



EMPLOYMENT TRIBUNALS

Claimants: Mr K Thomas and others (see schedule)

Respondent: The Chief Constable of Humberside

Heard by Remote Video Link - CVP **On:** 15 January 2024

Before: Employment Judge D N Jones

REPRESENTATION:

Claimants: Ms C Ibbotson, counsel

Respondent: Ms K Loraine, counsel

JUDGMENT

1. The claims in respect of national minimum wage are dismissed upon withdrawal.
2. The claims of the seventh and tenth claimants are dismissed upon withdrawal.
3. The periods of standby duty, that is the whole of the periods when the claimants were on call, were working time within the meaning of Regulation 2(1) of the Working Time Regulations 1998.

REASONS

Introduction and issue

1. These are claims for refusals to permit the exercise of a right to daily rest breaks contrary to regulations 10 and 30 of the Working Time Regulations 1998 (WTR) and unauthorised deductions from wages in respect of time spent on call.
2. There were also claims in respect of a failure to pay the national minimum wage but these have been withdrawn. It is not clear the extent to which the unauthorised deduction from wages claims survive the withdrawal of that claim, but that is not a matter which concerns the preliminary issue to be determined at this hearing.

3. That was identified on 6 October 2023 at a preliminary hearing. It was, “*when the claimants were on a period of being “on call”, does the whole of the time on call amount to working time, or does the period of time when the claimants were on call and tasked with work amount to working time?*”.

4. Another preliminary issue was identified in respect of time limits with respect to the claims of the seventh and tenth claimant, but these claims have been withdrawn.

The Evidence

5. One of the claimants, Ms Joanne Noble, gave evidence. The Tribunal had witness statements of six other claimants, Katrina Lancaster, Kieron Thomas, Louise Wilkinson, Lucy Bragg, Samantha Flood and Struan Martin. The respondent called Mr Philip Ward, formerly Detective Chief Superintendent of the Humberside Police Force. He had second line manager responsibility for the claimants or those who worked in that capacity as Detective Superintendent Force Authorising Officer between May 2014 November 2016 and April 2019 to the summer of 2020 and had responsibility from 2020 until August 2023 for that Department in his role as Head of Crime.

6. The parties submitted a bundle of documents running to 345 pages.

Background

7. The claimants are employed as Covert Authorities Bureau Staff (Specialist Commander) in the Humberside Forces Covert Authorities Bureau (CAB). The role has two functions: communications and covert. Communications involve advising on and processing applications for data from telecommunications, social media and the web marketplace. Covert concerns request for surveillance authorities. The work is governed by the Investigatory Powers Act 2016 and the Home Office’s Communications Data Code of Practice (the Code of Practice).

8. This case concerns the communications aspect of the role. The claimants worked as the Single Points of Contact (SPoC) to assess the appropriateness of a request from a police officer for data of the above type and obtaining authority from a senior officer to acquire the data. If authority for obtaining the data is granted the SPoC liaises with the relevant telecommunications operators to obtain the information. The role is defined in the Code of Practice:

4.4 The SPoC is an individual trained to facilitate the lawful acquisition of communications data and effective co-operation between a public authority, the Office for Communications Data Authorisations (‘OCDA’) (where relevant) and telecommunications operators and postal operators.

4.5 Public authorities are expected to provide SPoC coverage for all communications data acquisitions that they reasonably expect to make. Police forces, for example, would expect to deal with threat to life situations at any time and should ensure that a SPoC is always available in such circumstances.

4.6 The SPoC promotes efficiency and good practice in ensuring only practical and lawful applications for communications data are made.

9. There are three categories of requests:

Grade 1 - an immediate threat to life:

Grade 2 - Exceptionally urgent requirement for the prevention or detection of serious crime, a credible and immediate threat to national security; or a serious concern for the welfare of a vulnerable person where urgent provision of the communications data will have an immediate and positive impact on the investigation or operation; and

Grade 3 - matters that are not urgent but, where appropriate, will include specific or time-critical issues such as bail dates; court dates; where persons are in custody; or where there is a specific line of investigation into a serious crime and early disclosure by the telecommunications operator or postal operator will directly assist in the prevention or detection of that crime.

10. Because police authorities must address threat to life situations at any time, under paragraph 4.5 of the Code of Practice, the Force must ensure that there is always a SPoC available. Until September 2023 when the respondent reorganised that provision, the claimants were employed for core business hours from Monday to Friday 07.00 to 16:00 hours. Outside the core hours the claimants were retained on an on call basis on 12 hours shifts during the week or 24 hour shifts at weekends and bank holidays. Communications requests within Grade 3, described by Mr Ward as slow-time requests, were handled during core hours. Communication requests in grades 1 and 2 were handled at all times.

11. When working on call, or standby duty, the claimants were paid an on call allowance. At paragraph 13.2 of the Police Staff Council Handbook, the on call payment is for *“the requirement to be available to deal with work issues either away from or at the workplace and the completion of all necessary paperwork arising from the standby period and which is outside of an employee’s normal contracted working hours”*. When called out to work, the claimants were remunerated by hourly rates.

12. Between May 2021 and October 2021, CAB staff received an average of 2.25 calls when on standby duty, worked for an average 5.8 hours per shift, had a 50% chance of being called out when on standby duty and a 69% chance of receiving multiple call outs on the same shift. There was a rota for standby duty. Four officers shared a weekly rota. Per person that resulted in an average of 32 hours on standby and an additional 6.5 hours of work. An analysis of the dates material to these claims reveals that from November 2022 to March 2023 there were 193 shifts when the claimants were on call. They were called on 42% of those standby shifts. The average time working when called out was 2 hours and 51 minutes.

13. There was a dispute between the parties in respect of the status of the document called the Standby Agreement. The claimants state this formed part of

their contract and that they were made aware of it when they joined the Department. A copy was kept in the office. The respondent did not accept that this was a part of the terms and conditions of the claimants' employment. Mr Ward stated that he had never seen it until he prepared his witness statement for these proceedings. He stated that it appeared to be old and out of date. It referred to a pager system which has not been used for many years.

14. The document has an introductory statement which reads, "*This agreement, which forms part of your Contract of Employment, lays down the rules to be observed whilst engaged on standby duties. They are to be obeyed at all times and any failure to observe will be dealt with through the Disciplinary Procedure*". The final section includes a heading *Acceptance of Conditions* and a declaration that the employee has read and accepted the terms and understand they form part of the contract of employment. The document has not been signed by any of the claimants.

15. The middle section contains the conditions. They are:

1. *No alcohol to be consumed.*
2. *A vehicle is available (and serviceable) to respond to all callout situations.*
3. *Response to callout to be immediate with a personal log kept of type and time of callout and arrival at scene of incident/equipment collection.*
4. *Paperwork relating to the recording of standby and callout to be completed accurately.*
5. *Claims for periods of standby and callout to be made on the appropriate forms signed, certified and submitted to Finance Unit (Payment Services) after approval.*
6. *Staff not in possession of a 'pager' system or mobile phone to remain at home.*
7. *Staff in possession of a 'pager' system or mobile phone to remain at home unless there is a need to leave. When this occurs the appropriate Command Centre must be informed of the following:-*
 - *when, where and on what number contact can be made*
 - *expected return; and*
 - *the need to be contacted by pager/mobile phone in the meantime.*
8. *Remain within the confines of the Humberside Police Force area when not at home (but in possession of pager or *mobile phone).*
** Any mobile phone or pager must be serviceable and switched on to allow for communication.*

16. Discussions between the trade union, Unison, and the respondent about on call time and changing the shift pattern to 24/7, which ultimately took place in September 2023, commenced in 2022. According to the claim form a grievance was submitted on the 8 March 2022, but that was not contained in the bundle, nor addressed in the witness statements. The communications demonstrated disagreement about how on call time was to be categorised and remunerated.

17. On 24 November 2022 Unison wrote to the claimants and conveyed the opinion of the respondent that they were not expected to be sat at home all the time

whilst on call. There was no reason they could not go out shopping if they could be back at home within 30 minutes. The claimants did not believe that reflected their understanding of what their duties had been.

18. On 23 December 2022 ACC Marshall wrote to Ms Ratcliffe, regional organiser of Unison. He stated that there was no expectation that Staff remained at home during the on call periods and he provided a guidance document. He said the understanding was that they should remain contactable and be able to respond to grade 1 incidents as soon as was reasonable. He stated that could be achieved by the laptop provided from any location where there was privacy. He stated that, in relation to what is a reasonable response time, it may take time to make arrangements following a call and in the majority of cases a response within half an hour would be reasonable.

19. The written guidance which accompanied the email of 23 December 2022 stated, *“It is accepted that being on call does inhibit some activities that could be undertaken during a rest day or during a period not on call, and that as a consequence individuals may have to make decisions as to the activities they undertake or don’t undertake, or that some activities they choose to undertake may be disrupted as a consequence of being on call”*. *“There is an expectation that staff are available as soon as practicable to discharge their duties in the event of being called in respect to a crime in action or Article 2 case, where their expertise could assist in a resolution to the case. As soon as practicable does not mean immediately available, but as soon as practicable is defined as what would-be considered reasonable in the circumstances by a person with the same information and within the body of those conducting a similar role. It is not possible to provide a definitive time period as to what is practicable as this would depend on a number of outline facts all of which have numerous variables.”* It posed an example of whether a staff member might feel able to attend a restaurant and that they may have to factor in any discomfort felt in leaving their friends or family at short notice to work. A number of scenarios were given about attending a supermarket.

20. On 12 January 2023 Ms Ratcliffe replied. She stated that the guidance had never been seen previously and had not been agreed through collective bargaining. She wrote, *“In terms of the 30 minute grace period for staff to return home when on call; this needs to be cascaded across the force. One member of CAB staff was on call at home this week; they were asleep when called (having being called just after 6am) and the member of staff advised the Inspector that they would need 10-15 minutes to get their laptop logged in and the Inspector was not being happy about having to wait that long for the call back. This is without the need to advise the Inspector that there is a 30 minute grace period now in place. It is the applicants expectation that CAB staff are at their immediate disposal, given it is how the team have operated for such a long period of time. CAB staff should not be made to feel uncomfortable and staff need the reassurance that the force will be cascading that there is this grace period now in place. Members would also like to see this agreement in writing from the Force”*.

The Law

21. Regulation 2 (1) of the Working Time Regulations 1998 provides:-

“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.

22. Working time is mutually exclusive to rest periods, which are defined in regulation 2(1) as a period which is not working time, other than rest breaks or leave to which the worker is entitled under the Regulations.

23. Standby work may or may not be categorised as working time, depending on the circumstances in which the worker’s physical presence at the workplace is required, see ***Sindicato de Médicos de Asistencia Pública (SIMAP) v Consellería de Sanidad and anor 2001 ICR 1116, ECJ*** and ***Truslove and anor v Scottish Ambulance Service 2014 ICR 1232, EAT***.

24. In ***DJ v Radiotelevizija Slovenija 2021 ICR 1109¹***, the CJEU held that where a worker on standby is required to be contactable and able to return the workplace within a given period, he or she will be working only if those constraints *objectively and very significantly* affect the worker’s ability to devote that time to his or her own interests. It contrasted the position of doctors who were required to be present at the health centre whilst on call to those who were allowed to be on standby away from site. The former group were engaged in working time whilst on call whilst the latter were not. A decisive factor is whether the worker is required to be present at a place determined by the employer and provide services to the employer immediately in times of need.

25. In the ***Truslove*** case (not cited by either party) the EAT in Scotland overturned a decision in which a tribunal had found that standby was not working time when ambulance paramedics provided cover for night calls and were required to stay within a 3-mile radius of the ambulance station with a mobilisation target of three minutes. Langstaff J said, at para 30, “*I accept the utility of the test posed by Mr Hay as to whether the time was one’s own. It was a test which, in his submissions, Mr Brown himself utilised. It is, like all such tests, to be viewed with care, because the statutory question is that posed by the regulation, and it cannot be answered simply by assuming that a test which is useful in some cases is the answer in all. None the less, what it indicates is that if, as it is, the provision as to rest breaks is a health and safety provision dealing with the work environment, then it must be remembered that work in employment is performed in a relationship characterised by control. Indeed without control, and its flip-side, subservience, there can be no employment. If a worker is obliged to be away from home, or even in some circumstances to remain at or within a very close distance from home, time is*”

¹ As this case postdates completion day, 31 December 2020, it is not binding in domestic law, but is an authority to which I may have regard in respect to the issue before the Tribunal, section 6(2) European Union (Withdrawal) Act 2018.

that much less his own. The time is all the more under the control of the employer. To that extent the worker has less relief from employment and those aspects of it which might be stressful, physically and perhaps more particularly mentally. The relaxation which is available in the company of family and friends (or at least may be) and the pursuit of personal hobbies and the like, all characterised by the exercise of free choice, free from the direction of the employer, is unavailable where an employee remains shackled by his employer to a particular location and is subject whilst there to providing an immediate response to his employer's bidding" [Emphasis in underlining added].

