



# EMPLOYMENT TRIBUNALS

**Claimants:** Mr A Gold  
Mr S Lancaster  
Mr D Lythgoe

**Respondent:** Secure Empty Property Limited

**Heard at:** Manchester Employment Tribunal

**On:** 5 to 8 May 2026 (and 20 to 23 July 2026 in chambers)

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

**Representation**

**Claimants:** In person

**Respondent:** Ms M Tutin, counsel

## PRELIMINARY HEARING

## RESERVED JUDGMENT

1. The Tribunal made findings of fact in relation to the work done by the claimants when they were performing First Man on-call duties. The Tribunal answered the questions at section 1 of the applicable List of Issues. The findings of fact are set out in the written reasons and are summarised in the conclusions section from paragraphs 162-195.
2. The totality of the time spent as First Man 'on-call' did not constitute working time within the definition set out in regulation 2(1) of the Working Time Regulations 1998.
3. Only those parts of the on-call period where the claimants spent time actually doing work tasks amounted to working time within the meaning of the Working Time Regulations. Working time comprises actual time spent working as opposed to being available for work. Such work tasks included:

answering the telephone, listening to voicemail messages, making phone calls, sending and reading messages, sending and reading emails, making arrangements to pick up the Second Man, driving to pick up the Second Man, driving home after dropping off the Second Man, travelling to a client's site, time spent at a client's site, time spent coordinating further steps in relation to a client's case/incident, and time spent updating the office staff or managers as to what had happened and the work done during the on-call period.

4. Given the conclusions as to what parts of the on-call shift amounted to 'working time' it was not necessary to determine whether any of the exemptions at regulation 21 of the Working Time Regulations applied in this case.
5. In determining the type of work done by the claimants for National Minimum Wage purposes, the Tribunal is obliged to make one determination of the type of work taking account of the arrangement as a whole. It is not permissible to make separate findings for the on-call periods as compared to the claimants' usual day shifts as each claimant had only one contract of employment with the respondent and all work was carried out by the claimant pursuant to that one contract.
6. For the purposes of the National Minimum Wage Regulations 2015 the claimants were engaged in "time work" within the meaning of regulation 30 and were not doing "unmeasured work" within the meaning of regulation 44.
7. Only those parts of the on-call shift where the First Man was actually performing work tasks (administrative duties or attending callouts to site) constituted "work" for which he was entitled to be paid under the National Minimum Wage Regulations framework. Where the claimant was not actually performing work tasks during the on-call shift, he was not deemed to be doing time work within the extended definition at regulation 32 of the National Minimum Wage Regulations 2015. The on-call shift itself was not work within regulation 32.

# REASONS

## **BACKGROUND TO THE CASE**

1. This was a public preliminary hearing to determine a number of issues in relation to working time. It was originally listed for two days by Employment Judge Dunlop at her preliminary hearing on 24 March 2025. The two-day hearing was listed for 16 and 17 December 2025. At the hearing on 16 December 2025 Employment Judge Allen postponed and re-listed the hearing for four days on the basis that a two-day hearing was inadequate given the volume of evidence in the case. The number of issues for determination at this re-listed hearing was narrowed to those listed at paragraphs 1-4 and 8-9 of the list of issues appended to Employment Judge

Dunlop's case management order. The parties had agreed six sample weeks for each claimant in the case. In re-listing the hearing for four days it was anticipated that the hearing would only be long enough to hear the evidence and submissions without time for judicial deliberation and the giving of an oral decision. A reserved decision was anticipated when the hearing was listed. Unfortunately, it was not possible to list the cases for consideration in chambers for over two months after the last hearing involving the parties, hence the unavoidable delay in providing this reserved decision.

2. These Tribunal claims arise out of the respondent's arrangements for Operatives to cover out of hours work via an on-call system. The claimants' claims concern the arrangements for paying the 'First Man' on the on-call rota and for ensuring that working time and minimum wage obligations are adhered to by the respondent.
3. As is set out in EJ Dunlop's case management summary, the respondent company provides security services for empty properties. Each claimant in this case is employed as a "Security Operative" and all of them remained employed by the respondent at the time that the claims were submitted to the Tribunal. In their "day jobs" the claimants work in two-man crews attending jobs to take the steps required to keep property secure. This might include things like fitting and maintaining steel shutters or boarding up windows. In addition, each claimant is required to spend time undertaking what the respondent calls "on-call duties". The claimants feel that their obligations when on-call go far beyond being "on-call", but the term is a way of distinguishing the extra duties from what might be described as the "day job." The on-call period covers the overnight period when the claimants and their colleagues are not on shift as well as the whole weekend (including bank holidays). Each operator works one week in six on-call as "First Man" and one week in six on-call as "Second Man". There is a phone number which clients can call. During office hours the calls are received by office staff. Out of office hours, incoming phone calls are directed to the on-call mobile phone which is held by the First Man for that particular period. The claimants say that the First Man is obliged to answer every out of hours call which is directed to this mobile phone. Sometimes, a call will generate a "job" where the operators have to attend the property and take practical steps. In those circumstances the First Man will alert the Second Man, and both will attend the job together. In many other circumstances however, there will be no "job". The First Man may determine that the work required can wait until the morning or the call may have simply been an enquiry, or an update. These calls may involve coordinating and communicating with other individuals (e.g. keyholders or the emergency services.) These communications need to be logged so that they can be followed up the next day.
4. The respondent's system provides for an on-call allowance and further payments when the Operatives physically attend a job, whether in a First Man or Second Man capacity. There is no complaint about time spent in the Second Man role. The claimants' position is that the Second Man role is properly seen as the "on-call" version of their job. However, they say that the First Man role is a different job altogether. They say that it provides cover for the office staff who would otherwise field these calls and do the relevant

administration during the day. The thrust of the case is summarised in Mr Gold's ET1 as follows: *"constant disruption means I was actively working rather than simply being on-call."* The claimants complain that this system meant that they did not get adequate rest or adequate remuneration during the periods when they were 'manning the helpline' (as they put it) or 'performing First Man on-call duties' (as the respondents would put it).

5. The claimants' primary case is that all of the hours they spend manning the helpline/on 'First Man' duty should be classed as "working time." This would have repercussions under the Working Time Regulations 1998 ("WTR"), for example, as to rest breaks and compensatory rest that they would potentially be entitled to, as well as to accrual of annual leave. It would also have repercussions under the National Minimum Wage Act 1998/National Minimum Wage Regulations 2015 ("NMWA/NMWR") as it would mean they had been underpaid. There are two legislative tests to be applied depending on which statutory regime is relied upon (i.e. national minimum wage legislation or working time legislation). The claimants have a secondary case, which is that, even if not all of the time that they were allocated to do extra duties properly counts as working time, the respondent has in fact under-counted by only counting as "work" those instances where a call resulted in a job which they had to travel to and physically undertake.
6. In light of the above, the issues for determination at this hearing were (as set out in Employment Judge Dunlop's list of issues):

*"Findings of fact"*

1. *What are the relevant findings of fact which the Tribunal should make in relation to the work done by the claimants during periods when they are performing "First Man on-call duties" (to use the terminology of the respondent) or manning the respondent's out-of-hours helpline (to use the terminology of the claimants)?*

*In particular:*

- 1.1 *What were the contractual provisions relating to being on-call/manning the helpline?*
- 1.2 *What general restrictions were placed on the claimants (whether contractually or otherwise) during this period, irrespective of the calls that might come in e.g. as to their location, activities (for example refraining from alcohol) etc.*
- 1.3 *What type of calls did the claimants receive? What was the general frequency of these calls, and how much did this vary? What actions would be required in response, and how might that vary? What administrative follow-up was required, and how might that vary?*
- 1.4 *To what extent did taking the calls and completing the follow-up actions interfere with the claimant's ability to sleep or do anything they would otherwise have been doing at the times they were on-call/manning the helpline?*
- 1.5 *To what extent were the claimants given (or permitted to take) compensatory rest periods as a result of activities that they had carried out during the periods where they were performing first-man on-call duties/manning the helpline.*
- 1.6 *To what extent, if at all, is there any difference in those findings in the period prior to the claimant's grievance appeal outcome in autumn*

2024 (there is a dispute between the parties as to the exact date of any changes, which may have to be resolved by the Tribunal), and after that date.

### Working Time

2. Was time spent by the claimants on first-man on-call duties/manning the respondent's out of hours helpline "working time" within the definition set out in regulation 2(1) Working Time Regulations 1998 ("WTR") namely, were the claimants working, at the employer's disposal and carrying out his activity or duties?
3. If the totality of the time spent by the claimants on first-man on-call duties/manning the respondent's out of hours helpline is not "working time", which parts would count as "working time"?
4. In respect of the Claimants' activities for the Respondent during the relevant periods:
  - 4.1 Are they engaged in vacant property security activities requiring a permanent presence in order to protect property and persons within regulation 21(b) WTR?; and/or
  - 4.2 Do they involve the need for continuity of service within regulation 21(c) WTR?; and/or
  - 4.3 Are they: (i) affected by an occurrence due to unusual and unforeseeable circumstances, beyond the control of the Respondent; or (ii) affected by exceptional events, the consequences of which could not have been avoided despite the exercise of all due care by the Respondent; or (iii) affected by an accident or an imminent risk of an accident under regulation 21(e) WTR?

So that regulations 10(1), 11(1) and 11(2) WTR do not apply in relation to the Claimants, subject to regulation 24 WTR.

### National Minimum Wage (NMW)

8. Is all, or part, of the time spent on-call/manning the helpline by the Claimants:
  - 8.1 time work for the purposes of NMW (taking into account Regulation 32(1) NMW Regulations 2015) in relation to on-call working)?;
  - 8.2 if not time work, is it unmeasured work?
  - 8.3 If only part of such time is time when the Claimants are performing work (whether time work or unmeasured work), which part or parts?
9. In determining issue 7 above, the Tribunal will consider whether the claimants' work in their 'day jobs' can be classified separately from their on-call/helpline work within the NMWR classification scheme, or whether the Tribunal is obliged to make one determination of the type of work for NMW purposes taking account the arrangement as a whole. (NB the respondent's representative's understand is the latter, based on HMRC guidance)."

7. For the purposes of this hearing, I received written witness statements and heard oral evidence from the following witnesses:
- (1) Andrew Gold, claimant
  - (2) Steven Lancaster, claimant
  - (3) Daniel Lythgoe, claimant
  - (4) James Brooks, respondent's Operations Manager
  - (5) Gareth Carson, respondent's former Head of Operations/General Manager
  - (6) Ronnie Coutts, former Managing Director of Clearway Group Ltd, the respondent's parent company.
- (The respondent's witnesses provided supplemental witness statements.)
8. The Tribunal had access to an agreed hearing bundle containing 1010 pages and I read those pages to which I was referred by the parties. I also received an opening skeleton argument from the respondent and written and limited supplemental oral closing submissions on behalf of the claimants and the respondent, for which I was grateful. I also had regard to a table of analysis of the sample weeks which was prepared by respondent's counsel as an aid to cross examination. Mr Gold acted as spokesperson for all three claimants during the hearing.
9. In the interests of proportionality, it was agreed that the Tribunal should focus upon a small number of weeks in order to reach a decision in principle, rather than considering the entirety of each claimant's employment history. In accordance with the case management orders each party selected three weeks for the Tribunal to examine in detail. Accordingly, there are six weeks in respect of each claimant (i.e. three selected by the claimant and three selected by the respondent).
10. The evidence provided by the parties focuses on the period prior to 30 September 2024, at which time there was a change to the on-call shifts following a grievance brought by the claimants (and others). All of the selected sample weeks fall within the period from early 2022 to early 2024.

## **THE FACTS**

### **The business and its operations**

11. Secure Empty Property Ltd is a company specialising in security for vacant property. The Clearway Group consists of a number of specialist companies with a focus on vacant property services and site security. Clearway acquired Secure Empty Property Ltd ("SEP") (the respondent) in October 2023, before which it was privately owned. SEP employs around 30 people. There was a project between October 2023 and the summer of 2024 to integrate SEP into Clearway's business.
12. Mr Gold was employed from 15 August 2022 until his dismissal in 2025. Mr Lancaster has been employed in the same role from 7 July 2021. Mr

Lythgoe has also been employed in the same role since 14 August 2017. The claimants were employed as Security Operatives based in the Haslingden depot. Their role involved installing and removing security systems, which generally consist of steel screens, temporary door covers and temporary alarms, in order to secure empty properties on behalf of the respondent's clients. They usually worked in pairs: Mr Gold and Mr Lythgoe formed Team 2 and Mr Lancaster with John Green formed Team 3.

13. The claimants worked as First Man on a one week in six rota. This meant that they were responsible for receiving phone calls on the respondent's out of hours helpline (an 0330 number), carrying out associated administrative duties and attending any urgent callouts to sites in certain circumstances. This phone number was the respondent's 'out of hours' service. If the matters raised by a call needed to be dealt with outside of normal office hours, then the operatives would address them out of hours. However, not all calls received by the out of hours service fell into that category. If a call was received out of hours which did not need to be dealt with outside normal business hours, then the First Man would take the details and refer it to be dealt with during normal business hours. The existence of an out of hours telephone number did not imply that there was some form of call-centre operation handling the calls or that the caller could expect the same level and speed of response and service outside business hours as would be expected inside standard business hours.
14. The position of First Man would swap between the two members of the team. As a result, each individual was on-call as First Man once every six weeks under the rota. Security Operatives could (and did) swap their on-call weeks with each other. Some Security Operatives chose to work more on-call weeks than others. For example, Mr Lythgoe has, on average, been First Man about 16 times per year (rather than the expected 8 or 9 times per year). By contrast Mr Lancaster did not carry out any First Man shifts between October 2023 and November 2024.
15. The respondent has two sides to its business: the 'field side' and the 'alarm side.' On the 'field side', to secure a property the operatives secure buildings by fitting steel screens and covers to the windows and doors. This is required where vacant property has become unsecure for whatever reason. There is also the 'alarm side' of the respondent's business. This is where the operatives fit and maintain temporary alarm systems or CCTV cameras to empty property to try and keep it secure. In addition, when SEP is alerted by their third-party alarm monitoring provider (East Midlands Monitoring Station "EMCS") to alarms having gone off, the operatives will attend the site to re-secure the building, check or repair equipment, or reset systems. Sometimes the respondent's customers can require both field side and alarm side services at any one time but sometimes the customer will require just one of these.
16. The respondent operates an out of hours service so that its customers can be serviced in emergency situations 24 hours a day 7 days per week. The six operatives at the Haslingden depot staff this out of hours service through an on-call rota. The operatives are split into two key roles whilst on-call: "First Man" and "Second Man". Each operative performs a one in six rota as First Man and a one in six rota as second man, meaning that operatives are

on call a maximum of one in every three weeks. The role of First Man and Second Man are different. The Tribunal proceedings relate only to time spent on call as First Man.

17. The First Man on-call is responsible for manning the work issued telephone and takes the company van home. During the relevant period of time for the purposes of the claim, a customer would call the 0330 0881973 number which would automatically divert to the First Man's work issued mobile telephone. On making the call, the customer would be greeted with an automated message which gave two options for whether it was an emergency or not. If the matter was not an emergency, the customer would be directed to leave a message which would be picked up by the office staff the next day. In theory, only emergency calls should go through to the First Man operative when he is on-call.
18. The call from the 0330 number would be answered by the First Man who would then triage the call. If the call required a call-out to attend site, the First Man would call the Second Man and would let him know that there was a call-out and would organise a pickup time and location. The First Man would then use the company van to go and pick up the Second Man and they would then attend the site to which the call-out related.
19. The First Man was responsible for deciding whether a site visit or other action was required based on their experience and the nature of the specific situation under consideration. Not all of the calls coming through the telephone line required a call-out for the respondent's operatives to attend the site. If the First Man considered that it was not an emergency and could reasonably wait until the following day, the First Man would confirm this with the customer and then send an email to the respondent's office to make them aware of the call. This would then be picked up the next working day by the office team. If a visit to site was required and the site was over two hours away, then the operatives were not expected to attend the site while on-call. There was a list of third-party contractors and the First Man would arrange for one of those third-party contractors to attend the site instead.
20. If the call was an alarm related call from the EMCS, even if the site in question was within the two-hour drive, the respondent's operatives would only go to site if the respondent was the out of hours primary key holder for that particular site. In the case of most customers, the respondent had another third-party supplier who was the primary key holder. In those circumstances, EMCS should first contact that third-party supplier. However, if EMCS could not get through to the third party, they might call the First Man who would then contact the third-party supplier and arrange for them to attend. If the call was from someone who was not an existing customer, was not EMCS, or was not the emergency services calling on behalf of the respondent's existing customer, then the respondent's operatives should not respond themselves. Instead, the First Man should take the contact details and reason for the call and pass that on to the office. Such calls are not the First Man's responsibility, beyond passing the relevant information on to the office. In light of the foregoing, the on-site callouts (i.e. visits to sites) would only be for urgent matters which were sufficiently local, required a response out of hours, and could not wait until the following working day.

