Case No: 2307665/2020

EMPLOYMENT TRIBUNALS

Claimant: Mr A Wisdom

Respondent: Secretary of State for Justice

Heard at: Croydon (by CVP video) **On:** 18 February 2022

Before: Employment Judge Parkin

Representation
Claimant: Mr O Isaacs, Counsel
Respondent: Mr B Gray, Counsel

RESERVED JUDGMENT

The Judgment of the Tribunal is that the claimant was not working as working time and thus was not denied rest periods throughout the whole of his standby duties from 18 June to 17 September 2020. His claim is therefore dismissed.

REASONS

1. The proceedings

In his claim form presented on 19 November 2020, the claimant made claims relating to his employment as an Approved Premises Area Manager ("APAM") based at Seafield Lodge, Cricklewood, setting out that he worked regularly on out of hours standby/on call duties well in excess of his normal 37 hour week managing the Probation Service staff and residential premises with 21 high and very high risk offender occupants. In particular, he worked for 1 in 4 weeks each weekday from 17.00 to 09.00 the next morning and then all day Saturday and Sunday until 09.00 on the Monday morning, needing to be available to take calls from staff at the premises. Every 9 weeks, he had to be available to take calls from outside agencies making contact with the Probation Service out of office hours. He could not drink alcohol and needed to be located no further than an hour from the premises and to respond to calls quickly and where he could maintain confidentiality. Whilst acknowledging that he was paid an allowance of £418.09 per month, his principal complaints were that he was not paid an hourly rate for the whole time on call as working time and not allowed to take 11 consecutive hour breaks in each 24-hour period of work, as required by the Working Time Regulations 1998. Following a case management hearing on 2 June 2021, he provided further particulars of his claim on 16 July 2021, expressly

claiming that the respondent failed to provide him compensatory rest during the period 18 June-17 September 2020 on the basis that the whole of the time he was on standby duties during that period was working time.

2. In its ET3 response presented on 6 January 2021, the respondent denied any breach of the 1998 Regulations. It contended that in circumstances where the claimant did not need to stay at work (and could manage his time and activities even when on call), he was not to be regarded as working at the employer's disposal in carrying out his activity or duties when not actually dealing with matters on call. It contended that the pay arrangements for the on call hours were set out in the nationally negotiated "National Agreement on Pay and Conditions of Service" whereby a standby allowance was paid, with an actual payment for periods when the employee was called in or required to work when on call, or alternatively time off in lieu allowed. The respondent amended its response on 3 September 2021, acknowledging that the claimant had been on standby from 22-28 June 2020, 13-19 July 2020, 27 July-2 August 2020 (albeit voluntary at his own request), 17-23 August 2020 and 14-17 September 2020 in the time period relied upon by the claimant. It continued to deny liability and contended he did get 11 hours rest outside his working times.

3. The claimant's complaint of breach of regulation 4 (Maximum working time/48-hour week) was dismissed on withdrawal by him in a Judgment issued on 13 September 2021, sent to the parties on 8 October 2021.

4. The hearing

4.1 The parties exchanged witness statements and finalised the contents of the Bundle late. Despite the calibre of both parties' representation, there was no agreed statement of facts and only a late agreement of a reduced list of issues was reached just before the hearing. The hearing started late through difficulties providing the full electronic Bundle to the Tribunal, which was only managed some time after the hearing commenced.

4.2 The claimant gave evidence on his own behalf and was cross-examined. There was a brief statement from his witness, Tarhe Monioro, which the respondent did not seek to challenge; its contents were very general and I could give little weight to them. The respondent called Diane Orlebar and Victoria Jeffries, both regional Heads of Public Protection (for Residential premises) ("HoPPs"). Ms Orlebar as HoPP for London Approved Premises, was the claimant's direct line manager from March 2020 and Ms Griffiths covered Kent, Surrey, Sussex and East of England regions; both were cross-examined. I found the claimant's evidence and that of Ms Orlebar, expressly dealing with his role and performance of within London region of greater assistance than the more general evidence of Ms Griffiths. There was an agreed Bundle (1-474). Both parties provided written skeleton arguments with authorities and expanded upon them orally. There was no time to deliberate and give judgment at the hearing and I reserved judgment.

5. The Issues:

Following the case management hearing on 2 June 2021, by the time of the hearing, the parties had substantially narrowed the issues leaving aside issues about special case exceptions, the maximum 48-hour week and out of time jurisdiction matters (63-64). They agreed that the only remaining issues were:

1) Is the claimant's "Standby" duty "working time" within the meaning of regulation 1(1), Working Time Regulations 1998? *It is accepted that time when the claimant is called upon to undertake work during this period (whether by phone only or on-site attendance) is working time. The issue is the entirety of the standby period beyond those times, which the claimant contends was also working time.*

2) If it is working time, has the respondent failed to provide the client with a rest period or periods of not less than 11 consecutive hours in any 24-hour period during which he works for the respondent (regulation 10(1)).

The respondent acknowledged that if issue 1 was answered in the claimant's favour, it would follow that there was a breach of regulation 10(1). Accordingly, the claimant claimed compensation for not receiving compensatory rest, which he based upon his normal hourly rate of pay for the standby hours as working time. He confirmed that he did not seek compensation for injury to feelings and that no personal injury claim was advanced within these proceedings.

6. The facts

From the documentary and oral evidence, I made the following brief findings of fact on the balance of probabilities.

6.1 Having commenced employment with the Probation Service in August 1993, the claimant became a Senior Probation Officer (SPO) in November 2005, an Approved Premises (AP) deputy manager in 2007, and a Band 6 Approved Premises Area Manager (APAM) in February 2018.

6.2 As APAM, based at Seafield Lodge, Cricklewood, North London, he was responsible for a small cluster of APs in North London which provided accommodation, supervision and support for people on bail, on licence from prison or serving a community sentence. In effect, these premises were hostels for residents under close supervision for relatively short terms, many of whom were subject to curfew conditions which required them to be in the premises from 11.00pm to 6am. Breach of their curfew and other licence conditions by the residents could involve recall to custody ("recalls"). Not all residents at an AP are on curfew but the higher proportion of residents with a curfew, the more likely there will be recall situations.

6.3 He managed a team of AP managers, residential workers and probation service assistants and had delegated authority for strategic and operational performance, including all aspects of risk assessment, health and safety and contingency planning, monitoring and reporting illegality, financial management, community relations, fabric management. He attended and held team meetings.

6.4 His basic contract of employment terms included working a 37-hour week, excluding meal breaks (200-203). The claimant normally worked from 9.00-17.00 or 17.30, with about 30 minutes meal break on Mondays to Fridays. The basic terms were silent about working standby/out of hours duties and the frequency of and payment for those duties.

6.5 Out of hours duties whereby senior managers were on call to attend to emergency issues not suitable to be left until the next working day were briefly referred to in the APAM job description (358-360) as a requirement "to participate

in the out of hours Senior Management on call rota". The responsibilities, activities and duties included "manage and participate in divisional out-of-hours on call rota". The job description set out that additional payments were made for out of hours work, with no detail about the frequency of out of hours of work.

6.6 The claimant's contract of employment was subject to terms and conditions incorporated through collective agreement by the National Negotiating Council for the Probation Service (NNC) National Agreement on Pay and Conditions of Service (158-190). In particular, this set out at section A5 at 182-185:

> Standby
>
> 8. "An employee may be required to perform standby duty at home to deal with emergencies which may arise. A payment shall be made for each session of standby duty. A weekday session covers the period between closure of an office one day and its opening the following day. A session at weekends and on bank or public holidays is 12 hours. Rosters shall be drawn up so that the requirement to undertake standby duty is shared fairly.
>
> (a) Any employee who is required to be available for immediate call-out is on standby and is entitled to claim the standby allowance. By local agreement, this could include availability for contact by mobile telephone or pager.
>
> (b) The normal requirements of fitness for duty will apply to employees on standby.
>
> (c) An employee who is called out when on standby is entitled to the call-out payment as in paragraph 10 below.
>
> (d) Any standby duty requirement should be shared as equitably as possible between suitably skilled and available staff so that an unfair burden of such duties does not fall to some staff disproportionately. Good management practice calls for volunteers to be requested in the first instance.
>
> (e) Probation trusts should examine their requirements for standby duty in the light of previous practice and should review them from time to time.
>
> (f) Probation trusts should ensure that procedures relating to the allocation and operation of standby duties are clear and properly understood by staff. Ad hoc and informal standby arrangements which have been in operation in the past should be reviewed and replaced by formal arrangements in accordance with the national agreement. Trusts are reminded that employees who are not on standby duty cannot be required to respond to a call-out request.
>
> 9. The requirements to undertake standby duty may vary significantly depending on the nature and area of work and the length of standby duty may need to be determined locally within the limits set out in the agreement. In drawing up suitable rosters for standby duty it should be noted that each recognised session of standby duties attracts the full

payment. The agreement does not provide for pro-rata payments to be made according to the length of standby duty. However, two employees would be permitted to share the same recognised session of standby duty where the employees concerned undertake such duties as part of a formal job share arrangement.

Call out

10. Employees who are called into work (or required to work but where the responsibility can be discharged without the employee having to leave home) during a period of on-call will receive payment for the period they are required to attend (or work) in accordance with the appropriate pay arrangements. Alternatively, employees may choose to take time off in lieu at plain time.

11. An employee who is not on standby duty cannot be required to respond to a call-out request. Where the employee does respond to such a request, a payment equivalent to time and a third shall be made, accept on weekdays between midnight and 6am, at weekends and bank holidays when payment shall be made equivalent to time and a half. Call-out duty undertaken on a bank holiday will also attract equivalent time off with pay.