Analysis

26. The question of whether the Standby Agreement was part of the terms and conditions of the claimants' employment is a matter of contractual construction. The question is what the common intention of the parties was in respect of this document. The approach is explained by Lord Bingham in **Arvunescu v Quick Release (Automotive) Limited [2023] ICR 271**, "*In construing this provision, as any other contractual provision, the object of the court is to give effect to what the contracting parties intended. To ascertain the intention of the parties the court reads the terms of the contract as a whole, giving the words used their natural and ordinary meaning in the context of the agreement, the parties' relationship and all the relevant facts surrounding the transaction as far as known to the parties. To ascertain the parties' intention the court does not of course enquire into the parties' subjective states of mind but makes an objective judgment based on the materials already identified.*"

27. The written statement of employment particulars is contained in the bundle. The hours are 37 per week, Monday to Friday 0730 to 1800. It states that the employee may be required to work additional hours and may qualify for overtime payments. In respect of pay and allowances, the spinal points applicable are identified and there is a specific salary. There is no reference to on call work or payments.

28. This document is plainly not comprehensive. The role involved the staff of CAB providing the SPoC role out of hours and it is not disputed that formed part of the contract. It illustrates how one must look at all the circumstances in interpreting an employment contract.

29. The Standby Agreement could not be taken, word for word, as applicable to the requirements which the CAB staff undertook when on standby. For the reasons identified by Mr Ward, some were no longer relevant. The use of pagers had become obsolete before Mr Ward took over responsibility for the Department. The reference to accurate keeping of paperwork has been overtaken by the maintenance of electronic records. One member of staff lived outside the force area. Mr Ward considered the obligations individually in his statement and acknowledged that some were still applicable such as keeping accurate records and not drinking alcohol. I accept Mr Ward was not aware of it, but he did not personally negotiate terms and conditions of the claimants, nor issue them with their terms and conditions of employment and police policies.

30. On the one hand, the fact that the document was known to the claimants, was to be found in their workplace and expressly asserted its status as a contractual one militates in favour of it being construed as the claimants suggest. One would expect standards to be met whilst on standby duty to be recorded in written form rather than passed by word of mouth. This was the only such document in existence before the emails referred to above, in November and December 2022 and the short extract about pay in the Staff Handbook. On the other, the fact that none of the claimants had signed it, or been required to, and that it was a document which had been produced some time ago, weigh against its status as a contractual document.

31. I find the document did include contractual terms, but the parties would have recognised that some had changed with technological developments or adjustments to working practices. Interpreting it required consideration alongside the rest of the evidence about standby duty in more recent times and the expectations which both parties, considered objectively, would have understood.

32. A significant feature of the Standby Agreement was clause 2, a requirement for an immediate response. There is no differentiation there between the receipt of the call and commencing work in response to it. The claimants submit the Standby Agreement reflected that obligation correctly.

33. Ms Noble said when she received a call she would then log onto her laptop. She did not distinguish between the two when it came to how she should respond and how quickly. As to the suggestion that she might have up to half an hour to respond between first receiving the call and then starting work, she stated the respondent only suggested this after the claimants had threatened legal proceedings. They were never working in that expectation. The understanding was that there was an immediate threat to life, in grade 1, or an ongoing crime or a serious risk under, grade 2, which required immediate action on their part. She said any member of the public would expect only the most minor delay not half an hour, nothing more than a short walk from the end of the street. She said a colleague had been questioned at a coroner's court about how long it took to respond and that emphasised the pressure they felt about the urgency of their work. She compared it with a police officer who responded to a 999 call. The SPoC was a frontline member of staff. I found the evidence of Ms Noble to both convincing and logical. The example Ms Radcliffe had given in her email of 12 January 2023, of an inspector challenging the proposition of a CAB member of staff that he was entitled to take 10 to 15 minutes to log on after the call, was consistent with Ms Noble's understanding.

34. In respect of paragraphs 6 and 7 of the Standby Agreement and the requirement to stay at home, I found the evidence of the claimants reflected how this had evolved with common usage of mobile phones. Ms Noble stated that she regarded it necessary to be at home whilst on call, although she might go out as far as the local shop. She said that occasionally the respondent would require her to attend a briefing at the green room, requiring her to leave home. She said she would not be driving when she received a call, she would be at home.

35. Ms Noble acknowledged that there could be circumstances in which one could stay with a relative if circumstances permitted but she did not accept visiting a restaurant or café would be appropriate. Ms Lancaster had given an example of

taking her laptop to her parents' home one Christmas. Ms Noble stated that she would never go to the cinema or out to tea whilst on call. She planned children's birthday parties, weekends away and social activities around her on call duties. She could not partake in these whilst on call. She never attended family events because of the sensitive and confidential nature of the matters she would be dealing with. She could not take her daughter to swimming or dance lessons on evenings, committing herself to the on call work on the same evening as the lessons. Ms Noble was a credible witness and I accepted her testimony. Similar examples were given in statements of the other claimants.

36. I am satisfied there was a significant restriction imposed upon the claimants whilst they were on standby. The expectation was they would be at home or within a few minutes away. Staying with a relative would only be appropriate if the levels of trust were such that privacy and working conditions allowed.

37. I agree with the claimants that the suggestion that there was an allowance of up to 30 minutes between receiving the call and actioning the commencement of work must be seen in the context of a litigious dispute which loomed. I accept the evidence of the claimants that their understanding and that of their employers had always been that responding meant immediately or almost immediately. That is a matter of minutes in single not double figures.

38. The view of Mr Ward about the obligations of the CAB staff was not shared by the submission made in the detailed written business case of the Humberside Police for the CAB review of October 2022. In respect of on call duty it states, "*It is not a requirement for the individual to attend their place of work when called out but the expectation is that they will be able to take the call and begin work from home almost immediately, depending on the circumstances at the time, for instance, if the individual was asleep or travelling to or from work*". I find this accurately summarises the parties' expectations as to the requirement and the common intention of the parties contractually.

39. The very nature of the work, responding to grade 1 or grade 2 circumstances, carried an urgency which sits uncomfortably with a SPoC visiting a supermarket some way from home, the cinema or restaurant. In his evidence Mr Ward suggested that the worker could set up their laptop in a private motor car nearby, thus responding within a recently practicable time. That did not seem realistic or practical, given that the average period of work could be about three to six hours, taking the averages set out above and on occasion much longer. Those are long periods to work in a car or a quiet corner of a café on important activity. I consider the Guidance which ACC Maxwell issued was not reflective of the expectations of the parties to the contract up until that time and reflected a desire to find some interim solution pending the change 24/7 work.

40. Another relevant feature is the extent to which the claimants were, in fact, required to work whilst on standby. That affects the degree to which they could usefully engage in activities aside and apart from work. On average, the claimants were required to work almost 1 in 2 standby shifts and then for an average of approximately 3 to 6 hours. I have drawn on both periods of statistics which are likely

to give a more accurate reflection rather restricting my consideration to the duration of the complaints.

41. The type of work by its very nature was likely to create a level of alertness during the standby periods which inhibited the opportunity to switch off and relax or fully engage in other activities. This is described by the claimants in their witness statements; one claimant expressed this as being on permanent alert. A call could not be predicted and when it came it involved a threat to life under grade 1 or other serious and imminent concern within grade 2.

42. I recognise that some of these features apply to many types of on call activity and in many of those situations the standby duty would not be categorised as working time. It is the number and combination of them which objectively and very significantly affected the claimants ability to devote that time to their own interests; the requirement to respond both to the call and to commence work immediately; restricting the worker, to all intents and purposes, to their homes; the frequency and unpredictability of the need to respond, the difficulty switching off mentally; and the period the taken up in the response, limiting what can be done in the remainder of the available time.

43. Ms Loraine drew my attention to the fact that that the geographical restriction imposed by the employer by way of the need to remain at or very near its workplace was usually determinative of the working time question in the European cases, a feature she submitted was singularly absent in the present case. Whilst that will often be conclusive, it need not be so, for the reasons expressed by Langstaff J in the *Truslove* case cited above. There is a significant geographical restriction to the home albeit not to the employer's place of work and the combination of other features significantly degrades the use to which the available time can be put. It crosses the threshold drawn in the authorities into working time.

Conclusion

44. The standby duty was working time.

45. The parties shall provide proposed directions for the future management of the case within 7 days of the judgment being sent to the parties.

Employment Judge D N Jones

Date: 31 January 2024

RESERVED JUDGMENT AND REASONS SENT TO THE
PARTIES ON

FOR THE TRIBUNAL OFFICE

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