21. Whilst the majority of telephone calls would be made to the main telephone number (0330), occasionally the First Man might receive a call directly to their work mobile number (i.e. beginning 07), primarily from management, if they had a reason to call the operative in question.
22. Where the operatives had been called out to attend site, after the job was completed the First Man would drop the second man off at their home and then return to his own home.
23. During the period under consideration, the on-call period was a full week. The on-call period was between 5:30pm and 8:30am the following day, Monday to Friday. Over the weekend, on-call started at 5:30pm on a Friday until the following Monday at 8:30am, when normal shifts would re-start. The next on-call team would then take over the on-call rota from 5:30pm on the Monday evening. On a bank holiday weekend, the next on-call team would take over at 8:30am on the bank holiday Monday.
24. On the “field side” the most common call-out situation was when an existing customer of the respondent called the number with an emergency. For example, a social housing customer might have had their property broken into or a door knocked down by the police seeking to gain access for a drugs raid. The First Man would take the call and agree with the customer that they would fit a temporary door or window to secure the property. If the site in question was more than two hours away, the First Man would contact a third-party provider to do the job on-site and would notify the office once they had done this. If the site in question was within two hours’ drive, the respondent’s operatives would need to attend the site themselves. The First Man would therefore contact the Second Man, arrange a pickup time and location and the operatives would attend the site and carry out the required works. The operatives were also asked to complete a form whilst they were on-site, explaining the works that had been carried out. This was to be completed on-site and not once the operatives had returned home. This meant that any time spent filling out the form would be counted as part of the call-out and paid at the overtime rate that they received whilst attending the call-out.
25. On the “alarm side, callouts came from alarm activations on properties where the respondent had installed temporary alarm systems or CCTV cameras. The alarms and cameras were monitored by the EMCS. EMCS assessed the alarm and called the respondent if they thought that someone needed to attend site. Not all alarm activations would result in a call from EMCS to the respondent. If EMCS considered that there was a need for someone to attend the site, they would call the primary key holder recorded on their systems. For the vast majority of customers this was actually a third-party subcontractor rather than SEP itself. However, for some local social housing customers, the primary key holder was SEP. In such a case, or if EMCS could not get hold of the third-party subcontractor, then EMCS would call the respondent’s on-call team and ask the operatives to action it.
26. The alarms which would result in EMCS contacting the keyholder to take action were:

- (1) Intruder alarms where there are 2 alarms from different sensors within 1 minute. This would indicate that there was somebody at the property and moving around (i.e. an intruder.) An intruder alarm which does not meet these criteria was just logged by EMCS and no action was taken.
  - (2) A tamper alarm, which suggests someone has tried to remove or damage the CCTV camera, sensor or other alarm equipment. Again, this suggested that someone was in the property who should not be and EMCS would call the keyholder.
  - (3) A fire alarm.
27. If the First Man received a call from EMCS they should then check the "SmarTest" app on their phone to see the site alarm log for the site in question and to check who the primary keyholder was. If they could see that, although they had been called, the relevant third-party contractor who was the primary keyholder was already dealing with it, then they did not need to take further action. Alternatively, where the primary keyholder was a third-party contractor and it was not clear that they had already picked up the matter, the First Man should still contact the third-party contractor to ask them to deal with the situation. The First Man only needed to action it further if the respondent was the primary keyholder. If they could not raise the third-party contractor who was the primary keyholder, they should email the office to let them know or escalate it to a manager. Very occasionally, management might ask the First Man and his partner to attend themselves. This would not be the usual practice, however.
28. If a call came in out of hours from an existing customer which was not urgent (e.g. it was commercial or administrative) the operatives were simply expected to take the contact details and pass them on to the office so that the office could deal with it the following working day.
29. Sometimes the First Man might receive a call from the emergency services. As the respondent is not on the supplier framework for the emergency services, they would only tend to get a call when the emergency services had attended site and the respondent's name was visible on signage at the location. The emergency services might call on behalf of the customer to ask if the respondent could come out and secure the site. In that situation, the respondent's normal contractual commitments to its customer would apply. The respondent has no direct responsibility or obligation to act on the instructions of the emergency services, only those of the customer. (This is apart from any perceived moral obligation or 'civic duty' obligation that an individual operative might feel. It is a consequence of the fact that the customer is the body who will 'pick up the bill' for any action taken by the respondent's operatives, hence the customer has the final say on what should or should not be done on-site.)
30. In limited circumstances the First Man might receive a call from a potential new customer asking for a quote for a job. The operatives were not allowed to discuss such matters or quote for work. Rather, they should simply take

the details and note the request and say that they would pass this on to the office. Any actions over and above that would be at the direct instruction of a manager. (There were some exceptional examples of a manager asking the First Man to provide specific information or take specific actions in such situations but these were the exception and not the standard way of working. In such circumstances, the First Man was acting in a different way from the standard procedure and was acting under the direct and specific instructions of a manager.)

31. Occasionally, the First Man might receive a call from a member of the public. The First Man was not allowed to take instructions to attend site from a member of the public. They should simply email the office to inform them that the call had been received.
32. After a team had been called out to attend a site they should send a brief report to the operations email address as part of the call-out activity. They also completed a manual handwritten timesheet at the end of the week which included all their callouts for that week. These were processed by the office so that the operatives were properly paid for this time. The number of callouts and the amount of time spent on them would fluctuate from week to week.
33. Some of the work done when on call is activity that follows on from the day's work, meaning that, rather than go home at the end of the day and get called back out, the operatives would deal with urgent reactive jobs that were outstanding when their normal shift finishes. I am satisfied that such jobs were only 'run on' after the end of the shift because of the time that the respondent became aware of the emergency, meaning that it could not be fitted into the core working day. The operatives doing this work would receive payment at the enhanced on-call rate for the work done during this period and it was usually completed immediately after their day shift. The Tribunal is satisfied that this happened periodically but not frequently. However, pre-planned work which the respondent had advance notice of would not be booked in for completion during an on-call period.
34. The quietest time for phone calls during the on-call period is during the week, particularly between 12 midnight and 6am (i.e. a time when many customers are asleep.) There will inevitably be occasional callouts during these times but they remain the quieter times of day for calls to the on-call team.
35. There was a general rule within the respondent's business that the on-call team would only service jobs within a 2 hour travel time of the main depot. If a call was received which related to a site outside of this travel radius, then there were a range of contractors who the First Man could contact and to whom he could delegate the job. It was generally up to the operative who was acting as First Man to decide whether the job could be serviced by SEP or whether third-party contractor should be contacted.
36. The general expectation was that operatives who were attending site would be on site within 3 hours of the call-out, except in the limited situations where there was a contracted customer commitment for a quicker time. Taking into account the maximum 2 hour travel time radius, this meant that, generally,

the operatives had at least one hour from receiving the call to be on their way to pick up the second man.

37. The First Man was required to take undertake some additional administrative duties rather than just attending a site to do the job. It was that which was compensated for by the additional £45 payment per week compared to the payments made to the Second Man for each week on-call. The types of administrative duties which were covered (or intended to be covered by this payment) were: answering the initial call and deciding whether a call-out was needed, calling the Second Man and arranging the pickup time and location, making any further phone calls to the third-party contractor or the primary key holder, checking the SmarTest app. None of these tasks would take more than a few seconds or minutes. In some circumstances the First Man might need to call the customer back to confirm the arrangements for the job and there might need to be some additional emails or telephone calls until the job was complete. This was by no means required for every case. All of these tasks were expected to take only a short period of time, minutes at most. It is not correct to say that the First Man performed the full suite of office tasks during the on-call period. The First Man only carried out a small subset of the administrative duties which were directly related to the calls that he had received. He was not performing the office worker's role out of hours.
38. If the First Man did not send the follow-up email to the office to show what work had been logged and carried out, then the office (and therefore the respondent) would not have a complete record of the duties that the First Man had performed when acting as First Man on-call. They would not have a record of what had been done or needed to be picked up subsequently by the office. This is something which was in the First Man's control.
39. The First Man received the standard payment of £135 for each week of being on-call as First Man. This was a set payment and was made irrespective of whether there were any callouts during the week. The Second Man received a similar automatic payment of £90. The difference of £45 between First Man and Second Man was designed to compensate the First Man for the additional responsibilities that he held. If the operatives were called out to site, then additional payments were made. Those payments covered the period from the Second Man being collected by the First Man until the men had returned home after the call-out. All travel time and time on site was classed as working time when on-call. Prior to the changes made as a result of the grievance, both the First Man and Second Man would receive a fixed sum for callouts up to the first 2 hours and thereafter would be paid an hourly rate based on their normal salary plus a third (i.e. time and one third). This meant that even if the operatives attended a call-out which took significantly less time than 2 hours (including travel time) they would still receive a payment of £45 during the week and £65 at weekends, per individual call-out. For any time spent over the initial 2 hours on each call-out, the claimants would receive payment at a rate of time and a third. This was £15.96 per hour for the claimants at the time that they submitted their claim. The claimants would complete their timecards at the end of the week which would confirm the times that they were called out and when they returned home. These would be processed for payment by

the office, along with the claimant's flat rate for being on-call during that week.

40. When operatives were not on-call they received a minimum of 15 hours rest per day between finishing one shift at 5:30pm and coming into work the next day at 8:30am. Further, whilst on-call, if they were not called out and did not receive any calls to the mobile phone whilst acting as First Man, they would receive 15 hours of rest per day. Operatives working as First Man were more likely to be interrupted by receiving a telephone call but this would not automatically happen every day during the on-call period. If there was an interruption (e.g. a phone call) but they did not have to visit site, or where calls and call-out time did not exceed a total of 4 hours between shifts, the First Man would still have 11 hours' daily rest in total between the end of one normal shift and the start of the next. Most of the time the First Man would receive at least 11 hours rest in total between shifts. If the operatives were interrupted significantly overnight, they were encouraged to share this with the manager and additional rest would be given. Their start and finish times for the following day shift would usually be adjusted to provide the additional required rest.
41. In 2023 there were two disciplinary investigation meetings with Mr Lancaster because he failed to respond to calls altogether when on-call as First Man on two separate occasions, once in April 2023 and once in July 2023. On both occasions Mr Lancaster had received calls during the night and had failed to answer them and failed to take any action until he woke up the following morning. Although these incidents were investigated, no formal action was taken and Mr Lancaster was simply reprimanded verbally for failing to pick up the phone. The action was not for a slow response time or for making a judgement that a visit was not required, it was for entirely ignoring the calls for what could have been serious emergency situations.
42. When preparing disclosure for the claim the respondent tried to access the call records for the company mobile phone numbers for the claimants in order to identify any calls which were made directly to the mobile phone and did not go via 0330 0881973. They were unable to access those records. Those records are held by the provider EE and neither the respondent nor its parent company routinely received this information. The phone invoices did not include such call data. The respondent requested records from EE but they advised that they were not available, having been deleted on the expiry of the 12 month EE retention period.
43. Mr Brooks considered the extent to which there could be additional direct calls on/to the First Man's company mobile phone. All EMCS alarm-related calls and almost all customer calls to report an incident initially would have been via the 0330 number and not the direct mobile number. Whilst a few customers may have had the operatives' direct numbers, they would not know who was on-call on a given day and so it would not make particular sense for them to try and use direct mobile phone numbers. Consequently, this would only happen occasionally. Occasionally, a manager might initially call the First Man via the direct mobile number. Even then, I am satisfied that the manager would often use the main 0330 number for a first call as even the manager might not be sure who is on First Man duty at the time. After the initial call, if the First Man needed to make a follow-up call he would

use the company mobile. Likewise, calls in reply to a call from the company mobile phone might well be made to the 07 number. Therefore, for some incidents there would have been follow-up calls on the direct mobile number which would not show up on the 0330 call log. However, there should be relatively few separate instances (in number and duration) which do not show up (at least initially) as a call on the 0330 log. In addition, given the system of follow up emails to the office, the First Man should have given an indication of whether follow-up calls were required and what level of activity was undertaken in his email to the office relating to the incident. This should have provided a paper trail in relation to the work being done, even if the 07 number was used and in the absence of access to the 07 number call logs. If the standard procedures were followed by the First Man, this should have provided an indication as to the existence of any calls which had not otherwise been captured by the records available for the Tribunal hearing. The respondent reviewed the available emails for the test weeks and included this information in its analysis of the data. Overall, I am satisfied that the data provided to the Tribunal is unlikely to omit significant activity levels in relation to the claimants.

### The grievance

44. In or about June 2024 a number of the operatives raised a grievance regarding the on-call arrangements. The grievance was submitted by Mr Gold but was raised on behalf of himself, Mr Lythgoe, Mr Lancaster, Daniel Campion, and Joe Huntriss. The grievance was initially heard by Gareth Carson. The grievance raised a number of key points. The operatives felt that the time spent on-call as First Man should be treated as working time for the purpose of the Working Time Regulations. Secondly, the operatives raised concerns around the compensatory rest arrangements in place. Finally, they said that they felt that all time spent on-call should be compensated in line with the National Living Wage. The grievance was heard and investigated between June 2024 and September 2024. The outcome was delivered to the claimants in September 2024 and followed up with written confirmation on 1 October 2024. The grievance was partially upheld and Mr Carson recommended a number of ways in which the on-call arrangements could be developed to improve the experience for the claimants. In particular, all calls to the 0330 helpline number would henceforth be redirected to Clearway ARC. The on-call teams would only receive a call when they were required to attend site. There were proposed changes to shift times when teams were on-call. There were changes to arrangements to ensure the 11 hour rest break following any call out. The operatives appealed the outcome.
45. The appeal against the grievance outcome was forwarded to Mr Coutts on 7 October 2024. In the appeal it was asserted that the grievance outcome did not address the issue of whether some of the First Man's shift should be considered working time. The changes to shift patterns and compensatory rest were challenged on the basis that they did not properly allow for adequate compensatory rest. The appeal also indicated issues in relation to the Shift Change Notice and indicated that there had been no resolution to the issue of backpay and previous bank holidays. The appeal notice was sent by Mr Gold. Mr Coutts wanted to check whether the other employees wished to appeal as well.

46. The grievance appeal hearing took place on 31 October 2024 and was conducted by Mr Coutts. Mr Gold, Mr Lythgoe and Mr Lancaster were in attendance as were two other operatives, Daniel Campion and Joe Huntriss. During the appeal hearing there was a wide-ranging discussion about the available information showing the on-call work being done by the operatives. The operatives were asked to provide any written records of the work that they had carried out so that the respondent could reach a conclusion on the issues. There was a debate about how quickly operatives were required to get out on-site when they were called out. There was a discussion about how the operatives could spend their time whilst on-call and when not actively answering calls or carrying out work for the respondent. Mr Coutts examined the amount of time that was spent on administrative tasks and asked questions of both the claimants and Mr Carson in relation to working practices. In relation to compensatory rest there was a difference of opinion amongst the crews. Some were happy with the flexibility allowing for later starts and earlier finishes after a call out, whereas others wished to have a more prescriptive model of 11 hours uninterrupted rest and then to start working at the end of that time. It was agreed that the Shift Change Notice issue had been resolved. At the conclusion of the meeting, Mr Coutts asked both the operatives and managers to provide further information on the issues prior to him taking further legal advice.
47. In the days following the appeal hearing there was correspondence wherein the claimants provided various items of information about the work that they had carried out during the relevant period. It is fair to say that the operatives themselves did not have complete written logs of the work that they had done. They provided what they had in a variety of formats but it was by no means complete.
48. Mr Coutts also received a breakdown of data that had been collated by James Forster. It had been prepared from a mixture of timesheets and emails. Whilst, in reality, most calls would only take a few minutes at most, Mr Forster had assumed 10 minutes for every call. This was designed to ensure that there was no underestimate of the time required and it effectively allowed time for drafting and sending the emails associated with the phone calls. Erin Hodgson (of HR) then analysed that information, along with the information from Mr Gold, and put summaries of both in a spreadsheet, a copy of which was within the Tribunal hearing bundle. Based on that dataset covering a period of 22 weeks from 11 March 2024 to October 2024, there was an average of 1.3 hours of clerical duties performed each week (even assuming 10 minutes for each call.) This ranged from some weeks where there was just one call up to the busiest week of 7.8 hours, one bank holiday weekend. On this analysis, only 3 weeks in the total 22 week period had 3 or more hours of calls based on the average of 10 minutes each. It was apparent from the data that the bank holiday weeks involved more calls during the on-call window than any other week period. In an on-call week where there was a bank holiday, there would be an additional period of time during that week which was classed as 'out of hours'/on-call. That on-call time would not exist during an ordinary working week.

49. Mr Coutts had asked the operatives whether they felt that the on-call task was too difficult and whether it should be stopped and subcontracted to a third-party. All of them confirmed that they did not want the on-call arrangement to stop. They said that it should continue and that they were happy to continue to be on-call.
50. There was a further operative (Mr Green) who had not raised a grievance. Given that he was directly impacted by the grievance appeal outcome, Mr Coutts wanted to speak to him to understand the effect of the on-call arrangements on him. During that conversation Mr Green did not raise any complaints or concerns about being on-call.
51. Mr Coutts wrote to the operatives on 15 November 2024 to confirm the decision on the grievance appeal. In relation to the operatives' assertion that all on-call time should be treated as working time, Mr Coutts did not uphold this aspect of the appeal. He explained that he understood that the time spent on-call would need to meet certain criteria in order to constitute working time, including a quick mandatory response time (generally having to be on site within around 20 minutes or less), that there was a requirement to be situated either at an employer's location or within a narrowly defined radius of such, that there would need to be a significant impact on the employee freely managing their own time, or that any tasks being conducted would need to be regular i.e. every night with similar volumes. Mr Coutts concluded that it was clear that the operatives were not required to deploy at very short notice, that there was no restriction on their location given that they could be up to 2 hours away and still respond to a call out within the expected timeframe, that they could go about their other activities whilst on-call, and that the impact of telephone calls out of hours was very variable and did not form an established pattern. Mr Coutts was comfortable that the 3 hour response time was significantly in excess of the cases which had found that on call time was working time due to a quick response time. Given that the respondent had a maximum 2 hour radius for accepting jobs, the operatives would always have more than one hour before they needed to start to make their way to a call-out. In relation to the restriction of their activities, Mr Coutts found that the operatives were free to go about their personal business whilst on-call, with the exception of not being able to drink alcohol. He found that none of the operatives were able to give him examples of times when they had to 'drop everything' and go to a job. There were no examples of family occasions that had to be missed or cut short. In relation to the level of disruption, Mr Coutts found that the operatives were able to give examples of particularly busy days but this was not regular and there was no established pattern of the First Man being disrupted on a continuous basis. Furthermore, on those particularly busy days, Mr Coutts did not find that the level of disruption was significant. Based on the data, the number of calls varied from week to week and were often in clusters close together (with big gaps between clusters or only one cluster on a given day.) On that basis, Mr Coutts found that the time spent being on-call for the respondent (and not otherwise performing administrative duties) did not equate to working time.
52. In relation to the wider complaints about the clerical and call answering duties when acting as First Man, Mr Coutts could see that it had not been specified clearly to the operatives what the on-call payments were

specifically for. Whilst there was a general understanding that the First Man received a payment of £135 per on-call week, as opposed to the second man receiving a payment of £90, it had not clearly been explained to the operatives in any paperwork that the additional £45 received by the First Man was intended to cover 3 hours per week spent performing clerical duties. However, it was clear to Mr Coutts that this payment was intended to cover the additional duties and responsibilities and that it would be a fair payment for 3 hours of activity. Mr Coutts therefore upheld this aspect of the appeal and found that, historically, availability payments were not fully understood by the First Man to also be related to the expected number of hours of clerical duties. It was clear to Mr Coutts that the time spent performing administrative duties was working time and that the payments paid to the operatives covered this. However, he concluded that the communication to the operatives on this could have been improved so he upheld this aspect of the appeal.

53. Mr Coutts did not agree with the operatives' assertion that they were essentially working as an extension of the office. He concluded that the description that some of the operatives gave about having to provide sales quotes and perform the job that the office staff did during the day was not accurate. Mr Coutts found that the role done by the office staff during the day was very different to what the operatives did whilst on-call. The operatives were only doing a very small proportion of the administrative work that would otherwise be done by the office staff during the normal working day. The operatives were just doing what was required in order to pass something on to the office to be followed up during normal office hours or to provide the coordination which was required to enable them to get to site for the operational work which needed to be actually carried out during the on-call period.
54. In relation to compensatory rest and scheduling, Mr Coutts could see that there had been informal arrangements in place prior to the grievance which meant that the operatives were given appropriate rest when they were disturbed during an evening on-call, for example, by coming in late the next day or finishing early the following day to give them additional rest before the start of their next on-call period. However, following the complaints made at the grievance stage, Mr Carson had taken steps to formalise the respondent's compensatory rest arrangements. He had altered this so that the operatives would instead come into work for their day shift at 10:30am and finish at 7:30pm when on-call. This was an attempt to ensure that the operatives were guaranteed extra rest during on-call periods. However, the operatives did not like the way that this worked and Mr Coutts did not believe that this was necessary or that it addressed the issue that the operatives were raising. He therefore upheld this aspect of the grievance appeal. He explained in his outcome letter that there had been discussions around a new way of working in this regard and that this had been agreed upon between management and the operatives. The new arrangement was that the Clearway Alarm Receiving Centre ("ARC") would answer any out-of-hours calls to the respondent and would filter calls so that only those that required an on-call team to be deployed would be passed to the on-call team. The volume of calls to the First Man would, therefore, be significantly reduced. This measure had been in place since 30 September 2024. The First Man should therefore expect to receive and manage a small number

of call outs from ARC only and the time taken to answer and deal with these calls would be covered by the availability payment of £135. (Mr Coutts explained that any excessive hours worked, such as over 60 minutes in a week, should be raised immediately to managers and then would be paid at time and one third.) The on-call period would now start at 8:30am on a Sunday and finish at 8:30am the following Sunday, rather than 5:30pm on a Monday until 8:30am the following Monday. This limited the amount of disruption for those operatives who were on-call over a bank holiday weekend, which seems to be a particularly busy period. If a team was called out, then they had to take an 11 hour rest once they returned home. Their normal working day shift would not start until 11 hours rest had been achieved. Given that the ARC would now be answering the phone, generally the operatives would only be disturbed if there was an actual need to call them out to attend the premises. The arrangement was that, irrespective of the time that the crew reported for duty the following day, after a call out, their shift would finish at 5:30pm and they would be paid for a full day (even if they had not worked a full day because of the delayed start.) Crews would be paid for an 8 hour shift on a bank holiday when on-call and a day off in lieu would also be applied.

55. In relation to backpay, Mr Coutts upheld that the telephone and clerical duties that the operatives were asked to perform were in addition to the availability. While the First Man was being paid a higher amount to account for this, Mr Coutts felt it was appropriate to offer a degree of compensation to fully resolve matters, given what he had found regarding the communication to the operatives not being clear about the purpose of the various payments. Neither the operatives nor management had detailed records of the time taken on the telephone and it was clear to Mr Coutts that the number of calls and their duration could vary greatly. He explained that it was not possible to make individual calculations going back two years for each of the operatives and so he had reviewed the data from Mr Forster, Mr Gold and Mr Lancaster. The average time spent on clerical duties per week spent on-call varied from 1.3 hours a week up to 6.2 hours a week on average. Having considered the data, he decided that, as a goodwill gesture, backdated pay would be offered to the operatives at the maximum average hours submitted. This meant that the operatives would receive backdated pay, with an additional payment of 6.2 hours being paid for each week spent on-call. He felt this was a very generous proposal as it was significantly in excess of what the true average was and was at the upper end of the examples that he saw. Rather than restrict backpay to a two-year time limit (which he understood would normally be applied by the Employment Tribunal) he decided that, as a goodwill gesture, the operatives should be offered 6.2 hours per week spent on call as First Man dating back for their entire period of service with the respondent. This was offered in order to resolve matters on a full and final basis and each of the operatives was asked to sign a COT3 agreement to settle any claims in relation to this. Some of the operatives signed the COT3 but the claimants in these Tribunal proceedings did not. Finally, in relation to bank holidays, Mr Coutts found that these had not been correctly managed. Whilst the operatives would have received eight-hour additional pay for a day spent on-call on a bank holiday, he decided that they should also be offered a day off in lieu. He decided that the operatives would be backdated these additional days of leave by two years, back to 15 November 2022.

56. Enclosed with the grievance outcome letter were a number of appendices which consisted of the data that Mr Coutts had reviewed in order to make his decision. The first was the summary analysis (prepared by Erin Hodgson) of the data that had been provided by Mr Gold and Mr Forster. The second was the spreadsheet that Mr Coutts had arranged for Erin Hodgson to collate from the data submitted by Mr Gold. The third was a spreadsheet created by Erin Hodgson setting out the data submitted by Mr Lancaster via screenshots of WhatsApp messages. Finally, he included the data compiled by Mr Forster.
57. In line with the new agreed approach, Mr Coutts asked Mr Carson to produce a document setting out SEP's on-call arrangements moving forward. The respondent asked each of the operatives to sign the document so that the respondent would be clear on the on-call arrangements thereafter.
58. Once the grievance appeal outcome letter had been provided to the operatives, Mr Coutts drove to the Haslingden depot on 20 November 2024 to meet with the operatives and talk them through the outcome and his findings. He also invited Mr Green (even though he had not raised a grievance) as the outcome also affected him.
59. During the Tribunal hearing, the claimants challenged the reliability of the respondent's calculations in respect of the time spent on work activities during the on-call periods. They felt that the respondent's records did not reliably capture all of the work done by the claimants during the relevant periods. For their part, the respondents accepted that neither side had been able to produce 100% accurate and comprehensive data. Hence, they had worked to make decisions based on their own documents and those provided by the claimants. Where there was a difference between the two data sets, the respondent tended to take the figures which were most advantageous to the claimants, even where the respondent did not think that the claimants' records were particularly representative of the reality on a weekly basis. Hence, where the claimants' evidence suggested that they were answering calls for approximately 6.2 hours in a week (considerably more than the respondent's data suggesting 1.2 hours), then the respondent based its offer and appeal outcome on the claimant's figures, even though the respondent did not accept that this accurately reflected the reality of the situation.
60. There was also a difficulty where Mr Lancaster submitted evidence by way of reference to the WhatsApp messages that he sent. For example, he claimed that some messages to one client reflected 11.2 hours of work. However, I am satisfied that this is not a reliable estimate of the time spent on the work. A series of WhatsApp's sent over a period of time does not equate to a continuous period of work. Rather, it represents short bursts of work done during a longer period of time during which Mr Lancaster was free and able to do other things. He was not continuously engaged in work for the period starting with the first message and ending with the last message in the series. (This is what Mr Lancaster seems to have been suggesting given the number of hours claimed.) Mr Lancaster claimed for 101.65 hours on the phone but there was no evidence on which to

reasonably base such an assertion. This would amount to 14-15 hours on the phone per day during that on-call week. That is not credible, given the surrounding evidence in the case about the work done during normal shifts and the way that the on-call First Man duties were carried out. It would not be physically feasible.

61. In passing, I note that the document at page 408 of the hearing bundle shows a routine pattern of calls in a handwritten log. It does not provide details about the duration of each call or what work was required as a result. It also does not show whether the calls were inbound or outbound. However, it does give an indication of the 'batches' of calls in relation to specific incidents.
62. There was a particular limitation on the data available to the Tribunal. Whilst the 0330 out of hours number would be diverted to the particular mobile phone held by the First Man for that week, the individual operatives had direct phone numbers associated with their individual mobile phones. Hence, some calls could be made and received directly via the 07 mobile numbers rather than via the 0330 number. The phone records in the bundle related to the 0330 number and did not capture calls made direct to and from the mobile phone number. However, I am not able to draw the adverse inferences from this which the claimants request. The evidence suggests that the respondents requested the records for the mobile phones but were told that the mobile phone company no longer had them as they went too far back in time. The respondent was unable to obtain that data from the phone provider EE. The respondent disclosed what was available and, during the internal grievance, asked the claimants to provide their evidence in order to ensure that the respondent had as full a picture as possible. Both sides to the dispute had incomplete data and the respondent did what it could to provide as full a picture as possible. The gaps in the data were recognised by the respondent and, as a result, the respondent relied on calculations which were more favourable to the claimants than the respondent's own data when they made offers to the claimants about backpay.
63. I also note that some of the evidence which was available to the Tribunal was not available to the managers who decided the internal grievance or appeal. For example, Mr Coutts did not have the information at p357 and so took the claimants' case at its highest, based on the information which was available to him at the time, and which had been provided by the claimants (e.g. 6.2 hours.)

#### Sample weeks data for Mr Gold

64. The first sample week was from 5 to 12 June 2023. During that week Mr Gold attended 3 callouts to premises when on-call. Those call-outs were to premises within the 2 hour travel radius from home. The telephone records showed 47 incoming calls to the 0330 telephone number in 26 'batches' of calls. (As previously stated, a batch of calls refers to calls from the same number within a short space of time and of short duration.) The short duration of some of the calls suggests that they were not answered by the claimant. The total length of the calls recorded during this week was 35

minutes 42 seconds, and the average length of each call was therefore 1 minute 23 seconds. During the same week there were some emails sent by the claimant about the work that he was undertaking as First Man. There was one email relating to a phone call to the number from a keyholder. No further emails from Mr Gold following up on the phone call activity were produced in the hearing bundle for the Tribunal. The SmarTest app records highlight that Mr Gold only used the SmarTest app once that week. That said, there was some query about whose login details were used by the 3 operatives who are the claimants in this case. Mr Gold maintained that he could (and did) login to the SmarTest app using the credentials belonging to other operatives.

65. The second sample week for Mr Gold was from the 11 to 18 December 2023. The records indicated that Mr Gold logged on to the SmarTest app 4 times on 17 December but that there were no other logins to the app by the claimant during this week. The documentation also showed that during this week the claimant attended 3 callouts during on-call periods. The callouts all required visits to properties in Bolton, well within the 2 hour journey time. According to the records, the total length of the callouts was 2 hours and 30 minutes, with an average of 50 minutes spent at each visit. If the times were measured from picking up the Second Man, they did not take account of the time spent driving from Mr Gold's home to Mr Lythgoe to pick him up. However, maps within the bundle suggest that it should take only 15 minutes to drive from the claimant's address to Mr Lythgoe's address, albeit this would be increased somewhat at the start and end of the working day in line with prevailing traffic conditions. The 0330 call log indicates that there were 21 batches of calls during this sample week, and the total length of those calls was recorded as 24 minutes 53 seconds. Thus, the average length of a call this sample week was 1 minute 11 seconds. In terms of emails, the evidence showed about 7-8 emails sent by the claimant during this week. The claimant sought to suggest that a record of calls received at pages 623 and 731 indicated that he was working for one hour and 10 minutes. The respondent suggests that the waiting time between those calls was not working time as Mr Gold could do other things during that period. The Tribunal finds that the respondents characterisation of this time between calls is the more realistic representation of the reality.
66. The third sample week for Mr Gold was from 1 to 8 January 2024. This was a week involving a bank holiday. During this week Mr Gold attended 2 callouts. One to a property in Bolton and another to a property in Derby. The total time spent on those callouts (including travel) was 5 hours. Mr Gold did not accept this as it did not include the time to drive to pick up the Second Man. However, as the maps show, the distance between the two team members' homes was a short drive. During this week there were 27 incoming calls in 16 batches. The total duration of those calls altogether was 17 minutes 17 seconds with an average duration of each call calculated as 1 minute 5 seconds. There was one email in the bundle in relation to that sample week and no record of further emails sent by the claimant albeit he questioned the absence of further email correspondence. There were no SmarTest at logins in the claimant's name at all during that week, although Mr Gold indicated that he may well have used somebody else's login details. However, the Tribunal has to go off the best available evidence and cannot assume that there is further evidence which has not been provided to it to

take into consideration during these proceedings.

67. The next sample week for Mr Gold was the 12<sup>th</sup> to 19 February 2024. During this week he attended 3 call-out visits to premises. The visits were to Bolton, Birmingham and Warrington and the total length of the time on-call out visits, including travel, was 5 hours 45 minutes (not including the time to drive to pick up the Second Man). The average length of a call-out was therefore calculated as 1 hour 55 minutes. The call-out to Birmingham could have been passed to a third party at Mr Gold's discretion given that it was at the borderline of the 2 hour travel time limit on the operatives' obligation to attend the premises themselves. Mr Gold sought to suggest that he was obliged to go and gave answers in cross examination to this effect. However, the Tribunal notes that he did not explain this or address it in his Tribunal witness statement. During this week the claimant can be seen to have sent one email, which related to a phone call from the police asking the respondent to secure the property. The records show the claimant sending 12 emails that week together with one further message. During the sample week the records indicate that Mr Gold logged onto the SmarTest app and performed 2 tests using his own login credentials. Mr Gold queried whether there were other logins using different credentials during that week but the Tribunal is unable to go behind the evidence that has been presented in order to fill in any alleged gaps.
68. The next sample week for Mr Gold was 25 March to 1 April 2024. As this was Easter, there were 2 bank holidays during this on-call period. Despite this, Mr Gold was not required to attend any callouts to premises during that week. Partially this was because he was on sick leave for part of the week but during that period Mr Gold was to answer the phone and anything that required a visit would then be passed by Mr Gold to another operative. Email correspondence indicated that this arrangement was in place from Thursday afternoon through to Monday morning, at which point everything would be diverted to a different operative. During that week Mr Gold still answered the phone. He received 86 calls in 47 batches. The total recorded length of the calls was 1 hour 31 minutes and 17 seconds. This meant that the average length of a call was calculated at 1 minute 57 seconds. There was one long chain of emails between the claimant and others during this week. Effectively, Mr Gold drafted a 'log' email which he updated as he went along before sending it to the respondent. That email log shows 31 entries. However, Mr Gold suggests that there were more calls than that during the period in question.
69. The next sample week for Mr Gold was the 6 to 13 May 2024, which included one bank holiday. Mr Gold was required to attend premises for 5 callouts during that week. Three of the attendances were to the same address in Worsley and the other two were to addresses in Bolton. The total length of the callouts in that week was 7 hours including travel but excluding the time taken to pick up the Second Man. The average length of a call-out therefore amounted to 1 hour 24 minutes. During that week Mr Gold received 73 calls on the 0330 number, which were grouped in 39 batches. The total length of time on calls was recorded as 1 hour 25 minutes and 25 seconds and the average length of each call calculated at 2 minutes 11 seconds. During this week the claimant sent 16 emails and 3 messages. Some of those messages and emails related to contact from the police and

the Fire Brigade.

70. Based on the 6 sample weeks for Mr Gold, he was called out to attend premises an average of 2.66 times per week. The total call-out duration for Mr Gold was, on average, 4 hours 53 minutes per week and the average length of each individual call-out attendance was 1 hour and 37 minutes. On average Mr Gold received 30.5 batches of calls and, on average, the total length of time spent on calls per week was 56 minutes 53 seconds with the average length of each call being 1 minute and 43 seconds.
71. There were similarities between Mr Gold's averages and those of others within the workforce according to the respondent's own internal calculations [298]. This data overlapped with some of the sample weeks and indicated that Mr Gold was therefore consistent with the wider team.
72. Mr Gold sought to suggest that, in addition to dealing with genuine on-call work, the respondent expected him to do or complete standard work which other teams had been unable to complete during normal working hours. He suggested that the on-call team would effectively become a backup for other teams and complete the work that they had not managed to finish during their shift. However, he did not have any evidence to substantiate this assertion and, on balance, the Tribunal is not satisfied that this accurately reflects the respondent's requirement or expectation of its First Man during the on-call period. Rather, the Tribunal is satisfied that incomplete work would be rescheduled to be completed the next day during normal working hours save for the exception explained at paragraph 33 above.
73. Mr Gold asserted that management was very strict about on-call duties to the point of issuing verbal warnings to staff who fail to meet the on-call requirements. However, the reality was more nuanced. For example, Mr Lancaster was issued with a warning, not because he took too long to answer calls, but because he slept through the shift and did not return the missed calls.
74. The claimant sought to link an incident when he put incorrect fuel into the van with his excessive levels of fatigue as a result of working on-call. He only made this link months after the mistake was actually made. On balance, if the claimant had genuinely thought that there was mistake related to fatigue, then he would have raised this closer in time to the event rather than waiting until the respondent sought to claw back and deduct the cost of repairs from wages. In essence, the respondent sought to claim the cost of repair caused by the mistake from the claimant. The records show that the incident took place in December 2023, but the claimant did not make the link between the mistake and fatigue until March 2024, once the respondent had indicated that it would seek to claw back the cost of repair. Whilst the claimant suggested that he had made verbal complaints and had discussions about this before this date, this is not substantiated elsewhere within the evidence. In the final resolution of the dispute, the respondent took on board the fact that the claimant had been on-call for two nights before the incident in question and reflected this in the contribution that the respondent made to the cost of the repair. The claimant was asked to contribute £245.33, whereas the respondent would pay the remaining £555.33 for the repairs.

### Sample weeks data for Mr Lancaster

75. The first sample week for Mr Lancaster was from 30 May to 6 June 2022. During that period, he attended 8 callouts to site. All of those call-outs were to properties within the 2 hour drive radius. In total, Mr Lancaster spent 18 hours (including travel time) attending the callouts to site. The average length of the callouts that week was 2 hours 15 minutes. During that week Mr Lancaster received 88 calls through the 0330 number. These were received in 68 batches of calls. The total length of time recorded on these calls for the week was 52 minutes 56 seconds and the average duration of each call was 47 seconds. During this week Mr Lancaster sent 16 emails regarding phone calls he had received. The week contained two bank holidays. This may explain the increased number of callouts and attendances at sites during the week.
76. The second sample week for Mr Lancaster was from 11 to 18 July 2022. During that week Mr Lancaster attended 3 callouts to sites at Bolton and Stockport. All the site visits were within the 2 hour travel radius. He spent a total of 7 hours on callouts to site. The average length of each call out to site was 2 hours 20 minutes. During the week he received 80 calls to the 0330 number in 40 separate batches. The total length of time spent on these calls was 1 hour 32 minutes 58 seconds. The average length of each call was 2 minutes 19 seconds. During this sample week Mr Lancaster sent 20 emails and 5 messages
77. The next sample week for Mr Lancaster was 22 to 29 August 2022. This week included one bank holiday and the claimant attended 2 callouts to site. The total amount of time spent on those site visits was 3.5 hours. The average length of each call-out was therefore 1 hour 45 minutes. The callouts were all to premises within the 2 hour radius. During the week Mr Lancaster received 43 calls via the 0330 number in 22 batches of calls. The total length of time spent on calls was 48 minutes 44 seconds and the average length per call was 2 minutes and 13 seconds. There is no record of Mr Lancaster having sent any emails during this week. He did, however, send some WhatsApp messages.
78. The next sample week for Mr Lancaster was 27 February to 6 March 2023. During that week he was not called out to any site visits. He received 50 calls via the 0330 number in 26 batches of calls. The total length of time on call was 42 minutes and 30 seconds with an average length of call of 1 minute 38 seconds. Mr Lancaster is known to have sent 10 emails during that week. The records show that Mr Lancaster accessed the SmarTest app once during the week. Mr Lancaster also maintains that he did not always use his own credentials to log in to that app and he asserts that login records for other staff (such as Mr Green) should be checked to get a more accurate reflection of his activities during the week.
79. The next sample week for Mr Lancaster was 22 to 29 May 2023. During that week he attended one call-out to site which was to a property in Bolton. The total length of this call-out was 2 hours. During this week Mr Lancaster

received 28 incoming calls to the 0330 number in 19 separate batches. The total length of time spent on calls was 20 minutes 34 seconds with an average length of phone call of 1 minute 21 seconds. During this week Mr Lancaster can be seen to have sent 9 emails and one WhatsApp message. During the same week he is recorded as using the SmarTest app twice.

80. The final sample week for Mr Lancaster is 3 to 10 July 2023. He attended 2 callouts to site and spent a total of 4 hours on those visits. The average length of the site visits was therefore 2 hours. During the week he received 58 incoming calls to the 0330 number in 28 batches of calls. The total length of time spent on the phone calls was 47 minutes 16 seconds and the average length of call was 1 minute 41 seconds. During that week he sent 4 emails and 7 or so messages. During the same week he logged onto the SmarTest app 8 times according to the written records in the hearing bundle.
81. Mr Lancaster's overall averages indicated that when on call as First Man he attended an average of 2.66 call-out visits to site per week. The total length of callouts averaged out at 5 hours 45 minutes per week with the average length of each call-out to site at 1 hour and 43 minutes. On average, he received 34 batches of incoming calls per week with an average total time spent on phone calls of 50 minutes 50 seconds per week. The average length of call was 1 minute 40 seconds.

#### Sample weeks for Mr Lythgoe

82. Mr Lythgoe's first sample week was 28 February to 7 March 2022. He was called out to attend 4 site visits. He spent a total of 5 hours on site visits and the average length of a site visit was 1 hour 15 minutes. He received 79 calls via the 0330 number in 38 batches. The total length of the phone calls was 43 minutes 56 seconds and the average length of each call was 1 minute 9 seconds. The documents showed that the claimant sent 3 emails that week.
83. The second sample week for Mr Lythgoe was the 11 to 18 April 2022. This was the Easter weekend and included 2 bank holidays. He was called out to 5 separate site visits, all within the 2 hour radius. The site visits were longer and amounted to a total time of 8 hours 10 minutes for the week. The average length of a site visit was 1 hour 38 minutes. During the week he received 51 incoming calls in 41 batches. The total length of time recorded for the phone calls was 42 minutes 32 seconds and the average length of each call was therefore 1 minute 2 seconds. During the week he sent a total of 4 emails.
84. The next sample week for Mr Lythgoe was from the 15 to 22 August 2022. During that week he did not attend any callouts to site. He received 42 incoming calls in 23 batches. The total length of time spent on those calls was 28 minutes 41 seconds with an average call length of 1 minute 15 seconds. During the week he sent 4 emails.
85. The next sample week was from the 20 to 27 November 2023. During the

week he attended 3 callouts all within a 2 hour radius. The total amount of time spent on site visits was 3 hours, giving an average length of each call-out of 1 hour. He received 56 calls on the 0330 number in 31 batches of calls. The total length of time spent on the phone calls was 42 minutes and 11 seconds with an average length of call of 1 minute 22 seconds. During the week he sent 4 emails. He also accessed the SmarTest app on 4 occasions that week.

86. The next sample week was 22 to 29 January 2024. During that week he attended one call-out to site and the total length of the visit to site was 30 minutes. He received 44 incoming calls in 26 batches. The total duration of the recorded calls was 31 minutes 36 seconds with an average length of call of 1 minute 13 seconds. During the week he sent 4 emails and accessed the SmarTest app on 2 occasions.
87. The final sample week for Mr Lythgoe was from the 15 to 22 April 2024. He attended 2 callouts to site with a total length of time on call-out of 7 hours. The average length of each call-out visit was therefore 3 hours 30 minutes. He received 32 incoming calls in 20 batches. The total length of time spent on calls was 47 minutes 4 seconds. The average length of a call was 2 minutes and 21 seconds. Mr Lythgoe sent 1 email that week which related to a call-out which had already been covered elsewhere in the figures. Mr Lythgoe accessed the SmarTest app once during the week.
88. Overall, on average, Mr Lythgoe attended 2.5 callouts per week and on average spent 3 hours 57 minutes per week on visits. The average length of a visit was 1 hour 19 minutes. On average he received 30 batches of calls per week, and the total average length of calls was 39 minutes 20 seconds per week. The average length of a call was 1 minute 24 seconds.
89. Mr Forster's analysis of the phone call data, taking account of teams 1, 2 and 3 indicated that there was an average of 1.3 hours spent on the telephone per week when on call as First Man. In Mr Forster's table, where the data was based on emails rather than phone records, he attributed 10 minutes of working time per email sent.

#### Contractual provisions and other documents.

90. The claimants' written contracts of employment are silent as to any on-call work.
91. At interview the claimants were informed of the on-call work arrangements. Furthermore, the offer of employment indicated that they would be placed on an on-call rota [e.g. 328].
92. The respondent produced a 'toolbox talk' document addressing the processes to be used on-call [482]. However, the evidence from the claimants suggested that this was not issued to them. However, Mr Gold did accept that all calls taken during the on-call period should be followed up by an email from the First Man to the office summarising the actions taken or required.
93. From 1 August 2018 until 18 September 2022, the First Man was entitled to

be paid £90 per week as a fixed allowance and a minimum of £30 for callouts of up to 2 hours with any additional hours at the standard rate [315]. This is relevant to the first 3 sample weeks for Mr Lancaster and Mr Lythgoe.

94. From 19 September 2022 (relevant to the remaining sample weeks), the First Man was entitled to be paid £135 as a fixed allowance and a minimum of £45 (increased to £65 for weekend evenings/nights) for callouts up to 2 hours' duration, with any additional hours paid at time and a third [316]. (The document shows that there were some variations in relation to any additional callouts within the 2 hour period).

#### Restrictions on claimants

95. When the claimants were acting as First Man they needed to have, or be near, their work issued mobile phone to which the out of hours helpline number would divert. They could not drink alcohol when on-call so that they could work and drive safely. They did not need to be located at home but they did need to be within reasonably close proximity of the company van which could be used for call-out purposes. The van should be kept fully stocked including with their uniforms so that the First Man could pick up the Second Man on the way to any call-out.
96. The respondent's case was that the First Man could take the work van home with him and use the vehicle for personal errands during the on-call period. This meant that the First Man would retain easy access to the work vehicle during the on-call period and would not need to travel to the respondent's premises before attending a call-out.
97. The respondent says that it expected phone calls to be answered where possible. However, it was acceptable for calls to be missed if the First Man was in the middle of doing something or did not hear the call. It was permissible to let the call go through to voicemail and then call back. The respondent argued that there was no requirement that a First Man had to answer every single call first time. The respondent also argued that there was no particular set expectation as to when any messages would be returned, provided that the call was returned within a reasonable period of time. The respondent argued that no disciplinary action was taken against any security operatives for a slow response time.
98. The claimants' position in relation to answering calls was somewhat different to the respondent's. The claimants, particularly Mr Gold, argued that they were required to answer every call when it came in and they got verbal warnings if they did not answer calls or reply to customers. He maintained that they were 'the voice of the company.' For example, Mr Gold said that he believed that he needed to answer every single call to the mobile phone during an on-call shift.
99. There are two aspects of this for the Tribunal to resolve. First, did Mr Gold genuinely believe at that time that he was required to answer every single call which was received by the mobile phone when he was First Man? If so, who set that expectation or communicated that requirement to him? The respondent's position is that any such expectation or belief held by Mr Gold

was not, in fact, set by the respondent. Mr Brooks explained that he often played semi-professional football when he was employed as a Security Operative. His evidence was that, if he could not answer the phone as First Man, he would let it go to voicemail and respond to any missed calls when he had finished playing. Similarly, he would attend a call-out when he had finished what he was doing. He would take the call if he was free to do so or would follow it up as soon he became free.

100. Whilst I accept that the claimants wished to do a good job and strove, by and large, to answer all calls when they came in, I do *not* accept that this was a *requirement or expectation which was set by the respondent*. The respondent was not paying to man a 24 hour call-centre service. Rather, they were leaving one man to answer calls outside of business hours. It is not credible to conclude that they expected every call to be answered first time and for none of the calls to go through to voicemail. Nor is it credible to conclude that they expected all calls to be returned immediately. Such expectations do not match the staffing levels provided for by the respondent's structure or the expectations set out in its contracts with clients. In order to have a reasonable expectation that calls would be answered first time, 100% of the time, the respondent would essentially be requiring the operatives to perform a waking shift (i.e. not to go to sleep at night in case a call came in so as to eliminate the risk that a call would be missed.) That is not what the respondents required of the operatives and none of the operatives suggest that they were required or told to stay awake throughout the shift 'just in case' a call came in. I find that the claimants are confusing a *desire* to provide a good and efficient out of hours service, with a *requirement* to be awake all night to take every single call as it came in. Such a contractual expectation would not fit with a system where one person is taking the calls via a mobile phone. Rather, it would necessitate multiple call handlers allocated to the task at all times to ensure that service was uninterrupted and that no calls were 'dropped'. This fits more realistically with a call-centre service rather than an out of hours on-call phone manned by one person.
101. I find that the claimants' characterisation of the requirement to answer and return calls is not credible and reliable. I prefer the respondent's evidence. It is more reliable and is more consistent with both the business model/structure and the evidence as to what happened in practice during the period of time in question. The operatives were to do their best to answer calls first time and to return unanswered calls within a reasonable time. They were not expected to 'drop everything' each time the phone rang. I doubt whether the claimants actually believed that they were required or expected to drop everything and answer the call first time. I think it more likely that they understood that they were expected to use their best endeavours to answer the calls when they came in or to reply to calls and messages within a reasonable period of time thereafter. To the extent that they misunderstood what was expected of them, this misunderstanding was not attributable to the respondent's communications or instructions to them. It may have been due to their desire to 'do a good job.' In short, the claimants were *not* obliged to answer calls first time in the way that they asserted during the Tribunal hearing. The arrangement was much more flexible than they sought to suggest.

102. Mr Gold sought to suggest that the First Man did the full range of tasks carried out by the office staff during business hours. Cross examination showed that this did not accurately reflect the position. It would be more accurate to say that the First Man did those aspects of the office work which genuinely could not wait until normal business hours. The First Man then passed the work/job back into the normal work processes as coordinated by the office workers during normal business hours. This is the essence of an out-of-hours service. It does not provide the full range of services, just the minimum level of service which needs to be maintained outside normal business hours. To say otherwise is to exaggerate the position.

#### Types of call received

103. One of the most common types of call received by the First Man would be a call from an existing customer reporting an emergency/urgent problem. On receipt of the call, the First Man would be expected to use his discretion in order to decide if the matter was urgent and needed to be addressed during the out of hours period. Alternatively, he might assess that the call could wait until the next working day. If the site in question was more than 2 hours away, the First Man would contact a third-party contractor to deal with the job if it was categorised as urgent. This meant that the First Man would not have to attend premises more than 2 hours away.
104. If the job was within a two-hour driving radius and needed to be dealt with urgently out of hours, the First Man would contact the Second Man to arrange a pickup. They would then attend the site to carry out the work required. They would complete a form on site detailing the work done, which would then be sent to the office to be reviewed by the office staff the next working day.
105. In relation to alarms, the temporary alarms and CCTV installed by the respondent are monitored by ECMS. The First Man should only receive calls from ECMS in relation to alarms. If ECMS contacted the respondent's out of hours helpline the call would come through to the First Man's mobile phone. The First Man would assess whether it was the sort of alarm-related call that he was required to attend to using, amongst other things, the SmarTest app. If the primary key holder was addressing the situation there was nothing further for the First Man to do. If it was unclear if the primary key holder was dealing with the matter, the First Man should contact them, or email the office or escalate it to a manager if the primary key holder did not respond. If SEP was the primary key holder, the First Man may need to attend the site on a call-out, unless the First Man considered that the alarm was likely to be faulty. The Tribunal accepts that, as the respondent's social housing customers are local to the area, any such callouts should not be far away from the claimants' homes.
106. The First Man could also receive calls from emergency services. Whilst the emergency services might require assistance with, for example, securing a site, the First Man had no obligation to act on the instruction of the emergency services as the respondent's employee. Only the respondent's customers could give such an instruction as they were ultimately

responsible for paying the bills for the work carried out by the First Man, acting as the respondent's employee.

107. The First Man might also receive calls from new customers. The First Man was not permitted to provide quotes so should simply take the details from the prospective customer and pass this onto the office. Occasionally the First Man might receive calls from a member of the public to attend a site but they should simply take those details and pass this onto the office rather than responding during out of hours/on-call shifts.

#### Frequency/length of communications and sample week data

108. The claimants did not address the sample weeks in their Tribunal witness statements.
109. Based on the data considered above, during the sample weeks, Mr Gold carried out an average of 2.66 callouts per week. Likewise, during the sample weeks Mr Lancaster carried out an average of 2.66 callouts per week. During sample weeks, Mr Lythgoe carried out an average of 2.5 callouts per week. (The respondent had produced its own analysis of the callouts carried out by the team more widely from December 2023 to August 2024 and this showed an average of 2.26 callouts per week.) The average length of time of the call-out during the sample weeks for all claimants was about 1.5 hours. This included travel from and to the point at which they picked up and dropped off the second man. Based on information from the sample weeks, the average total length of time spent on callouts during an on-call period was 4 hours and 52 minutes. This would amount to the equivalent of 40 minutes per day actually attending a call-out. (The figures quoted in this paragraph relate to the claimants as a group rather than as individuals but are based on the claimants' individual data.)
110. The respondent made submissions in relation to "batches" of telephone calls. This was a reference to the groups of phone calls made within a short period of time. Very often those phone calls would relate to the same issue or job. Grouping them in batches therefore better reflected the experience rather than counting individual calls given that some of those calls will have been of short duration. For example, the raw data could show lots of calls over a week (e.g. p425), but a significant majority of those calls would be less than 60 seconds long and a significant number less than 20 seconds long. Therefore, the raw number of calls in a week did not, of itself, accurately reflect the amount of time that an operative would be working during the on-call period. Even Mr Gold's own logged description of the work done on a bank holiday logged the time at which certain activities were done but did not log the duration of the activities themselves. It would not be an accurate reflection to start with the first log and end with the last logged activity and to conclude that Mr Gold was at work throughout this period, not least because there were often gaps of more than an hour between logged activities (p353). Specific dates might also show an exceptional on-call day rather than a truly representative example. For example, bank holidays were often busier on-call than other weeks and so a bank holiday example was unlikely to provide an accurate guide to the work done on a 'standard' basis.

111. On average, the claimants received 31.5 “batches” of telephone calls throughout the week that they were acting as First Man. This is the equivalent of 4.5 batches of calls per day. The average length of phone call per batch of call was about 1.5 minutes. This reflects that they were relatively short individual phone conversations. The average total length of phone calls per week was 49 minutes. (The figures quoted in this paragraph relate to the claimants as a group rather than as individuals but are based on the claimant individual data.)
112. The data in relation to the claimants is broadly consistent with the figures produced by the respondent during the grievance process. During that process the calculation was that the average length of time spent by First Man (in Team 1,2 or 3) on the telephone was 1 hour and 18 minutes over an approximate 6 month period in 2024. The methodology utilised by the respondent for these purposes differed from that used by respondent’s counsel for the purposes of the Tribunal hearing. The respondent’s internal methodology was to consider each email sent by the relevant security operative in order to ascertain the number of incidents they referred to and assume that each matter would take 10 minutes to address.
113. The respondent submits that, allowing for a few additional minutes each week making and receiving calls on work issued mobile devices, the figures are similar whether looking at the sample data or the respondent’s internal calculations. The respondent acknowledges that the First Man’s phone calls on their work issued mobile devices cannot be accessed or ascertained precisely in respect of the sample weeks (i.e. calls directly to 07 mobile phone numbers). The respondent’s position is that such calls should be relatively limited. ECMS would make contact with the First Man via the out of hours helpline (i.e. the 0330 number). Further, customers would not know which individual was on-call and so it would not make sense for them to call the First Man using their direct mobile phone numbers, insofar as they had them. It would make more sense to call the out of hours number (i.e. the 0330 number) which would then divert through to the mobile phone held by the First Man for that week.
114. After receiving a call from the out of hours helpline, there could be follow-up calls that the First Man might make (for example, to a manager, primary keyholder, or third party contractor) from their work issued mobile phone. However, there should be no separate “incidents” that a First Man would have to address, which do not also show up on the phone records for the out of hours helpline as all enquiries should initially be received by that number, even if they are subsequently followed up using a direct mobile phone number (i.e. an “07” number).
115. The First Man is expected to update the office by way of an email with a summary of any next steps required in respect of the phone calls received. The claimants confirmed that they were familiar with this process. Emails indicate that on occasion further phone calls were made by the First Man. However, there were also emails during the sample weeks which make no reference to any additional phone calls made. The respondent asserts that from this information it is reasonable to assume that any such phone calls

did not take more than a few minutes each week. I have concluded that the respondent is likely to be right about this. If substantial time were spent on additional work, I would expect it to have been flagged up in the emails so that a reliable estimate of the additional time could be made. In the absence of such indicators in the documents, it is safer to assume only a few minutes per week were required.

116. In relation to written emails and messages for the sample weeks, Mr Gold sent, on average, 12 emails or messages to others about phone calls that he received. Likewise, Mr Lancaster sent on average 12 emails or What's App messages to others about phone calls received (messages sent about the same property in a short burst were counted as one message.) Mr Lythgoe sent, on average, only 3.33 emails to others about phone calls received. In general, the emails which were sent were relatively brief (1 or 2 lines), with some exceptions. It is reasonable to conclude that such short emails did not take longer than a couple of minutes to draft and then send and I make a finding to that effect.
117. The respondent submits that it is likely, on average, that administrative duties (i.e. work excluding attendance at site on a call-out) took no longer than 3 hours per week for the claimants. The respondent accepts that there may have been some heavier weeks but also that there would be lighter weeks. 3 hours of administrative work per week amounts to the equivalent of 25 minutes of administrative duties per day. Based on all the available evidence, I consider that the respondent more accurately reflects the actual position. The claimants' case significantly overstates the amount of administrative duties that the First Man would carry out during an on-call week. I find that, although the documentary record does not capture each and every activity during an on call week, the respondent has taken the data gleaned from the records and has made a sensible estimate of the additional time spent on this work which has not been otherwise captured in the documentary evidence. They have given a fair allowance for this undocumented activity. Thus, the amount of administrative work carried out by the First Man each week was much closer to 3 hours than to 6 hours per week.
118. Mr Gold alleges that the respondent withheld or did not produce all of the relevant emails that he sent, which would have given a more accurate picture of his workload during on call shifts. However, the respondent did say that they had produced the emails that he sent during the sample weeks. The claimant made very vague assertions that he remembered sending more emails but was unable to provide specifics. If the claimant genuinely felt that there was more documentation which would more accurately demonstrate his workload, then he should have been able to identify it with sufficient particularity so that the respondent could do an additional search for it. As it was, these assertions were made during cross examination when Mr Gold's position was challenged and he was confronted by respondent's counsel with the evidence demonstrating the actual work levels during on-call shifts.

## Responses to calls

119. As set out above, not all phone calls required a call-out. However, such phone calls might require some follow-up by the First Man. That follow-up work is set out in relation to the description of different types of call in the paragraphs above.
120. If attendance at a call-out was required, I am satisfied that the respondent had no expectation that the First Man had to stop what they were in the middle of doing in order to attend on site. There was a general expectation that the First Man would arrive on site within about 3 hours of a call-out being received. Given that there is a maximum driving radius of 2 hours for call out to be attended by the First Man and second man, this means that, in the most extreme case, the First Man had an hour to stop what they were doing and pick up the Second Man before driving to the premises that they were attending. That is, in effect, a worst case scenario as, very often, the jobs in question were significantly closer to the team than the maximum 2 hour drive. For example, if the call related to Bolton at Home, travel time would be minimal for Mr Gold and Mr Lythgoe as they both live in Bolton.
121. There is a small subset of customers where there is an expectation that the operative will respond within a set timeframe. This is set out in the contracts with those customers. For example, Community Gateway Association (in Preston) expected responses to alarm activations within 4 hours, and any works ordered within 8 hours of receipt of the order. Rochdale Borough Wide Housing Ltd had an ideal response time of 2 hours. However, given that the claimants live within 30 to 45 minutes' drive of Rochdale, this means that they would still have over an hour between receiving receipt of the call and having to set off to attend the premises. In relation to Bolton at Home, the understanding was that there would be a 3 hour response time. Recently obtained contractual documentation did refer to a response time of 30 minutes when an intrusion occurs. The respondent's position and evidence was that this provision had never actually operated in practice and would never have affected many properties given that only a small number of their properties had an SEP alarm installed. The respondent says that neither the security operatives nor management understood there to be a 30 minute response time for intrusions prior to disclosure of documentation for the purposes of these Tribunal proceedings. The witness evidence indicated that Bolton at Home had never enforced a 30 minute call out window. I am satisfied that the respondent's evidence on this point is correct. Whilst the written documents referred to a 30 minute response time, this did not operate in practice and was not enforced. Indeed, both operatives and managers are likely to have been unaware of the contents of the contractual document prior to the start of these proceedings. There is no evidence that Bolton at Home ever sought to enforce such a timescale.
122. It seems that there was no response time set out in the contractual documentation for Stockport Homes Ltd.
123. The respondent's position is that the response times are guidelines rather than strict limits. The respondent's evidence is that it was not aware of any complaints having been made by customers. Certainly, no Security Operative had been disciplined for taking too long to attend at a call out.

The Tribunal has no reason to dispute the respondent's evidence and finds that it is an accurate reflection of the reality.

124. Mr Gold sought to suggest that the First Man had to attend site as soon as possible and that there was an expectation that they would go to Bolton at Home call outs so quickly that he could not leave his home whilst on-call as First Man, if he was doing his job properly. He maintained that if he left his house during an on-call period, he would not be able to get to the call out within the expected time frame. He went further and said that it was not even a 30 minute call out time. Rather there was a requirement to attend ASAP (i.e. in less than 30 minutes.) He referred to himself and his colleagues as "the fourth emergency service". Again, I find that Mr Gold exaggerated somewhat. Whilst he may have wished to get to a property 'ASAP', there was no requirement to do so imposed on him by the respondent and no disciplinary action would be taken if he failed to do so. Indeed, the claimants did not refer to such a short arrival window during the grievance procedure. Furthermore, the contemporaneous documents (e.g. p170) refer to a 3 hour response time, not 30 minutes and certainly not less than 30 minutes. When questioned in relation to the Rochdale contract, Mr Gold did not readily accept the 2 hour indicative timeframe set out in the contract. In fact, he sought to say that he was told "ASAP" in relation to all of the named/specific client contracts. I do not accept Mr Gold's evidence in this regard.
125. In relation to responding to calls from the emergency services, I am satisfied that there was no specific time expectation imposed on the operatives to respond within a certain time limit if the police contacted them, for example. The respondent (and therefore the operatives) was not under any particular service level agreement in relation to the police or the emergency services. Thus, on-call personnel would try to respond to police calls as soon as reasonably practicable, but this was a feature of what might be described as their "civic responsibilities" as good citizens (to help the police), rather than the result of any requirement/expectation imposed by the respondent employer or the claimants' contracts of employment. The respondent was not contracted to provide emergency access to properties for the emergency services. Rather, they were more likely to become involved after the police had gained entry. The respondent's employees might attend to ensure that the property was made secure after the police had been on the premises. Mr Gold did not accept that the respondent acted in line with customer consent rather than police demands, even though it would be the client who would pay the costs associated with any operatives work on the premises. He did not accept that customer consent was required. Rather, he maintained that they "had to do it". Again, I do not find this evidence to be persuasive and prefer the respondent's evidence on this point.

#### Impact on claimant's personal time.

126. The respondent's case is that the claimants were free to do as they pleased whilst on-call, subject to the restrictions on them (which are set out in the preceding paragraphs.) If the claimants wanted to stay at home, they could have dinner, watch TV, read a book, garden or otherwise relax. If they

wanted to leave the house, they could do so, so long as they remained within close proximity of the work issued mobile phone and company van. The respondent's case is that if the claimants wanted to stay at home whilst they were on-call, that was a matter for them. It was their choice. It was not a requirement or expectation imposed on them by the respondent. The respondent also submitted that it was open to the claimants to miss a call whilst they were in the middle of a task, such as shopping, and return the call once they had completed that other task. By contrast, Mr Gold suggested that he could not even leave the house to walk his dog when he was on call. He did not accept that he could go to the supermarket for a full shop.

127. The respondents case is that the claimants were able to sleep during the evenings and nights that they were on-call. The respondent accepts that the claimant's sleep may have been interrupted by telephone calls from time to time as that is the nature of on-call work. However, the respondent witness evidence was that the respondent received the least number of calls from customers during the week between 12 midnight and 6am, as many of them are also asleep. The respondent relied on an example in relation to Mr Gold's sample week 5-12 June 2023. During that week only 2 out of 26 batches of calls were received between midnight and 6am. Mr Gold went to far as to suggest that Mr Carson advised him to get his sleep in the van whilst the Second Man drove the vehicle. This evidence lacked credibility.
128. Mr Gold accepted that the First Man could use the respondent's company van at home when they were on call. His later answers to questions were not consistent with this and pointed to insurance difficulties if the van was used to carry non-employees. He went on to suggest that employees were disciplined for using the van in their own time. There was no evidence of this. I am satisfied that the operatives were able to use the work van for personal purposes during on-call periods as it was in the respondent's interests for them to be able to respond quickly to any callouts to site. As this was the expected way of working, the respondent set up its vehicles accordingly (e.g. for insurance purposes and ensuring that the necessary equipment and uniforms could be kept in the van). The claimants could use the respondent's van for personal purposes whilst on call.

#### Compensatory rest periods

129. The respondent says that the extent to which the claimants were given compensatory rest is not properly relevant to the determination of what is working time. In any event, the respondent says that where any call-out and administrative duties do not exceed 4 hours between the end of a normal weekday shift and the start of the next, the First Man would still receive a minimum of 11 hours rest in total. The respondents case is that it would be rare for any call-out and administrative duties to exceed 4 hours and, if it did, the First Man would typically make up for any excessive hours on the following day. The respondent's case is that if the First Man was interrupted significantly overnight, he was encouraged to share that with the operations manager so that additional rest could be given, following which jobs would be moved around accordingly. If the First Man did not notify the office that they had been interrupted significantly at night until they arrived at the depot,

then they would be allowed to leave early so that they had some rest before their next on-call period started. Mr Brooks gave evidence that he usually sought to avoid giving early jobs to the on-call team so that they could have extra rest, if required.

#### Impact of grievance outcome/grievance appeal outcome

130. As part of the grievance process the respondent sought the views of the claimants and other affected employees in order to explore improving the on-call system. Some changes were made to the on-call arrangements as a result of the grievance and consultation process. The respondents out of hours helpline was redirected through the Alarm Receiving Centre ("ARC") of Clearway Group Limited, a company which acquired the respondent in late 2023. This was not a resource that the respondent had access to prior to its acquisition given that it was a smaller business. The respondent maintains that from 30 September 2024, ARC have fielded initial calls to the out of hours helpline rather than these being diverted to the First Man's work issued mobile phone. This has, as a consequence, reduced the level of disruption during the on-call period. Using this system, the First Man is generally only contacted if they need to attend the site or if their opinion is needed regarding a job or incident.
131. The on-call period has also changed so that it runs from Sunday to Sunday as set out above. This was done at the request of the claimants in order to lessen the impact of the bank holiday weekends. If the First Man is disturbed during the night and needs to attend site, then they are not required to come into work until they have had 11 hours of continuous rest. They are still, however, permitted to finish their normal day shift at 5:30pm.
132. An offer was made to the claimants during the grievance appeal process to pay them on the basis that they had undertaken 6.2 hours of administrative duties as First Man backdated to the start of their employment, paid at time and a third. The figure of 6.2 hours was based upon Mr Gold's handwritten call logs (unless it could be identified that the call lasted less than 10 minutes). The respondent says that it selected this figure as it was the "most favourable" to the claimants and was done as a "goodwill gesture" to bring the dispute to a close. The respondent says it did not select this figure because it represented what the business felt was an accurate figure for the work done. Nor was the respondent making an admission of liability. In any event, the Tribunal understands that this was an offer made by the respondent to the claimants rather than a calculation of the number of hours worked but underpaid, based on the available evidence. The Tribunal has not considered this offer to be a concession by the respondent but has, instead, made its own assessment of the correct factual position, based on the evidence presented to the Tribunal.

## **THE LAW**

### **The Working Time Regulations**

133. The concept of 'working time' is relevant under the Working Time Regulations 1998 ("WTR") in respect of the rules on the average maximum working week, night working, rest periods and rest breaks.

134. "Working time" is defined by regulation 2 of the Working Time Regulations 1998 as:

"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;"

[bold type added for emphasis].

As set out above in bold type, there are three relevant elements for the purposes of this case. All three requirements must be satisfied in order for a period to constitute working time: Edwards and Morgan v Encirc Ltd [2015] IRLR 528, per Judge Eady (as she then was) at paragraphs 21 and 53. The worker must be working *and* at the employer's disposal *and* carrying out his activities or duties.

135. In respect of time spent by workers on-call or on standby, in general:

- (1) Time spent on-call or on standby at a place or narrowly defined place determined by an employer is likely to be regarded as working time in its entirety;
- (2) Time spent on-call or on standby where the employer does not determine the place where it is spent but in relation to which constraints imposed on the worker have an objective and very significant impact on their opportunity to pursue personal and social interests is also likely to be regarded as working time in its entirety.

136. In SIMAP v Conselleria de Sanidad y Consumo de la Generalidad Valenciana [2000] IRLR 845, the ECJ considered the case of doctors in primary healthcare teams who were required to be present at the relevant medical facility whilst on call, but did not actually perform any medical duties in between each call out. They were free to engage in whatever activity or inactivity they wished, and which was feasible whilst remaining on premises. The CJEU held that in these circumstances, all three of the conjunctive requirements for working time were satisfied. However, if the doctors were on call and required to be contactable, but not required to be at the medical facility, the third requirement was not satisfied, except whilst they were actually called on to perform their services. Only then would they be regarded as carrying out their activities or duties.

*"In the present case, the fact that doctors are obliged to be present and available at the workplace with a view to providing their professional services means that they are carrying out their duties. However, where doctors are on call by being contactable without having to be at the health centre, only time linked to the actual provision of primary care services must be regarded as "working time" within the meaning of the Directive. In that situation, 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."*

137. In Blakley v South Eastern Health and Social Services Trust [2009] NICA 62, an estate officer had responsibility for the maintenance and repair of buildings, plant and equipment at the Trust's premises. He worked under a rota which required him to be on call for a continuous seven day period once every six weeks, for which he received an additional fixed payment, together with a payment for the time he worked on callouts. He was not required to be on the employer's premises or at his home during the period of call but had to be available to deal promptly with any call. The response to a call (of which there were on average over 40 in each 7 day period) could vary from directing a tradesman on site to attend, calling out a tradesman, dealing with the matter himself or taking no action at all. When on call Mr Blakley was provided with a pager, a mobile phone and laptop computer containing an emergency manual. He had records to complete with details of calls received and action taken. On receiving calls during the on-call hours the following options were open to him: - taking no action if the matter was of a minor nature; arranging an appropriate tradesman to attend the site and deal with the problem; arranging for a tradesman already on the site to attend to the problem; and attend the site himself. The Northern Ireland Court of Appeal held that the employee was to be treated as working only when he was called on to actually provide services during the period of call. Whilst there were some constraints on his freedom of action whilst on-call, these were not absolute. His situation was what the CJEU described in SIMAP as "*being contactable*" without any obligation to be present and available at the workplace or other location designated by the employer.

138. In Ville de Nivelles v Matzak [2018] IRLR 457, the CJEU held that time spent by firefighters on standby at home during which they could be required to report for work within 8 minutes was working time. The Court held that the obligation for the firefighters to remain physically present at the place determined by the employer (in this case, at their homes) and the constraints imposed on them in terms of location and being able to reach work in 8 minutes, significantly restricted their ability to devote themselves to their personal and social interests. The headnote to the case report states:

*(e) Under art 2, stand-by time which a worker spends at home with the duty to respond to calls from his employer within eight minutes, very significantly restricting the opportunities for other activities, must be regarded as 'working time'. Following case-law, the determining factor for the classification of 'working time' is the requirement that the worker be physically present at the place determined by the*

*employer and to be available to the employer in order to be able to provide the appropriate services immediately in case of need. Those obligations, which make it impossible for the workers concerned to choose the place where they stay during stand-by periods, must be regarded as coming within the ambit of the performance of their duties. The situation is different where the worker performs a standby duty according to a standby system which requires that the worker be permanently accessible without being required to be present at the place of work. Even if he is at the disposal of his employer, since it must be possible to contact him, in that situation the worker may manage his time with fewer constraints and pursue his own interests. In those circumstances, only time linked to the actual provision of services must be regarded as 'working time'.*

*In the present case, Mr Matzak was not only to be contactable during his stand-by time. He was obliged to respond to calls within eight minutes and required to be physically present at the place determined by the employer. That place was his home and not, as in previous cases, his place of work. The obligations and geographical and temporal constraints were such as to objectively limit the opportunities which a worker in his circumstances had to devote himself to his personal and social interests. His situation differed from that of a worker who, during his standby duty, had simply to be at his employer's disposal inasmuch as it had to be possible to contact him. In those circumstances, the concept of 'working time' in art 2 applied to a situation in which a worker is obliged to spend standby time at his home, to be available there to his employer and to be able to reach his place of work within eight minutes.*

139. In DJ v Radiotelevizija Slovenija [2021] IRLR 479 and RJ v Stadt Offenbach am Main (2021) C-580/19, the respective employers did not require the worker to be present at a particular location during standby, but in each case the worker argued that their time on standby should be regarded as working time in its entirety given the impact of the constraints placed on them during that time. In particular:

- (1) DJ worked at two television transmission centres in the Slovenian mountains. During standby he was not required to remain at the transmission centres but had to be contactable by telephone and able to return within one hour. In practice, the geographical location of the transmission centres (one in particular) meant that DJ had to stay at the centres when on standby (in accommodation provided by his employer) and had limited opportunities for leisure activities;
- (2) RJ was a division commander and firefighter with the Offenbach am Main fire service. During standby he had to be reachable at any time and have his service uniform and service vehicle (provided by his employer) available. On receiving a call, RJ had to decide whether to attend the scene of an incident or go to his workplace. He had to be able to reach the Offenbach am Main town boundary in his uniform and service vehicle, using traffic regulations privileges and rights of priority, within 20 minutes (assuming average traffic density and normal road and weather conditions) of receiving a call.

140. The CJEU did not reach a decision in either case but provided guidance. The court held that working time covers the entirety of periods of standby if the constraints imposed on a worker “*objectively and very significantly*” affect their ability to freely manage their time during which their services are not required and use that time for their own interests. Conversely, when there are no such constraints, only the time linked to the provision of work actually carried out during a standby period constitutes working time. The headnote stated:

*“The concept of ‘working time’ covers the entirety of periods of standby time, including those according to a standby system, during which the constraints imposed on the worker are such as to affect, objectively and very significantly, the possibility for the latter freely to manage the time during which his or her professional services are not required and to pursue his or her own interests. Conversely, where the constraints imposed do not reach such a level of intensity and allow him or her to manage his or her own time, and to pursue his or her own interests without major constraints, only the time linked to the provision of work actually carried out during that period constitutes ‘working time’.”*

The case report repeatedly refers to ‘objective and very significant constraints’ on the worker’s freedom to spend his time as he wishes.

141. The Court held that only the constraints that are imposed on the worker by law, a collective agreement or by the employer are relevant. By contrast, organisational difficulties that a period of standby may generate for the worker which are not the result of such contracts but are the consequence of “*natural factors or of his or her own free choice*” may not be taken into account. For example, the fact that a worker’s home is far away from the workplace and that they had to stay in a place that had limited leisure opportunities is irrelevant.
142. The Court held that it is necessary to have regard to the time during standby spent by the worker in returning to work. A period of standby which allows a “*reasonable time period for [a worker] to resume [their] professional activities*”, and which in turn enables them to “*plan [their] personal and social activities*”, would not constitute working time. Conversely, a period of standby time during which a worker is “*required to return to work [within] a few minutes*” must, in principle, be regarded as working time in its entirety because the worker is strongly dissuaded from planning any kind of recreational activity, even of a short duration. The Court also held that, where appropriate, it may assist to consider the average frequency of the calls made upon the worker during standby. If a worker is called on numerous times during a period on standby, they have less scope freely to manage their time during those periods of inactivity. If a worker is called on frequently and, as a general rule, the time they then spend working is not of short duration, the entirety of their standby will be working time. The headnote to the case report states:

*“The average frequency of the actual services that are normally carried out by that worker during each period of standby time must be taken into account. Thus, if the worker is, on average, called upon to act on numerous*

*occasions during a period of standby time, he or she has less scope freely to manage his or her time during those periods of inactivity, given that they are frequently interrupted. That is all the more true where the activity required of the worker, during a period of standby time, is of a non-negligible duration. It follows that, if the worker is, on average, frequently called upon to provide services during his or her periods of stand-by time and, as a general rule, those services are not of a short duration, the entirety of those periods constitutes, in principle, 'working time'."*

143. Certain obligations under the WTR (such as the requirement to provide daily and weekly rest periods) are disapplied in 'special cases' under regulation 21 WTR. Instead, workers are entitled to a period of 'compensatory rest'
144. It is relevant to consider whether any of the exceptions in regulation 21 apply in this case. The relevant parts of regulation 21 state:

**21. Other special case**

*Subject to regulation 24, regulations 6(1), (2) and (7), 10(1), 11(1) and (2) and 12(1) do not apply in relation to a worker—*

*(a) ...*

*(b) where the worker is engaged in security and surveillance activities requiring a permanent presence in order to protect property and persons, as may be the case for security guards and caretakers or security firms;*

*(c) where the worker's activities involve the need for continuity of service or production, as may be the case in relation to—*

*(i) services relating to the reception, treatment or care provided by hospitals or similar establishments (including the activities of doctors in training), residential institutions and prisons;*

*(ii) work at docks or airports;*

*(iii) press, radio, television, cinematographic production, postal and telecommunications services and civil protection services;*

*(iv) gas, water and electricity production, transmission and distribution, household refuse collection and incineration;*

*(v) industries in which work cannot be interrupted on technical grounds;*

*(vi) research and development activities;*

*(vii) agriculture;*

*(viii) the carriage of passengers on regular urban transport services;*

*(d)...*

*(e) where the worker's activities are affected by—*

*(i) an occurrence due to unusual and unforeseeable circumstances, beyond the control of the worker's employer;*

*(ii) exceptional events, the consequences of which could not have been avoided despite the exercise of all due care by the employer;  
or*

*(iii) an accident or the imminent risk of an accident;*

(f) ...

145. Regulation 21(b) applies where a worker is “*engaged in security and surveillance activities requiring a permanent presence in order to protect property and persons*”. The examples given are “*security guards and caretakers or security firms*”. The provision can apply in other scenarios: Union Syndicale Solidaires Isere v Premier Ministre [2011] IRLR 84.
146. The focus must be on whether the worker’s activities, not the employer’s activities as a whole, require a permanent presence: Hughes v Corps of Commissionaires Management Ltd (No.2) [2011] IRLR 915. The key question is whether there are objective reasons why the work could not be organised so as to enable workers to take the necessary rest breaks: Hughes, per Elias LJ at [23].
147. Regulation 21(c) applies where the worker’s activities involve “*the need for continuity of service or production*”. Numerous examples are given of the types of work activity that may involve such continuity (such as emergency or prison services), although the list is not exhaustive. Again, it is the worker’s activities, not the work carried out by the employer, that must involve the need for continuity: Gallagher v Alpha Catering Services Ltd t/a Alpha Flight Services [2005] ICR 673, CA.
148. Regulation 21(e) applies where the worker’s activities are affected by: (i) “*an occurrence due to unusual and unforeseeable circumstances beyond the control of the employer*”; (ii) “*exceptional events, the consequences of which could not have been avoided despite the exercise of all due care by the employer*”; or (iii) “*an accident or the imminent risk of an accident*”.

### **The National Minimum Wage provisions.**

149. The National Minimum Wage Regulations 2015 (“NMWR”) define “time work” thus:

#### **30. The meaning of time work**

*Time work is work, other than salaried hours work, in respect of which a worker is entitled under their contract to be paid—*

- (a) by reference to the time worked by the worker;*
- (b) by reference to a measure of output in a period of time where the worker is required to work for the whole of that period; or*
- (c) for work that would fall within sub-paragraph (b) but for the worker having an entitlement to be paid by reference to the period of time alone when the output does not exceed a particular level.*

The same regulations define “unmeasured work” as follows:

#### **44. The meaning of unmeasured work**

*Unmeasured work is any other work that is not time work, salaried hours work or output work.*

150. Under regulation 17 NMWR, the hours of work in a pay reference period are the hours worked, or treated as worked, by the worker as: (1) salaried hours work; (2) time work; (3) output work; and (4) unmeasured work. Broadly speaking, the type of work being performed is determined by examining the way the worker is paid, which is usually evident from the contractual arrangements. It is not possible to do more than one type of work at the same time under the contract. If two different types of work are done under the same contract, then the overall arrangements are looked at as a whole.
151. Under regulation 21(1)-(5) NMWR, ‘salaried hours work’ is work done under a worker’s contract: (a) for which the worker is entitled under their contract to be paid an annual salary plus any performance bonus or salary premia; (b) the worker is entitled to be paid that salary in respect of a number of hours in a year (the basic hours), whether those hours are specified or ascertained in accordance with their contract; (c) the worker is not entitled under their contract to any other payment in respect of the basic hours; and (d) the worker is entitled to be paid in equal instalments.
152. Under regulation 30 NMWR, ‘time work’ is work, other than ‘salaried hours work’, in respect of which a worker is entitled under their contract to be paid: (a) by reference to the time worked; (b) by reference to a measure of output in a period of time where the worker is required to work for the whole of that period; or (c) for work that would otherwise fall into category (b), but for the worker having an entitlement to be paid by reference to the period of time alone when the output does not exceed a particular level.
153. Department for Business and Trade Guidance (‘Calculating the minimum wage (Working hours for which the minimum wage must be paid)’<sup>1</sup>) indicates that any worker whose pay goes up and down depending on the number of hours they work is likely to be a time worker. HMRC describe what is not time work (see NMWM07050<sup>2</sup>). It states that if a worker is paid the same amount each month, even though the number of days they work may vary, they are not being paid in relation to the time worked and so cannot be performing time work.
154. Under regulation 36 NMWR, ‘output work’ is work, other than ‘time work’, in respect of which a worker is entitled under their contract to be paid by reference to a measure of output by the worker (i.e. the number of pieces made or processed, or tasks performed).
155. Under regulation 44 NMWR, ‘unmeasured work’ is any other work that is not ‘time work’, ‘salaried hours work’ or ‘output work’. It is a residual category. Unmeasured work is characterised by the absence of relationship between the work being performed, the time being spent performing the work and the amount of payment. HMRC takes the view (see NMWM07110<sup>3</sup>) that a worker who is paid a fixed monthly amount regardless of the number of working days in the month is an unmeasured worker.

---

<sup>1</sup> <https://www.gov.uk/guidance/calculating-the-minimum-wage/working-hours-for-which-the-minimum-wage-must-be-paid>

<sup>2</sup> <https://www.gov.uk/hmrc-internal-manuals/national-minimum-wage-manual/nmwm07050>

<sup>3</sup> <https://www.gov.uk/hmrc-internal-manuals/national-minimum-wage-manual/nmwm07110>

NMWR: 'working time'

156. All time spent actually working should be taken into account as working time for the purpose of determining compliance with the National Minimum Wage provisions. However, for 'salaried hours work' and 'time work', there are special provisions relating to on-call or standby time, under regulations 27 and 32 NMWR respectively. Certain periods of time that would otherwise not be counted are included, subject to important exceptions. The words of the provision for salaried work (regulation 27(1)(b) and 27(2)) mirror those for time work (regulation 32.)
157. Under reg.32 NMWR, 'time work' includes hours "*when a worker is available, and required to be available, at or near a place of work for the purposes of working unless the worker is at home*" (emphasis added). Further, hours when a worker is "available" only include hours "*when the worker is awake for the purposes of work, even if a worker by arrangement sleeps at or near a place of work and the employer provides suitable facilities for sleeping*" (emphasis added). The two phrases which are underlined are referred to as the 'home' and 'sleep in' exceptions.
158. The natural reading of the words in regulation 32 would tend to suggest that time spent on-call/standby at or near the workplace is counted as work unless:
- (1) The employee is spending the on- call/standby period at his **home** (in which case it is not work) or
  - (2) The employee is on call but **not awake** for work (even if the employee is sleeping in the workplace or the employer's sleeping accommodation). In such cases the on-call/standby period is not work either.
159. In British Nursing Association v Inland Revenue [2002] EWCA Civ 494, the Court of Appeal noted that the 'home' and 'sleep in' exceptions only apply if the worker "*is available for the purposes of working*"; they do not apply if the worker is actually working. It held that nurses providing a night service by telephone from home were doing 'time work' through their shift and were not merely on call. During the day, the service was provided from the employer's premises but the overnight calls were redirected to a worker's home. The work done at night was identical, except that the worker could relax at home when not answering the telephone. The Court of Appeal held the workers were working at all times, as no one could argue that during the day when they were at the employer's premises they were not working unless engaged on a telephone call.
160. However, in Royal Mencap Society v Tomlinson-Blake [2021] IRLR 466, the Supreme Court unanimously agreed that this finding in British Nursing was wrong (see [58]; [78]; [83]). Lady Arden, giving the leading judgment, held that the two concepts of 'working' and 'being available for work' must be kept distinct (see [57]). The claimants in that case were not entitled to claim that they were 'available for work' when asleep but awaiting calls. It would be anomalous if the regulations had the effect that the employee who was required to be available for work at home, but not actually working there, could be treated as working during the time that they were expected to

sleep, while the sleep-in worker away from home was only entitled to have the time actually spent working taken into calculation for NMW purposes (see [58]).

161. Lady Arden explained that the better view is that the effect of the 'home' exception means that an employee is not working but only available for work (if they are expected to sleep during their shift at home and only to be woken infrequently). The further effect of the 'home' exception is that the worker is outside the extended meaning of work (under the predecessor provision of regulation 32 NMWR) and therefore has to show that they are actually working for that time to be included. They can do this when they are actually performing duties as part of their employment, which puts them in the same position as the sleep-in worker who has to be available away from home. In short, if the employee is not actually performing work tasks, they have to be awake for the purposes of being able to do some work tasks and they must not be at home (i.e. they need to be awake and not at home.) Otherwise, the standby period does not count as work.

## **CONCLUSIONS ON THE LIST OF ISSUES**

### **Section 1: Findings of fact**

162. As can be discerned from the factual narrative above, the Tribunal finds that, on the whole, the evidence provided by the respondent in terms of documentation and witness evidence was more reliable than that of the claimants. The respondent concedes that there are gaps in the available record and has done its best to supplement the available information by extrapolating from the available documents and witness evidence. Whilst this is not a perfect situation, it is the appropriate way to approach the factual disputes in this case and provides a rational underpinning for the Tribunal's findings of fact in this case.
163. To the extent that the claimants suggest that the respondent has withheld documentation (or not provided information which was available and should have been retained), the Tribunal finds that the respondent has provided all available information and there is no evidence to suggest that it has failed to comply with its duty of disclosure. The respondent's witnesses have done their best to assist the Tribunal and the Tribunal is not persuaded that they have deliberately withheld information. It has to be acknowledged that some of the phone data is no longer available but that is attributable to the retention policies of the telephone provider, rather than to any fault on the part of the respondent. The claimants criticise the respondent for not seeking to preserve that evidence at an earlier stage. However, they do that with the benefit of hindsight. The importance or relevance of such extensive phone records may be apparent once the case comes to a Tribunal hearing, but it may not have been as apparent at an earlier stage, when the phone provider could have been required to preserve the documentation. Furthermore, in its evidence to the Tribunal, the respondent has sought to compensate for the missing data by the use of estimates and calculations. In general, the respondent is more likely to have overestimated the amount of time/work unaccounted for in the documentation (to the claimants' benefit) rather than to have underestimated it. There is a limit to the extent

that the Tribunal can fill in an evidential gap without straying too far from the available evidence and information. Consequently, the conclusions to which I have come are based firmly on the available evidence and documentation. I have sought to apply a reasonable methodology to give credit to the claimants for any work not captured by the records in the documents.

164. In general, the Tribunal found the claimants' witness evidence of less assistance. Where they sought to contradict the evidence provided by the respondent, they were not able to provide documentation to substantiate their position. Further, some issues raised by the claimants were raised for the first time in response to questions in cross examination. The witness statements did not address the sample weeks (as was clearly intended by the case management orders in the case.) Hence, much of the documentary evidence in this case was not addressed by the claimants in their statements.

What were the contractual provisions relating to being on-call/manning the helpline?

165. The claimants' written contracts of employment were silent in relation to on-call work. However, covering the on-call rota was part of the contractual obligations placed on the claimants when they agreed to start work as security operatives. They knew, upon receiving the offer of employment and following their interview for the post, that they would be required to participate in the on-call rota. The on-call rota required the claimants to work as First Man in a one in six week pattern, albeit with flexibility which would enable them to swap their on-call weeks with each other, so long as cover could be found for the on-call shifts. In fact, the evidence suggests that claimants could (and did) withdraw from the rota altogether at various stages during their employment with the respondent. The terms and conditions in relation to the on-call element of the claimants' role were implied into the contract of employment through custom and practice.
166. From 1 August 2018 to 18 September 2022 the First Man was entitled to be paid £90 per week as a fixed allowance and a minimum of £30 for callouts up to 2 hours with any additional hours at the standard rate. From 19 September 2022 the First Man was entitled to be paid £135 as a fixed allowance and a minimum of £45 (or £65 for weekend evening/night's) for callouts up to 2 hours with any additional hours at time and a third (with some additional variations for any additional callouts within the 2 hour period).
167. The First Man took calls on the respondent's out of hours phone line. They took responsibility for organising callouts to site to complete the required work and they also had responsibility for administrative tasks associated with this out of hours work. On occasion, they would be part of the team going out to a customer's site to do the relevant work. They would organise to pick up the Second Man before proceeding to the site in question. They were responsible for keeping a record of the work done and for liaising with other stakeholders and keeping the respondent's office staff updated as to what had happened during the out-of-hours period.

What general restrictions were placed on the claimants (whether contractually or otherwise) during the period, irrespective of the calls that might come in e.g. as to their location, activities (for example, refraining from alcohol) etc.?

168. The restrictions placed on the First Man during an on-call period were that they needed to be near the respondent's mobile phone or have it with them. This was the phone which would receive the calls from the out of hours number. The First Man would answer those phone calls or, if the call was missed initially, reply to any missed calls and follow up on any voicemail messages left on the out of hours line.
169. The claimants had to abstain from alcohol when they were on call so that they could work and drive safely, if required. They did not need to stay at home and there was no particular restriction on where they were located during the period, so long as they could get to the company van within a reasonable timeframe so that they could attend any necessary callout visits within the relevant timeframe. To that end, they were entitled to use the company van for personal use during an on-call period. It was expected that they would take the work van home with them so that they could use it for work without attending the respondent's premises first. This freed them up to leave their homes as they could keep the van with them, stocked with the relevant equipment and their uniforms, so that they could attend any necessary callout without having to go home or to the depot beforehand. This reduced the restrictions on their freedom of movement during an on call shift. It meant that they were, by and large, free to choose how they spent their time during an on-call period. They were basically at leisure unless and until a call came in which required some action on their part.
170. There was no restriction on how the claimants spent their time during an on-call shift so long as they were able to comply with the company's expectations as to how calls would be answered and other work tasks performed. They could plan leisure activities, carry out day-to-day tasks, such as shopping, and could socialise, stay at home, or sleep/rest.
171. The First Man needed to have the company mobile phone easily accessible to him during an on-call period. If calls came through to that mobile phone, the First Man was expected to answer them, where possible. That was, after all, the purpose of them being on call and being provided with the phone. However, there was a good degree of flexibility about call answering. They were expected to answer calls as they came in where reasonably practicable. However, it was reasonably foreseeable that they would be engaged in other tasks when a call came in. They were not required to stop what they were doing in order to take the call. Likewise, calls could come in whilst they were asleep and the First Man might not be able to answer them immediately before they went through to voicemail. The respondent's expectation was that a certain number of calls would not be picked up immediately and that the customer would leave a message on the voicemail facility. Hence, the operative would be expected to pick up the voicemail when they had finished what they were doing, listen to it, and then make a decision as to the appropriate next steps. They would be expected to

respond to phone calls and call the customer back but this did not need to happen immediately so long as it happened within a reasonable timeframe. This was compatible with the expectation that the First Man would be doing other things during an on call shift and would not be able to take every call when it came in (e.g. if they were playing football).

172. It is most certainly not the case that the First Man had to answer every single call, as the claimants sought to suggest. There was no stated timeframe within which missed calls should be returned. It was left largely to the First Man's discretion. There is no evidence that anybody was disciplined or taken to task for a slow response or breaching some stated deadline. The only evidence before the Tribunal related to a reprimand being issued for a failure to respond to a call altogether (i.e. a complete breach of the requirement to respond to calls rather than a breach of any timeliness requirement). A failure to respond to the call altogether was a complete failure to carry out the contractual responsibilities of the First Man, rather than a failure to act within relevant applicable timeframe.
173. To the extent that the claimants may have felt that they needed to answer every single call received immediately (or reply to it immediately) that was not an expectation or requirement placed upon them by the respondent. The respondent did not communicate any such expectation to the claimants. Thus, operatives could go and play football and could let calls go through to voicemail during a match and respond when they had finished playing.

What types of calls did the claimants receive? What was the general frequency of these calls, and how much did this vary? What actions would be required in response, and how might that vary? What administrative follow-up was required, and how might that vary?

174. The claimants could receive call calls on the "field side" or the "alarm side." On the field side, the most common type of call was a call from an existing customer reporting a perceived emergency, for example when a property had been broken into or access gained by the emergency services. The First Man would use his discretion to decide if the matter was urgent and needed to be addressed out of hours or could wait until the next working day. If attendance on site was required but the site was more than 2 hours away, the First Man would contact a third party contractor to deal with the job if it was urgent and needed attending to. If the job was within the two-hour driving radius and needed to be dealt with urgently, the First Man would contact the Second Man to arrange a pickup. They would then attend the site to carry out the work needed. They would complete a form whilst still on site which recorded the work they had done and this would be sent to the office to be reviewed the next working day.
175. On the alarm side, CCTV and alarms were monitored by ECMS. ECMS would decide whether it was necessary to contact the First Man. On receipt of a call from ECMS the First Man would use the SmarTest app to check the alarm log for the site and identify the primary key holder. If the primary key holder was clearly addressing the situation, there was nothing further

for the First Man to do. If it was unclear whether the primary key holder was dealing with the matter, the First Man would then attempt to contact them, email the office, or escalate it to a manager if the primary key holder did not respond. If the respondent (SEP), was the primary key holder for the location, the First Man might need to attend the site on a call out. The First Man would assess whether this was necessary, using the SmarTest app, as necessary (the alarm may be due to a faulty alarm which did not need to be responded to, for example). Incidents which required the First Man to visit the site as primary key holder would, by definition, be call-outs to sites relatively close to home as the respondent was primary key holder for some social housing customers who were based locally.

176. The First Man might also receive calls from the emergency services but owed the emergency services no direct obligation to attend the site. The First Man does not act on the instructions of the emergency services but in accordance with the customer's instructions. The First Man may ultimately go out to site to help the emergency services secure a property if this is acceptable to the client. No particular urgency applied to calls from the emergency services. In the event that the First Man responded and visited the site following such a call, the usual timeliness expectations would apply. He would not be expected to attend site particularly quickly just because the call had come from the emergency services. He did not have to "drop everything" and run to the aid of the police, for example. Likewise, if the call came in about a site which was more than 2 hours drive away, the First Man would call on the services of the third-party contractor to attend site in the usual way.
177. It is possible that the First Man would receive calls from a new customer but liaising with new customers did not form part of the First Man's job. The First Man was not permitted to provide quotes and so should simply take the caller's details and pass them onto the office so that they could be followed up during normal working hours. The First Man would only act differently if asked to by a manager in a specific case. This would be the exception rather than the rule. Likewise, a First Man could receive calls from a member of the public (rather than a customer) to attend the site. The First Man should simply take those details and pass them on to the office rather than comply with the demands of the member of the public.
178. The frequency of such calls would vary significantly from day to day and week to week. More calls might be received during bank holiday weekends as this reflects the fact that the office would be closed for a longer period of time during such weekends. It was perfectly possible for a shift to go by with no calls being received at all. Calls could come in in clusters. Fewer calls were likely between midnight and 6am. Calls could be of short duration, a matter of seconds rather than minutes. Calls could trigger a site visit or might just require answering the call and passing the details on to the office.
179. Looking at the available data, there was no predictable pattern to the calls in terms of duration or frequency. There was no such thing as a 'typical' on call shift as First Man in that sense. The most that can be done is to look at the averages to get a sense of the extent to which the First Man's time was interrupted during an on-call shift and the extent to which the First Man had to attend to work tasks during an on-call shift.

180. On average, the First Man received 31.5 batches of telephone calls throughout a week. This is equivalent to 4.5 batches of calls per day. The average length of the phone calls was about 1.5 minutes. This indicates that they were relatively short conversations. The records in relation to phone calls suggest an average total length of time on the phone per week of 49 minutes (i.e. less than one hour per week over a 7 day period.) This does not differ wildly from the evidence provided by Mr Forster in his work for the respondent. He estimated an average of 1 hour and 18 minutes spent on the phone during an average week on call.
181. The data in relation to call frequency and duration does not capture calls made directly to the 07 number. However, there are good reasons to suppose that there would only be limited extra calls to the 07 number, given that customers would not know who was on-call as First Man that week and so would not know who to call directly in the event that they needed to contact the First Man. Rather, they were more likely to call the 03 number and put the call through to whoever happened to be holding the mobile phone. Likewise, ECMS would call the 03 number. Even if it was assumed that an equal number of calls were generated by direct calls to the 07 number as to the 03 number, this would still only produce a further 1 to 1.5 hours on the phone per week. This would give a total average amount of time on the phone of up to 3 hours per week (about 25 minutes per day). In fact, I have concluded that this is an overly generous estimate of the amount of time that the First Man would actually spend on the phone, irrespective of the telephone number used. He is likely to have spent considerably less than 3 hours on the phone per week, on average.
182. After receiving a call-in from the helpline, there could be follow-up calls that the First Man might make (e.g. to a manager, primary key holder or third-party contractor) from their work issued mobile phone. However, there should be no separate incidents that the First Man addresses which do not show on the phone records for the out of hours helpline. Furthermore, the First Man was expected to update the office by way of an email with a summary of any next steps required in respect of phone calls. That is a further way of recording the amount of time spent by an operative working on call. The emails available to the Tribunal show that on occasion, further phone calls were made by the First Man, however, there were many emails during the sample weeks in which there was no reference to any additional phone calls. I am satisfied, from this information, that it is reasonable to assume that such calls did not take more than a few minutes each week.
183. As a result of receiving telephone calls, the First Man might need to attend a call out to site with the Second Man. On average, the First Man would need to attend 2.26-2.77 callouts per week. The average length of time spent on a call out was about 1.5 hours. This included travel time from and to the point at which they picked up and dropped off the Second Man. On average, the total length of time spent on a callout during an on-call week was 4 hours 52 minutes, equivalent to 40 minutes per day.
184. In addition, there might be written emails and messages during an on-call week. The emails were relatively brief and would not have taken long to draft and send even taking account of the fact that it is sometimes slower to

type on a mobile phone than on a laptop or other computer. The claimants appear to have sent an average of up to 12 messages or emails. This would not account for much of an interruption to their time whilst on call.