12. Call-out hours taken as time off in lieu will be at plain time. Working time for the period of a call- out shall be the time between leaving and returning home. Travelling expenses shall also be payable…

Individual Exemptions

17. In exceptional circumstances, individual employees in particular domestic or other circumstances may, by agreement, be exempted from the unsocial hours, stand-by or call-out working requirements

18. In determining when unsocial hours working is to be required, management should have regard to the personal circumstances and commitments of employees when considering individual exemptions. Such consideration might include the following examples (which are not exhaustive):

- Sole responsibility for the care of children
- Requirements of access arrangements for children
- Responsibility for the care of aged or infirm persons
- Obligations arising from religious or cultural convictions."

6.7 Local agreement in place for the London region was that managers on standby could be expected to attend the AP within 1 hour of receiving the initial call i.e. needed to be within one hour's travelling distance of any AP they were covering. Having himself moved outside London, the claimant was only able to cover the North and East London APs and his travelling time from home to his main Seafield Lodge base was 50 minutes.

6.8 When on call, the claimant was the Tier 1 Manager first point of contact ("TM1") from 17.00 (or 17.30pm if he was at work until then) until 09.00 the

following morning on Monday to Friday, and for the whole of the two days at the weekend and until 09.00 Monday morning. The Tier 2 manager ("TM2") he would contact, for instance for final authority on recalls, would be a Head of Service or HoPP, such as Ms Orlebar.

6.9 Despite the reference to being required to perform standby duty at home (at 6.6, paragraph 8 above) the claimant was not expected to remain at home throughout the time he was on standby. However, he needed to be available to take and deal with telephone calls from staff at the APs, which may involve making further telephone calls or dealing with email correspondence and even, in rare instances, returning to the AP to deal with issues. This obviously meant being somewhere with good mobile phone coverage. Since the fitness for duty requirements applied, he could not drink alcohol and, in any event, might need to drive to an AP.

6.10 He had to deal with calls confidentially and to have access to the respondent's OASYS offender risk assessment system and to the NDelius day-to-day case management records of the resident which may need to be updated. Whilst not a specific requirement off the respondent to have his laptop with him at all times when on standby, this effectively meant he needed to be near his laptop and where there was good internet reception since he could not access these databases by mobile phone.

6.11 About once every nine weeks he would also be on standby duty to take telephone calls from outside agencies such as the police making contact with the Probation Service out of hours on matters ordinarily dealt with by the NPS All London Duty Managers.

6.12 In addition to the NNC National Agreement, there was an Out of Hours Protocol for the London NPS Division (April 2019)(352-357) which stated:

> "The NPS is required to provide an "out of hours" duty service to deal with offender recalls and other unspecified situations that may arise outside of normal office operating hours. The details and expectations relating to this provision are detailed below.
>
> Those undertaking these duties are expected to be available and contactable throughout their duty and remain fit to discharge their duties.
>
> The out of hours duty periods are:
>
> 17.00 to 9.00 Monday to Thursday
>
> 17.00 Friday to 9.00 the following Monday
>
> 9.00 to 9.00 on bank holidays and/or other mandatory dates on which offices may be closed…

Part One dealt with arrangements for T1Ms and T2Ms:

> "These arrangements are designed to provide 24-hour emergency contact for probation staff and other agencies in the …Division…
>
> 7. The T1M and T2M must be available on their designated contact number and be in a position to respond to all calls during the period of duty…"

Within Part Two - Approved Premises/Other Staff, the Protocol sets out:

> "4. The T1M is available for telephone advice and to instruct staff how to deal with situations that arise. Duty staff should not expect to T1M to attend the AP except:
>
> - In an emergency
> - To take charge of a serious incident"
>
> 5. On occasion, the T1M may not be able to answer the phone immediately, in such circumstances the caller should leave a message and ring again within 15 minutes if there is no response. Normally, stash should use the designated mobile phone number to contact the T1M. If there is no reply on the mobile phone, staff should use the T1M's alternative number(s) where available. If having exhausted all the options the staff are unable to contact the T1 then they should contact the T2M.
>
> 6. All NPS employed AP staff must ensure they are able to log into and navigate OASys and NDelius systems. They must also maintain local accessible records for every resident, containing sufficient, accurate and up to date information to inform recall decisions. This will mitigate any issues should the IT systems not be available."

6.13 In London the rota was covered by 9 APMs and 4 APAMs, with 13 on the rota covering 4 weeks, and 16 sessions to be filled. There were thus 3 spare sessions. Whereas Ms Orlebar contended that managers could choose to cover those shifts, the claimant felt it was more of an obligation to volunteer to do so not least when he was responsible for organising the rota for his cluster of 3 APs.

6.14 The claimant, who was very conscientious, found being on standby greatly restricted his time away from the AP and his normal family life. He did not go swimming, could not travel for long journeys on the underground (beyond 15 minutes), or spend time in areas with no or poor mobile reception or internet coverage or play team sports such as football; his opportunities for day trips with the family, weekends away, visits to the theatre, cinema and restaurants were all greatly restricted. He tended not to take his children out alone without his partner. When on standby, he would stay downstairs at home longer until at least 00.00 (midnight) so as not to disturb his family asleep upstairs or would sleep in another bedroom. He felt he never truly relaxed and rested properly when he was on standby duty.

