public holidays as he works in lieu. I am satisfied to the extent that this claim is engaging with overall

annual leave entitlement alone, that that is enough for the claim to fail at the first question of less favourable treatment. But I am also of the view generally that there is scope to view the ups and downs or the swings or roundabouts in determining the presence or absence of less favourable treatment against the claimant. There is a small margin of pay benefit to the retained employees. I say small margin but it becomes substantial if one compares long periods of like for like comparison but, of course, in practice there usually aren't such long periods of like for like comparison but nonetheless when they do arise the retained fire fighter is paid approximately 10% more. The question of flexibility of what one can do with one's time again is more flexible with retained than it is with whole time albeit, again, I don't think that is a substantial distinction, a retained fire fighter is still subject to a restriction which in many respects is an onerous restriction. There is then the flexibility of when to make oneself available. That is entirely in the hands of the retained fire fighter compared to the whole time employed fire fighter and perhaps the greatest significance in terms of the distinction between the two roles is the flexibility so far as the ability to take leave in the manner in which one wishes and at the time one wishes.

37. I am satisfied there are two bases on which the presence of less favourable treatment is not made out. If there is less favourable treatment, and it can only possibly exist in the way that arises from the fact that the full time comparator has periods of off duty so that they can have relatively longer periods away from the workplace than the Claimant does, I nevertheless conclude that that is not less favourable treatment in the swings and roundabouts approach. But if that is not the proper approach to that question and there is less favourable treatment I am still required to consider on what ground that arises. I have already said how the Claimant's own evidence was put in terms that this is not so much about being part time as the fact that he was working on the retained duty system. This is not a proxy case. The difference in the treatment is not about full time or part time working, it is clearly about the circumstances of the particular shift pattern or duty system being operated by any individual at any one time. That, in my judgment, is what explains the difference and is a difference which arises for reasons unconnected with his part time status. I am reinforced in reaching that conclusion by the fact that there is no distinction within the various duties that creates less favourable treatment between part time and full time, within the pro rata principal. I am satisfied there are differences between the different duties as between comparable full time workers which as I have already said suggests the operation of the duty is the explanation for the grounds for any difference that might arise. Further, it is not insignificant that the various different duties that do exist seems have all arisen through the process of joint agreements with the various collective bargaining machinery which is entitlement to some respect not least in the circumstances of schemes which are very complicated to understand by those not deeply involved in their operation. Each duty deals with a specific type of need of this employer to manage employee entitlements, particularly annual leave, in a way which meets the individual employee's contractual and statutory entitlement but in a way that continues to provide safe and efficient emergency service under each type of roster. So even if I were to go on to apply what in other areas of discrimination law is termed the shifting burden of proof, and even if that burden were to shift to the Respondent in this case, which I don't accept it does, I am satisfied that the reason for any less favourable treatment has been shown to be something other than the Claimant's part time worker status. For that reason, the claim under the Part Time Worker Regulations

fails and it is not necessary for me to deal with the justification arguments that are also advanced by the employer in the alternative.

38. I would just say my final thoughts about the schemes operated. They are at times close to impenetrable and some of the written procedures seem to bear little relationship with the practice in reality. There are other elements of this claim where I have been concerned to some degree that there may be arguments about infringements of other individual employment rights and I suspect, on the basis of the scheme that's been put before me over these two days, that the Respondent may be faced with dealing with more claims in the future as long as that state of affairs subsists. I expect it's beyond the scope of this individual Respondent to directly engage with the national terms but it might do itself something of a favour, at least in respect of those internal written orders and documents that it does have more direct control over, to ensure that they are written in a way that is consistent with the practice on the ground.

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Employment Judge Clark

Date 7 January 2019

REASONS SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE