



Traffic Commissioners for Great Britain

Administrative Policy Guidance

AVOIDING EXCESSIVE HOURS OF WORK

This policy has no statutory basis and is issued with and is subject to the agreement of the Traffic Commissioner Board.

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Introduction

1. It is widely recognised that there is a need and desirability for judicial office-holders (in this case Traffic Commissioners) to be able to be alert and effective in their roles. It is undesirable for them to work excessive hours, particularly where they are responsible for regulating how operators and others comply with drivers' hours and working time legislation.
2. Some people mistakenly think that Traffic Commissioners' working hours are confined to tribunal hours, normally 10.00am - 4.30pm. The reality is very different; like judges, they carry out a lot of 'box work' (paperwork and electronic submissions) on current cases and applications, including disposals outside a formal tribunal hearing (Public Inquiry etc). It is not unusual for Traffic Commissioners to work late into the evening or at weekends, writing decisions and reading evidence and letters from parties. The absence of tribunal rules makes this inevitable. Traffic Commissioners also regularly attend and speak at industry events and conferences, very often outside of traditional office hours. They do not claim overtime for this or for the periods where they catch up on new legislation and case law.
3. By law (The Working Time Regulations 1998), employees and workers must not work more than 48 hours a week on average. This is usually averaged over 17 weeks. The 48-hour weekly limit applies unless the person:
 - has 'opted out' of the maximum limit – this means they agree to work more hours.
 - does a job with exceptions under the law.As Gov.UK acknowledges, limiting the hours people work is important for everyone's health, safety and wellbeing.

Application to Traffic Commissioners

4. In *Gilham v Ministry of Justice* [2019] UKSC 44, [2019] 1 WLR 5905, the Supreme Court considered the status of judicial office holders in the context of statutory protections under the Employment Rights Act 1996. The Court concluded that Judges are not civil servants or the equivalent of civil servants. They do not work under or for the purposes of the functions of the Lord Chief Justice, but for the administration of justice, in accordance with their oaths of office.
5. Traffic Commissioners are not required to make an oath on taking up appointment. However, Traffic Commissioners do not appear to fall within the definition of Crown employment as provided in section 191 of the Employment Relations Act 1996 either.
6. Judges hold a statutory office. They do not *necessarily* hold office pursuant to any kind of contract, however, they *may* do so under a contract with the person or body for whom they undertake to perform work or services. The Supreme Court identified at least three factors to consider: the way the judge was engaged; the source and character of the rules governing service; the overall, constitutional context.
7. Office-holders do not necessarily hold office pursuant to a contract. That will depend on the intention of the parties, which is reflected in the manner of engagement, the source and character of the rules governing service and the

overall context. In the Gilham case, the essential components of the relationship were derived from statute and not a matter for negotiation; it was difficult to identify an employer; and the separation of powers was a factor suggesting against a contractual relationship. Further to the Agreement on Liability Issues dating to January 2016, the development of policies is based on the acknowledgement of judicial equivalence, but that will largely be dictated by officials acting in a manner which is consistent with those principles.

8. The remedy for the incompatibility of the exclusion of the judiciary from the protection of the 1996 Act with the rights under the European Convention on Human Rights was found in the obligation in section 3 of the Human Rights Act 1998 to read and give effect to primary legislation in a way which is compatible with those rights. The Supreme Court established that it is possible to interpret the definition of a 'limb (b)' worker to include judicial office-holders when required to do so by EU law. Accordingly, it would not 'go against the grain' of the 1996 Act to do so in respect of the protections of Part IVA.
9. The European Framework Directive on Safety and Health at Work (Directive 89/391 EEC) was adopted in 1989. It guaranteed minimum safety and health requirements and reflected responsibilities already imposed by the Health and Safety at Work etc. Act 1974. The Working Time Directive 1998 was implemented through the Working Time Regulations 1998. The regulations place limits on the number of hours that a worker or employee should work each week and define minimum rest periods.
10. The Supreme Court found no evidence that either the executive or Parliament addressed their minds to the exclusion of the judiciary from the protection of Part IVA of the 1996 Act and no legitimate aim was put forward. It is similarly unclear which of the other protections, for instance under Part V Protection from suffering detriment in employment, Part VI Time off work, Part VII Suspension from work, Part VIII Maternity and Parental Leave, Part IX Termination of employment, Part X Unfair dismissal etc, it is said should be disapplied in the case of Traffic Commissioners, particularly where there are equivalent policies which apply to the judiciary and which allow for flexible working.

Guidance to Traffic Commissioners

11. In the absence of formal arrangements, it is necessary to issue this Administrative Policy Guidance to address the risk of excessive hours being worked and thereby avoid possible detriment to the tribunal process, businesses and members of the public who rely on Traffic Commissioners to remain effective.
12. Working time is any period when an employee or worker is working at the employer's disposal and carrying out their duties, including travel time during the working day, time spent working away from home and time on call at the workplace. The Secretary of State appoints Traffic Commissioners but is not the employer. However, as the Health and Safety Executive explains, health and safety protections are more extensive and the presence or absence of any one factor is not conclusive. There is no intent on the part of Traffic Commissioners to assume responsibility for health and safety, beyond section 7 of the HSWA relating to the duty of employees. The role of Traffic Commissioner is not equivalent to those jobs which are exempt from the rule on compensatory rest (such as the armed forces, police, or specific activities in civil protection) but

Traffic Commissioners recognise the importance of their role to the protection of life and the health and safety of the community. It is not often required to respond to an immediate incident, but they understand the need for flexibility.

13. Traffic Commissioners are not subject to a collective agreement, as evidenced by the various terms of appointment. There is no suggestion of an 'opt-out agreement', or overtime pay, but nor do the terms of appointment allow for excessive hours.
14. The law on working time does not generally apply to:
 - managing and senior executives and those who have the ability to make organisational decisions.
 - those who are self-employed.That is because they have control over their own working time. That may apply to Traffic Commissioners to a degree, although statutory deadlines and ambitions for processing times communicated by the Department, are also relevant. The constitutional context is also highly relevant to the level of control that a traffic Commissioner has over the work environment. The controls over DVSA employees are extremely limited, as the legal Framework Document and Service Level Agreement recognise.
15. As Gov.UK advises, anyone at work must take appropriate rest to protect health and safety. In providing this advice, it is recognised that Traffic Commissioners are required to work a weekly total number of hours (42 inclusive of breaks). The various terms of appointment also refer to additional hours of work but fail to provide any specifics or to identify any effective control measures. Traffic Commissioners are therefore advised to keep a record of their hours worked and to consider taking time-off in lieu. It is important to recognise the maximum working time limits. The total hours worked in a 17-week period are divided by 17 to provide the average working week. If a Traffic Commissioner is working more than 48 hours on average, they should take urgent action to ensure a proper break in their duties. If this happens over successive periods, they should notify the senior sponsor in DfT.

Flexible Working

16. In 2001, following recommendations from a working group which referred to the need to encourage diversity within the judiciary, the Ministry of Justice introduced a Salaried Part-time Working scheme. This has subsequently been extended to include all salaried judicial office holders including the Court of Appeal. It recognises that certain statutory roles cannot be shared and are therefore excluded.
17. The judicial Salaried Part-time Working scheme is not intended as an alternative or a replacement to either compassionate or sick leave. A salaried part-time judicial office holder is subject to the same terms and conditions as a full-time judicial office holder. A salaried part-time judicial office holder is also entitled to the same benefits as the full-time judiciary such as a pension and paid leave. A salaried part-time Judge may be expected to sit for the full duration in longer cases.
18. All applications are considered, provided that they equate to no less than 50% (in multiples of 10%) of the full-time equivalent post. Anything less is considered

to be incompatible with, or conducive to, efficient business activity, and would limit the tribunal's ability to list cases effectively. It would also limit that judicial office holder's exposure to the cases and activities. Senior judicial office holders (under delegation) are responsible for deciding applications but must seek advice from the relevant senior administrative officer on how such requests might work operationally before any decision is confirmed with the salaried judicial officer holder.

19. The decision must take into account operational requirements, business need and the applicant's preferred working pattern. The judicial decision maker is encouraged to work with the senior administrative officer, to determine, where possible, a new pattern of working which benefits both the judicial office holder and the tribunal.
20. DfT has made commitments in its Diversity, Inclusion and Wellbeing Strategy, as has Government in the Public Appointment Diversity Action Plan. The Traffic Commissioner Board has therefore adopted a similar approach, which reflects judicial equivalence.
21. DfT has previously recognised the case for compressed hours (a type of flexible working arrangement which allows a salaried Traffic Commissioner to work a full-time week in fewer days). In the absence of formal arrangements, it might be necessary to apply to the Senior Traffic Commissioner to consider how the power in section 4B of the Public Passenger Vehicles Act 1981 (Annex A) on the deployment of Traffic Commissioners should be utilised. Parliament has not provided a power to alter total hours of appointment.

ANNEX A – STC’S DEPLOYMENT POWERS

4B Power of senior traffic commissioner to deploy other commissioners

- (1) In this section—
- (a) subsections (2) to (4) confer powers on the senior traffic commissioner in relation to traffic commissioners and deputy traffic commissioners for England and Wales; and
 - (b) subsections (5) to (7) confer powers on the senior traffic commissioner in relation to the Scottish traffic commissioner and any deputy traffic commissioners for the Scottish traffic area.
- (2) The senior traffic commissioner may require any traffic commissioner for England and Wales to carry out such of the functions of traffic commissioner for England and Wales as the senior traffic commissioner may determine—
- (a) in relation to such matters relating to England and Wales, or
 - (b) as respects Scotland, in relation to such reserved matters, as the senior traffic commissioner may determine.
- (3) The senior traffic commissioner may require any traffic commissioner for England and Wales to carry out such of those functions as the senior traffic commissioner may determine at such places—
- (a) in England and Wales, or
 - (b) in the case of functions which relate to reserved matters and are exercisable in relation to Scotland, in Scotland, as the senior traffic commissioner may determine.
- (4) Subsections (2) and (3) above also apply in relation to a deputy traffic commissioner for England and Wales as they apply in relation to a traffic commissioner for England and Wales, construing the references to functions accordingly.
- (5) The senior traffic commissioner may require the Scottish traffic commissioner to carry out as respects England and Wales such of the functions exercisable by the Scottish traffic commissioner in relation to reserved matters by virtue of section 4(3B)(b) of this Act as the senior traffic commissioner may determine.
- (6) The senior traffic commissioner may require the Scottish traffic commissioner to carry out such of those functions as the senior traffic commissioner may determine at such places in England and Wales as the senior traffic commissioner may determine.
- (7) Subsections (5) and (6) above also apply in relation to a deputy traffic commissioner for the Scottish Traffic Area as they apply in relation to the Scottish traffic commissioner, construing the references to functions accordingly.
- (8) In this section—
- “deputy traffic commissioner for the Scottish Traffic Area” means any person appointed under paragraph 3 or 4 of Schedule 2 to this Act to act as deputy in the case of the Scottish traffic commissioner;
 - “reserved matters” means reserved matters within the meaning of the Scotland Act 1998.