6.15 Eventually, with symptoms of insomnia and anxiety the claimant went off sick in early 2019. He was signed off sick from 5 March 2019 with work related stress, described by his GP as "burnout". An Occupational Health report following an appointment on 13 May 2019 showed that he had a psychological vulnerability due to severe anxiety and depression which was a barrier to him returning to work in any capacity at that time (447).

6.16 On 17 September 2019 a formal stress risk assessment was carried out by Mary Pilgrim (then the HoPP) and Ian Lander (HR Business Partner Health and Safety and Fire) in September 2019 which was completed in December 2019 after the claimant's return to work following special and annual leave (432-444).

6.17 On 4 November 2019 the claimant started a phased return to work, beginning with a non-operational role before resuming his APAM role and then, from 10 February 2020, his standby duties as well. Soon after, under Diane Orlebar, the new HoPP, he took over the drawing up of the standby rota for his cluster of 3 APs as well.

6.18 On 13 March 2020, a further Occupational Health assessment was undertaken by telephone, which reported:

> "…so far he has been coping with the phased return to work plan and feels generally able to return to his normal duties…
> Based on the above I consider Mr Wisdom fit to undertake his normal duties. If however he was required to cover various other duties in addition to his normal contractual duties, it can be expected that his health would deteriorate again. I therefore recommend that he is only required to undertake the duties of his own role. Furthermore I recommend that when undertaking night work he has sufficient breaks before and after such work in line with working time directive (445-446).

6.19 Following this there was a formal Attendance Review Meeting with the claimant by telephone on 23 March 2020 with Mary Pilgrim, outgoing HoPP for London and Human Resources representatives (449-454) and Ms Pilgrim wrote in her outcome letter on 26 March 2020:

> "Regarding out of hours or "standby" work, we discussed that you believe this work counts as an official "working day" and that there should be an 11-hour break after finishing standby before returning to work. Whilst you understood that "standby" work is not deemed to be an official working day or pattern, you stated that you had not seen it confirmed in writing that this was the case and that you sought clarity on this before committing long term to "standby" work.
>
> An action was set for …HR Casework Advisor, to escalate the issue through his line manager as well as discuss with the HRBP for our department to gain written clarity on this issue either way. This will be communicated to you separately. It was however noted that this issue is also being looked at nationally.
>
> We discussed that, going forward I am happy for you to take a long break as you see fit after completing "standby" work as set out in the working time directive or to take TOIL and that there would be need to be ongoing communication between you and your new line manager Diane Orlebar Interim Head of Service, to ensure that you take appropriate rest during following standby duties. You confirmed that you are happy to undertake standby duties and for it to be reviewed at the three month stage via formal supervision. This would then allow for consideration to be given to any issues that arise or impact on your health to be discussed" (455-456).

6.20 The need for the T1M manager to attend the AP was very rare; almost all calls were dealt with by phone. However, the possibility meant that the claimant's potential travelling distance away from his home, for instance taking the family on excursions, was very limited in view of his ordinary travel time to the AP.

6.21 Outside times affected by the Covid-19 pandemic, there could be as many as 5-10 calls per day depending on the day of the week or weekend. Dealing with a call might last anything from 5-10 minutes to 1-1½ hours and even, such as in the case of a recall to prison, as long as 2-3 or even 4 hours. When a resident had failed to return in accordance with curfew and was past the 15-minute grace period, the standby manager would be sent the documentation to review and then go into the NDelius and possibly OASyS systems. Roughly 50% of calls could be dealt with within a ½ hour, another 30% within 1-1½ hours and the remainder (i.e. recalls) lasting 2-3 hours or more.

6.22 Longer engagement involving consideration of recall was more common later in the week, from Wednesday onwards. There would normally be a few recalls every week in ordinary non-Covid times. This major input involved the TM1 making a recommendation to recall a resident to the TM2 and seeking their authority to arrange to do this. It often involved a first call after 23.00 once the resident had not complied with the late curfew (after a 15-minute grace period), with documentation to review and the manager going into the NDelius and possibly OASyS systems and briefing the T2M such that the T1M would be likely only to get to bed after 02.00 or 03.00 if the case went as far as recall, after liaison with the Public Protection Casework Section Officer over the issue of the warrant and updating the NDelius records.

6.23 Earlier curfew times than 23.00 set for residents, such as 19.00, 20.00 and 21.00, had also become more common. The breach of curfew reporting to the standby T1M manager could thus start earlier in the day with the process of trying to track the resident and any decision to recall them likewise being made and recorded earlier.

6.24 The claimant generally felt unable to take time off in lieu following his standby duties since he considered there was no cover available. There was no regular system for facilitating T1M managers such as him to take specific rest breaks during standby or for compensatory rest after working standby. However, subject to approval from their own senior manager, a standby manager would have some flexibility in arranging their working times such as putting back the Monday start time after a weekend on standby.

6.25 When receiving and dealing with a call on standby, the claimant was treated as being on working time and would be able to claim payment (in addition to the regular standby allowance) and did so, although sometimes at times when the call from the AP was very quickly resolved by him, he did not bother to claim payment.

6.26 Other T1Ms, such as Ms Orlebar when she had acted previously as a T1M manager on standby, did not feel as restricted in their private lives as the claimant. For instance, Ms Orlebar would readily leave home and meet others, would even attend the theatre (booking seats at the end of a row, so she could exit without disturbing others, if called).

6.27 The period relied upon by the claimant in the further particulars was 18 June to 17 September 2020**,** within overall Covid-19 restrictions at a time the first national lockdown restrictions were being loosened in London. The claimant was on the standby rota in the period 18 June to 17 September 2020 from 17.00 on 22 June to 09.00 on 29 June 2020; from 17.00 on 13 July to 09.00 on 20 July

2020; from 17.00 on 27 July to 09.00 on 3 August 2020; from 17.00 on 17 August to 09.00 on 24 August 2020 and from 17.00 on 14 September to 09.00 on 21 September 2020.

6.28 In June to September 2020, whilst not in formal lockdown, there was still less movement in and out of the APs by residents and thus less opportunity for them to be in breach of curfew conditions resulting in fewer calls to the standby manager than in ordinary non-Covid times. The number of APs housing residents had also been reduced during the pandemic. The claimant described this 3-month period as "…the most unusual of times for all of us on call. Residents were staying in and staying safe which created less work for us". Indeed, on the evidence during this period; there were no calls at all to the claimant when he was on standby which led to him claiming and being paid for dealing with work and no calls leading to him attending an AP within an hour. He received only the standby allowance during that period.

6.29 For the period 27 July to 3 August 2020**,** when he was back-up standby manager under the EDM procedures, he made no claim to payment for work on the basis of being called-out, whereas the principal standby manager he was covering was called on and did make claims.

6.30 Within the 3-month period, he was also on annual leave on 21 July, 24-28 August, 1-8 September 2020 and took off 5 August 2020 as time off in lieu.

6.31 That the 3-month period was not representative in terms of matters dealt with generally whilst on standby by the claimant (even in Covid-pandemic times) is demonstrated by contrasting it with the week from 12-18 October 2020, when he spent almost 18 hours dealing with matters on call on 4 different days (300-301) or from 13-19 November 2020 when he spent about 9 hours on five separate days (334).

6.32 From April 2019 to August 2020, the claimant was involved in a collective dispute between the Unison and NAPO trade unions and the respondent, which was not resolved and following that an unsuccessful Early Reconciliation process through ACAS up to October 2020. He commenced these proceedings on 19 November 2020.

6.33 On 21 May 2021, six months after the claimant commenced these proceedings, the Ministry of Justice produced its document: "Recommendations for the future design of the NPS out of hours rota" following its "Review of the out of hours rota policy and practice for the RPD, ACO and SPO rota, with particular attention to the support required by, and provided to Approved Premises" (469-474). The report noted inconsistencies and variations across the country:

> "The ratio of on call managers to APs varied across the country; ranging from 2 in some regions to 7…
>
> There is significant risk of staff being overstretched; for example. HOPPs have reported instances where a single on call manager has had to manage a death in one EPI whilst simultaneously dealing with several recalls." (470).

Various recommendations about operational procedures, principles and pay for the future were made in the report. However, Ms Orlebear did not accept that there was a significant risk of staff being overstretched in the London region in May 2021.

7. The parties' submissions

7.1 In broad terms the parties agreed on the legal approach. They relied in particular upon the European law jurisprudence, with the respondent citing SIMAP v Conselleria de Sanidad y Consumo de la Generalidad Valenciana [2000] IRLR 845, Landeshaupstadt Kiel v Jaeger [2003] IRLR 804, Villes de Nivelles v Matzak [2018] IRLR 457 and DJ v Radiotelevijia Slovenia [2021] IRLR 479 and the Northern Ireland Court of Appeal authority of Blakley [2009] NICA 62 and the claimant likewise citing Jaeger, Matzak, DJ and also RJ v Stadt Offenbach an Main Case [2021] C-580/19 as well as the Administrative Court judgment in R (Fire Brigades Union) v South Yorkshire Fire & Rescue Authority [2018] IRLR 717 and the EAT judgment in Truslove v Scottish Ambulance Services [2014] ICR 1232.

7.2 The respondent contended that SIMAP clearly distinguished between doctors on call who did not need to be present at the medical centre and those who did; Jaeger restated the principles. A worker could still be on rest periods when there were fewer restraints than having to be present at the workplace. In Matzak, whilst the employee in theory did not have to be in the location they needed to attend within 8 minutes and it was therefore impossible for them to choose where to stay during the standby period; this short time was as good as telling them they needed to remain on the premises. The respondent acknowledged that Blakley in the NICA, like the post-Brexit CJEU judgments in DJ and RJ was relevant but not binding. However, these two later judgments did not move matters on significantly from Matzak where the test was already whether there was an objective and very significant restriction upon the employee's freedom of movement, see DJ paragraph 36 and RJ paragraph 37. Did the restrictions mean the claimant was carrying out activities or duties throughout when on standby? There is a qualitative difference in the claimant's situation from someone required to be physically present, in terms of restrictions on doing anything with their family or outside of work; being outside of work does not need to be the same as absolutely free during that time. Intrinsically, whilst on standby you need to be contactable but did the restrictions act in practice as different from sitting at the premises waiting to be called in? At paragraph 20-21 of his witness statement the claimant points to what are normal restrictions of having to be able to answer the phone. He clearly could not be on annual leave at the same time as on standby; the requirement not to drink is no different from from a doctor required to be contactable since some roles are incompatible with drinking alcohol. The claimant had to be able to answer the phone within 15 minutes; if he did so, that was accepted as working time but the work was then done remotely with some of it being delegated to staff at the AP. The employee could use the time as he pleased subject to dealing with calls and getting to the premises on the rare occasions he needed to; he could still enjoy family life, have social life with friends and engage in activities which were not work. The claimant's evidence at paragraphs 25 to 26 showed how he subjectively chose to address the duties, but he was not effectively tethered to the workplace and not in the same position of those at the workplace or close by unable to do anything different from their normal work during the slack moments.

7.3 The claimant stressed the purpose of the Working Time Directive and Regulations to protect the health and safety of workers. There was a real danger to people if they did not get proper rest and were caused fatigue and stress. There is a strict dichotomy in regulation 2 between work and being on a rest period; the worker cannot be both at rest and at work. Looking at SIMAP, the key question is whether the constraints upon the worker were such as to place them on working time as opposed to rest time. Whilst the respondent says if you are on call you are only paid if we contact you, that is not what the authorities after SIMAP say. The Tribunal must look at the level of constraint to decide whether standby time falls one side or the other. The claimant relied upon Truslove identifying in particular the nature of the control which the employer has over the employee. Langstaff J. at paragraph 30 spoke of relief from employment, free choice and the worker being "shackled to a particular location and required to provide an immediate response". The claimant was shackled here and it fell on the side of work, not rest. Likewise in Matzak paragraph 63 to 64 where the 8-minute requirement to attend meant the worker was shackled; very different from a worker who was just at the employer's disposal in as much as it must be possible to contact him. The more recent CJEU cases DJ and RJ both said determination was a matter for the national courts. In DJ the worker was obliged to stay in the vicinity of his place of work and be available within an hour but the location of the workplace made him incapable of managing his own time viewed; objectively those very significant constraints made it work. In RJ the individual firefighter undertook his standby time at home but needed to be at work in his vehicle and uniform within 20 minutes of the call. The cases gave guidance how a Tribunal should consider whether there were objective and major constraints on the worker: what was the worker's ability to freely manage their own time; was the employee regularly required to undertake a lot of work at different times of night; a number of very short but still numerous contacts might also be work; a call for 5 minutes each hour would suggest the whole period might be more appropriately considered as work not rest; what is the time limit for reaction by the worker? Did the constraints cross the line making all standby time working time, were they objective and very significant so as to make it work? There were two major constraints: firstly,having to be available to answer a call within 15 minutes and deal with matters confidentially with access to systems not available by phone. The combined effect of these was not attending pubs or playing sport or enjoying time with family; it was farcical to suggest he could deal with confidential information outside a restaurant or pub. Secondly, the requirement to return to his place of work within an hour if necessary; had this been the only restriction it would not make all standby time work but with the other restraints it had a significant effect on his ability to enjoy time with his family even if not called in often. The amount and frequency of calls is relevant. In any one week of standby duties, the claimant regularly deals with recall duties lasting 2-3 hours, calls up to ½ hour and short calls from 5 minutes to an hour. Standby duties are not only for cases of emergency but involves regular contact throughout, requiring availability to be contacted late into the night; in reality it was working time.

8. The Law

8.1 The Working Time Regulations 1998 which implemented to EC Working Time Directive into UK law include in the Interpretation provisions at Regulation 2:

"(1) In these Regulations—

..."rest period", in relation to a worker, means a period which is not working time, other than a rest break or leave to which the worker is entitled under these Regulations; ...

"working time", in relation to a worker, means—

(a)any period during which he is working, at his employer's disposal and carrying out his activity or duties,

(b)any period during which he is receiving relevant training, and

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

and "work" shall be construed accordingly…"

8.2 Regulation 10 deals with daily rest:

"(1) A worker is entitled to a rest period of not less than eleven consecutive hours in each 24-hour period during which he works for his employer…"

8.3 Regulation 21 provides some special case exceptions disapplying regulation 10(1) and regulation 24 in turn makes provision for compensatory rest when 10(1) has been disapplied.

8.4 Regulation 30 provides for claims to be brought to the Employment Tribunal alleging breaches of the Regulations:

"(1) A worker may present a complaint to an employment tribunal that his employer—

(a)has refused to permit him to exercise any right he has under—

(i)regulation 10(1) ...

(2) ...an employment tribunal shall not consider a complaint under this regulation unless it is presented—

(a)before the end of the period of three months ... beginning with the date on which it is alleged that the exercise of the right should have been permitted (or in the case of a rest period or leave extending over more than one day, the date on which it should have been permitted to begin) or, as the case may be, the payment should have been made;

(b)within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three ...months."

Regulation 30B provides for extension of time limits to facilitate conciliation before institutional proceedings (known as Early Conciliation).

8.5 As to the interpretation of retained EU law, section 6 of the European Union (Withdrawal) Act 2018 sets out:

"(1) A court or tribunal—

(a)is not bound by any principles laid down, or any decisions made, on or after completion day by the European Court... and

(2) Subject to this and subsections (3) to (6), a court or tribunal may have regard to anything done on or after completion day by the European Court, another EU entity or the EU so far as it is relevant to any matter before the court or tribunal...".

The Implementation Period completion day was 30 December 2020.

8.6 Rather than citing extensively from the CJEU and domestic case law, it is appropriate to seek the key principles or propositions which can be found in the authorities. In Truslove, Langstaff J. described the authorities as proving the exegesis of the Working Time Directive and there has been further development of the law since 2013, including the post-Brexit CJEU decisions in DJ and RJ. The early authorities centred upon doctors on call at or close to their medical centres whereas more recent authorities have concerned fire fighters, ambulance, care and other workers generally on call or standby to return urgently to their base of work or attend an emergency situation. As ever, the precise factual context of those authorities is not the point of relying upon them.

8.7 Thus, the purpose of the Directive is to lay down minimum requirements intended to improve the living and working conditions of workers and to guarantee better protection of their safety and health by ensuring that they are entitled to minimum rest periods, particularly daily and weekly, and adequate breaks and by putting a ceiling on the length of the working week. The Directive was then put into force in the UK in the Working Time Regulations.

8.8 The Tribunal, as the domestic court dealing with claims under the Regulations following the Directive, should apply a purposive construction in dealing with disputed cases within the factual context and the objective of improvement of workers' safety, hygiene and health at work should not be subordinated to purely economic considerations.

8.9 Rest and rest periods are not specifically defined but working time cannot also be a rest period and vice versa.

8.10 A worker required by the employer to be available at a place determined by the employer cannot be regarded as being at rest during the periods of on call duty when not actually carrying out any work activity. Only the time actually providing services constitutes working time. Where workers are on call but not at a place determined by the employer, even if they are at the disposal of their employer in that it must be possible to contact them, they may manage their time with fewer constraints and pursue their own interests.

8.11 However, in order to be able to rest effectively and for a period to constitute a rest period as opposed to working time, workers must be able to remove themselves from their working environment to pursue their own interests freely and without interruption in order to neutralise the effects of work on their safety or health and both recover from any fatigue engendered by his work and prevent the build-up of fatigue in the first place (Jaeger, para. 95). The mere fact that no services are being supplied does not make it a rest period

8.12 Therefore, when the worker has the opportunity to leave the main workplace, the Tribunal needs to guage their ability freely to manage their time when their services are not required? Even if the location at which the worker is to stay is not specifically defined, the effect of the constraints or requirements

placed upon them may be such that when viewed objectively the worker cannot call the time their own and has no real flexibility of movement. Do the obligations and geographical and temporal restraints significantly and objectively limit the worker's opportunities to pursue their social and personal interests?

8.13 A useful shorthand test applied by Langstaff J. in Truslove was "is the time the worker's own when on standby?". This needs to be determined by objective characteristics, not just the subjective approach taken by the workers themselves.

8.14 The Guidance in DJ and RJ is relevant and of assistance. Therefore the average frequency of the actual services normally carried out by the worker during each period of standby time (which are already counted as working time) should be taken into account. On average, if the worker is called upon to act on numerous occasions during a period of standby time the worker has less scope to manage their time freely during the periods of inactivity given that they are frequently interrupted. This is all the more so where the activity required of the worker during standby time is not of negligible duration.

9. Conclusions

9.1 As set out above, I did find the latest CJEU judgments in DJ and RJ relevant and of assistance, akin to being persuasive authorities. I took into account the average frequency of the actual services normally provided by the claimant; thus, the more frequently he was called upon to provide services during the periods of standby time especially for services of longer duration, the more likely the whole period would constitute working time and repeated frequent calls even of very short duration needing to be dealt with could produce the same outcome.

9.2 I acknowledge a clear distinction between a worker working or being at rest, since it cannot be both. However, I consider the very nature of standby and on call working is that that there might be periods which are legitimately rest periods adjacent to working time if the worker is called (and thus begins what is agreed to be working time during a standby session) within a particular session. The concept of standby duties does necessarily involve some limitation upon the worker's freedom of action.

9.3 Although the National Agreement described standby as being "standby duty at home to deal with emergencies which may arise", it was common ground between the parties that the worker did not need to remain at home throughout the period from 17.00 and 9.00 the next day (save clearly when travelling from and to work) or over the entirety of the weekend waiting in, just in case there was a call from an AP. The claimant himself spoke of things like attending the theatre or the cinema or going to restaurants being difficult, even with his mobile on silent as he could be forced to disturb others to leave to take a call somewhere private; he said that swimming and playing team sports were understandably impossible whereas day trips with the family and weekends away were restricted. I fully accept that much more of the childcare burden fell on the claimant's partner when he was on standby and that they used to take their children out together, rather than him doing so alone.

9.4 I need to determine to what extent was the claimant's time his own? Alongside this, were the restraints he felt were imposed upon him subjective or objective, since there is a distinction between what was employer-imposed and what was much more individually self-imposed. During this period, the claimant was at home, with or in proximity to his family. However, he was able to go out from home, albeit when with his family he would be accompanied by his partner rather than alone with his children. This feels very different from someone required on standby to be at the place of work or very close by in order to attend very quickly back at their base of work. Therefore it is important to consider the extent of him being called to provide services during the standby sessions. Whilst I accept that the period of three months selected by the claimant may not be representative of his ordinary standby duties at times not affected by the pandemic, the remedies under the 1998 Regulations are specific to breaches within the Tribunal's jurisdiction under the statutory framework of Regulation 30 including the time limits set out. I must consider the claim in accordance with the claimant's case as amplified in his Further Particulars that he was working as working time and thus denied rest periods throughout the whole of his standby duties from 18 June to 17 September 2020. Ultimately the claimant failed to prove as a matter of fact that he received and dealt with any telephone calls from an AP or gave any actual guidance to NPS employees or outside contacts whilst he was on standby duty in the period 18 June to 17 September 2020 cited by him.

9.5 In ordinary non-Covid pandemic times, it appears the claimant's engagement with work through answering and dealing with calls whilst on standby duties is very significant. However, this was simply not so in the 3-month period in question. In reality, during this exceptional period the claimant was little more than contactable by the AP when he was not actually at work at his workplace. In this 3-month period, the claimant was either never called to deal with issues whilst on standby or at least never made a claim to be paid for the working time he spent while dealing with a call. The claimant had only resumed standby duties in February 2020, some 6 weeks before the national lockdown with its dramatic impact, and the period cited was another exceptionally quiet period when the work at APs and the situation of those resident at them was still markedly impacted by the pandemic even after the heaviest personal restrictions under the national lockdown were eased. For this 3-month period, I am unable to find that the normal standby duties he carried out were those recorded at paragraph 6.21 above.

9.6 No doubt during this period the claimant subjectively continued to act very conscientiously, expecting that a call may come in which he needed to deal with; objectively, however, the geographical and temporal restraints did not significantly limit his opportunities to pursue his social and personal interests in this period when he has not established that he needed to deal with any calls whilst on standby. Therefore following the line of authorities in respect of the Working Time Directive and Regulations, and having regard to the additional recent guidance in DJ and RJ, I am unable to conclude that the whole of the standby time was working time and that the claimant was thereby denied the health and safety benefit of 11-hour rest breaks. Putting it differently, in respect of this 3-month period, the claimant has not proved he was so subject to the control

of his employer that he was effectively tethered or shackled by the employer in a way which made the whole of his standby time working time. In these circumstances, the claimant has not established the alleged breaches of Regulation 10(1) of the Working Time Regulations 1998 by the respondent and his claim is dismissed.

9.7 My decision might well have been very different had I been considering a period of time within the jurisdiction of the Tribunal other than this 3-month period and in particular a period when the impact on everyday life including normal arrangements at the APs as a result of the Covid-19 pandemic was far less. Had I found the claimant was invariably or even regularly telephoned at least once during the evening whilst on standby by AP staff and that on some or several nights each week, particularly later in the week, there were regular late evening calls requiring consideration of and often recommendations for recall to custody, with the consequent administration arrangements with the Public Protection Casework Section Officer and NDelius paperwork entailed, my conclusion about being shackled or tethered to the work is likely to have been different. Although the claimant was cross-examined about his subjective approach to standby work, his evidence of extensive and regular engagement with calls from the AP often resulting in the intensive work of a recall was both unchallenged and indeed substantially corroborated by Ms Orlebar and went well beyond his personal approach to carrying out standby duties; viewed objectively the level of engagement with work when on standby duties in normal times outside the Covid-19 pandemic was onerous and significant. When considering matters relating to the health and safety of workers, in particular whether they enjoy meaningful rest away from the stresses and strains of employment whilst not at their workplace yet subject to standby arrangements, as I have explained above, I consider the frequency both in terms of regularity and likely length of engagement of calls and need to deal actively with work matters is an important element in the determination of what is working time.

Employment Judge Parkin

Date: 6 April 2022