185. Given all the available information, I am satisfied that on average, the First Man's administrative duties (i.e. work on phone, email, text message and not visiting customer sites) are likely to have taken no more than an average of 3 hours per week (or 25 minutes per day). This includes all text messages, WhatsApp's or phone calls, whether coming in or going out.
186. If a callout to site was required, there was no expectation that the First Man would have to stop what they were doing in order to attend the site. The expectation was that the team would arrive on site within around 3 hours of a callout. Given the maximum driving radius of 2 hours, even in the most extreme case, the First Man would have an hour to stop what he was doing and pick up the Second Man who, by definition, was located locally to them. More often, the jobs were significantly closer than that. Travel time is likely to have been significantly less than 2 hours in a lot of cases.
187. There were a small number of customers where there were expectations that the operatives would respond to a callout within a set timeframe which differed from the general three-hour principle. Community Gateway Association (in Preston) indicated that responses to alarm activations should be within 4 hours (i.e. allowing *more* time than the general rule) and any works ordered within 8 hours of receipt of the order. Rochdale Boroughwide Housing Ltd gave an ideal response time of 2 hours but the claimants live within 30 to 45 minutes' drive of Rochdale, which still means that they have over an hour before they need to set off to attend the site. I am satisfied, based on the evidence I have received, that the Bolton at Home contract still had an understanding of a 3 hour response time. To the extent that the contractual documentation specified a response time of 30 minutes, this did not operate in practice, and the operatives (including the claimants) did not understand that there was a 30 minute response time prior to disclosure of the documents during the course of these proceedings. Thus, during the relevant period they were working to a three-hour response time for Bolton at Home. Stockport Homes Ltd did not contain a response time in the contractual documentation.
188. Even where a response time was specified within the documents, it was a guideline rather than a strict limit. The Tribunal did not receive evidence of any customer complaints or any disciplinary action being taken against security operatives for taking too long to arrive at a callout to a site.

To what extent did taking the calls and completing the follow-up actions interfere with the claimant's ability to sleep or do anything they would otherwise have been doing at the times that they were on call/manning the helpline?

189. I am satisfied that the claimants would generally have been able to sleep as normal during their on-call weeks. They might have been woken by telephone calls from time to time but there is nothing before me to suggest that this would have been a regular occurrence. Indeed, the quietest time for calls is likely to have been midnight until 6am.

190. The claimants were at liberty to plan their leisure time as they wished during on-call periods. They could leave the house. They could undertake tasks and chores. They could socialise or attend to hobbies so long as they replied to calls within a reasonable timeframe. They did not have to stay particularly close to home save that they would need to be able to attend a callout within a two-hour driving radius of home within the 3 hour guideline. The claimants did not live in a remote area and would therefore have had a free choice of activities within the locality. In short, the requirement to be on call would not have restricted their free time unduly outside the time that they were actually working on a call out to site.
191. In particular, it is relevant to remember that the Tribunal is concerned with the constraints imposed on the claimants by their employer as a result of their contract, rather than “natural factors” or their own free choice. Ultimately, I am satisfied that the claimants were free to do as they pleased whilst on-call subject to the restrictions necessary to enable them to respond to the calls to site within a two-hour drive radius and within the three-hour response time. If the claimants chose to/wanted to stay at home whilst they were on-call, that was a matter for them. The respondent did not require them to do so. They could miss a call whilst they were in the middle of a task such as shopping and return the call once they had completed that task.

To what extent were the claimants given (or permitted to take) compensatory rest periods as a result of activities that they have carried out during the periods where they were performing First Man on-call duties/manning the helpline.?

192. The evidence currently available suggests that where any callout and administrative duties do not exceed 4 hours between the end of a normal weekday shift and the start of the next day shift, the First Man will still receive a minimum of 11 hours rest in total. However, the 11 hour period might be interrupted rather than continuous. The calls may be distributed throughout the overnight period. In the event that this becomes relevant, further evidence on this point may be required. During the relevant period under consideration in these proceedings, if the First Man was interrupted significantly overnight, such that he did not get the relevant rest period, he was encouraged to share that with his manager so that additional rest could be given. Jobs would be moved around accordingly to facilitate that. If the First Man waited until he arrived at the depot before notifying the office that he had been interrupted significantly overnight, then he would be allowed to leave early so that he had some rest before the next on-call period started. It appears that the respondent made some effort to avoid giving early jobs to the on-call team so that they could start late and obtain extra rest if it was required.

To what extent, if at all, is there any difference in those findings in the period prior to the claimant's grievance appeal outcome in autumn 2024, and after that date.

193. There were changes as a result of the claimants' grievance. The first change was that all incoming calls were to be fielded by the alarm receiving centre (“ARC”). Only if the ARC felt that a call needed to go through to the on-call team, would the First Man actually receive a phone call. This would significantly reduce the number of interruptions to the First Man during the

on-call period. Any phone calls which did not require a callout were unlikely to be passed to the First Man. This would significantly reduce the amount of phone time and administrative duties (as opposed to attendance on site). Other than an attendance at site, the First Man might be required to provide his opinion regarding a job or incident. Despite the reduction in administrative interruptions, it does not appear that the claimants have made any particular changes to how they spend their on-call time or that the reduction in phone calls has freed them up to do activities which they otherwise felt unable to do when operating under the original scheme.

194. The on-call period has also altered so that it commences at 8:30am on a Sunday and finishes the following Sunday. This is designed to reduce the impact of the bank holiday weekend. This should result in a reduction in calls on the claimants' time when acting as First Man.
195. Since the grievance, if the First Man is disturbed and needs to attend site, they are not required to come into work for their normal shift to the next day until they have achieved a total of 11 hours of continuous rest. They are still permitted to finish their normal day shift at 5:30pm even if this means that they have not worked the full day shift because of a late start following on-call activities. An offer was made to the claimants during the grievance appeal process to pay them on the basis that they had undertaken 6.2 hours of administrative duties as First Man. This was backdated to the start of their employment and paid at time and one third. This figure of 6.2 hours was based on Mr Gold's handwritten call logs assuming each call lasted 10 minutes. This figure was selected as it was the most favourable to the claimants and was made as an offer as a goodwill gesture to bring the dispute to a close. I am satisfied that the figures offered were not selected because they represented what the respondent felt was an accurate figure in relation to the work done. It was not an admission of liability.

## **Section 2: Working time and the Working Time Regulations**

Was time spent by the claimants on first man on-call duties/manning the respondents out of hours helpline "working time" within the definition set out in regulation 2 (1) Working Time Regulations 1998 namely, were the claimants working at the employer's disposal and carrying out his activity or duties?

196. In line with the principles set out in the relevant case law I am not satisfied that the entirety of the on-call period amounted to working time within the meaning of regulation 2(1). The three elements of the definition were not satisfied for the entirety of the on-call shift.
197. The claimants were not doing work for the respondent throughout the entire on-call shift. There were lengthy periods where they were not doing work tasks, they were merely 'on-call' in case some work came in that they needed to attend to. Further, the claimants were not waiting on-call at a narrowly defined location or place which was determined by the respondent. They did not have to be at the respondent's premises or their workplace and they did not have to stay at home either. They could choose where and how they spent their time. They had freedom of movement and freedom of activity so long as they could answer the phone or respond to calls within a

reasonable time frame and then attend some site visits in appropriate circumstances. Whilst there were some expectations applied to the claimants during the on-call shifts, it cannot be said that the constraints placed upon them had an 'objective and very significant impact on their opportunity to pursue personal and social interests' when they were not actively engaged in work but merely 'on-call' awaiting phone-calls or work tasks. They were able to plan their leisure time and activities whilst on call and had a reasonable period of time in which to return to work, when required. The response times were couched in terms of hours rather than minutes, as is set out in detail above. Further, it cannot be said that the First Man was called upon to attend to work matters on a particularly frequent basis. It was quite conceivable that an on-call shift would pass without the need to answer a call or attend a site. That said, of course, there were some shifts where a significant number of calls would be received and/or a call out to site would be needed. There was no 'standard' or 'expected' amount of interruption to the on call shift.

198. The findings of fact indicate that any requirements placed on the claimants during the on-call period as a whole did not have an objective and very significant impact on their opportunity to pursue their social interests. They were contactable without any obligation to be present and available at the workplace. The First Man could carry out his duties remotely from a location of his choosing as long as he had his mobile phone close by and was able to access the company van. Given that he could use the van for personal use, this meant that he could be away from home in it during the on-call period. He did not need to return to the depot before going on a callout. This case is unlike the case law examples which consider where a worker is required to remain at an employer's premises.
199. The constraints in the current proceedings were not comparable with those in Matzak. Matzak involved a very short deadline within which the worker had to respond to callouts (8 minutes) from a specified location (home). In this case there was no hard deadline but the guideline was 3 hours. The two situations are not comparable. Nor were the employees in this case required to respond to telephone calls within a limited period of time. "Reasonableness" was the applicable guideline. Everybody understood that calls could go through to voicemail and be picked up once the employee had finished whatever they were doing at that time. Much was left to the discretion of the individual person carrying out First Man duties.
200. In relation to callouts the First Man had at least one hour to conclude whatever they were doing in their free time and pick up the Second Man. In any event, the three-hour guideline was not monitored or strictly enforced by the respondent or its customers. The claimants were not disciplined if they did not meet this response time target. Given that many callouts would be closer to home, in many cases the individual would have even longer to conclude their personal business before attending on site. Any constraints on the claimants in this case did not "very significantly" affect their ability to freely manage their time when they were on standby because they had a reasonable time period in which to resume work. Even if the claimants, as a matter of practice, responded more quickly to callouts or took a phone call straightaway, this is not the same as them being required to do so. This was

their choice rather than an obligation imposed upon them by the respondent as employer.

201. Further, the average frequency of telephone calls and calls out to site varied. It cannot be said that each shift would see a minimum amount of work coming in to be dealt with by the First Man. This is not a case where the frequency of telephone calls and callouts suggests that the entirety of the on-call period amounted to working time. Further, when telephone calls did come in, they were of limited duration in the context of the overall time period under consideration. It is not correct to say that a significant amount of the overall time was taken up in attending to telephone calls or following up on telephone calls (i.e. administrative work). Likewise in relation to callouts to site, the amount of time out on site varied significantly and, on some days/weeks the claimants were not asked to attend any site visits. The average figures show that they were an equivalent of 40 minutes per day. The averages show an average of 25 minutes of administrative duty per day. Given that the on-call period was either 15 hours on a weekday or 24 hours at the weekend, the total period taken up with work-related tasks in each period must be regarded as being of short duration.
202. In reality, the on-call period was predominantly the operative's to do with as he chose. He had to be contactable and be prepared to undertake certain tasks during the on-call period but this made up a limited portion of the overall time in question. It was his time to organise to his own preferences. In light of the above I have concluded that the on-call period as a whole did not amount to working time within the meaning of the Working Time Regulations.

If the totality of the time spent by the claimants on first man on-call duties/manning the respondents out of hours helpline is not "working time", which parts would count as "working time"?

203. The respondent accepts that for the purposes of regulation 2 (1), the time spent by the claimant on callouts (including travel to and from site) and undertaking administrative duties (such as answering and making phone calls and sending and reading emails or any other messages) amounted to work time. They accept that working time comprises the actual time spent working, as opposed to being available for work.
204. I am satisfied that the respondent's concession is an appropriate one on the facts of this case, in light of the case law guidance. I cannot identify another principled way to distinguish between working time and non-working "on-call" time. Any other distinction would be somewhat arbitrary and would not respect the required component parts of the regulation 2(1) definition. Given the flexibility in relation to answering telephone calls and in relation to travelling to sites on a callout, it is not possible to identify an additional period of working time in addition to the actual time spent on administrative work or travelling to and attending at site. Therefore, it is only when the claimants started to attend to actual tasks during the on-call period that the multifactorial approach dictates that they were "working" within the meaning of the regulations. These tasks included: answering the telephone, listening to voicemail messages, making phone calls, sending and reading messages, sending and reading emails, making arrangements to pick up

the Second Man, driving to pick up the Second Man, driving home after dropping off the Second Man, travelling to a client's site, time spent at a client's site, time spent coordinating further steps in relation to a client's case/incident, and time spent updating the office staff or managers as to what had happened and the work done during the on-call period.

**Does any of the time under consideration fall within an exemption to the Working Time Regulations at regulation 21?**

205. The question set out in the heading above is a summary of the effect and meaning of paragraph 4 in the list of issues. Regulation 21 sets out an exemption which can apply to periods of time which would otherwise be considered to be 'working time' within the meaning of the WTR. Given that I have concluded that only those parts of the on-call period where the claimants were actively involved in work tasks (either administrative or callout tasks) amounted to working time (rather than the whole of the on-call period) the issue of an exemption to the WTR does not arise for me to determine. It is not relevant to consider whether the circumstances of the claimant's on-call arrangements made them exempt from regulations 10, and 11 of the Working Time Regulations. The issue falls away and I say no more about it.

**Section 3: National Minimum Wage provisions**

Question 9: In determining the type of work for national minimum wage purposes, the Tribunal will consider whether the claimants' work in their "day jobs" can be classified separately from their on-call/helpline work within the NMWR classification scheme, or whether the Tribunal is obliged to make one determination of the type of work for NMW purposes taking account of the arrangement as a whole.

206. In line with the submissions made on behalf of the respondent, if multiple different types of work are done under the same contract, then the overall arrangements are looked at as a whole. It is not permissible for the Tribunal to determine that the claimants carried out one type of work (e.g. salaried work) during the day job and another type of work (e.g. time work or unmeasured work) whilst on-call, if that work was carried out under the same contract. It is clear from the evidence and submissions that each of these claimants carried out all of their work for the respondent pursuant to one indivisible contract of employment. They did not each have multiple contracts of employment with the respondent.
207. In determining whether the worker has been paid in line with NMW requirements, an assessment is made by reference to the 'pay reference period' (regulations 6 and 7 NMWR). The pay reference period for the NMWR is looked at globally. The legislation does not permit different periods of time to be distinguished within the pay reference period. Different kinds of work can only be distinguished if they are carried out under different contracts. That is because the definitions of salaried work, time work, output work, and unmeasured work refer specifically to the contract under which the worker works. This is consistent with HMRC guidance on the topic.

Is all, or part, of the time spent on-call/manning the helpline by the claimants time work for the purposes of NMW? If not time work, is it unmeasured work? If only part of such time is time when the claimants are performing work (whether time work or unmeasured work), which part or parts?

208. Looking at the employment arrangement as a whole, I have to decide which type of work the claimants were engaged in for the purposes of the National Minimum Wage legislative scheme. I must look at the work as a whole as there was one contract for each claimant.
209. The agreed list of issues specifies that the choice I have to make is between 'time work' and 'unmeasured work.' Salaried work is not in the list of issues as an option. (The case has not been argued on the basis that the claimants could be salaried workers for minimum wage purposes, even though the major part of their work was the standard 'day job' rather than the on-call rota. The submissions presuppose that the presence of the variation in payments attributable to the on-call rota means that the contract as a whole cannot be for salaried work even if the majority of the claimants' work is accounted for by the 'day job' which is apparently paid a fixed salary.)
210. Applying the statutory scheme to the facts of this case, the claimants were paid by reference to the time that they worked. A salary component was based upon them working from 8:30am to 5:30pm every weekday. They received the payment of £135 to reflect the work undertaken in a week on the on-call rota as First Man along with additional payments for the work done on any callouts. The claimants' total pay varied each month according to how much work was carried out (as a result of the on-call system.) There was a clear relationship between the time spent performing work and the payments that the claimants received. This satisfies the definition of "time work" within the NMWR scheme.
211. "Unmeasured work" is a residual category. Thus, if the claimants were engaged on "time work" for the respondent they cannot also be engaged on "unmeasured work." The claimants were not engaged on "unmeasured work."
212. I must go on to consider whether all or part of the time spent as First Man on the on-call rota amounted to work for the purposes of the NMW scheme. If only part of it constitutes work, which part?
213. The respondent accepts that the claimants were carrying out time work for the purposes of regulation 30 NMWR when they were on callouts (including travel) and undertaking administrative duties (such as answering and making phone calls, and sending emails or any other messages.) During such times they were actually performing work tasks and so do not need to rely on the extended definition of work in regulation 32. They were, de facto, doing work for the respondent.
214. The respondent does not accept, however, that the entire on-call period when the claimants were available for work but not in fact working amounted to time work. In order to have the parts of the on-call shift where no work tasks were actually being performed counted as 'work', the claimants will have to bring themselves within the extension covered by regulation 32.

215. In line with the legal principles following the Royal Mencap Society case above, any time spent at home where the claimants were not actually performing work tasks (but were just waiting for work to come in) does not count as work. Likewise, any time spent asleep did not count as work.
216. Pursuant to regulation 32 NMWR time work includes hours when a worker is available and required to be available at or near the place of work for the purposes of working unless the worker is at home. "Available" only includes hours when the worker is awake for the purposes of working, even if a worker by arrangement sleeps at or near a place of work and the employer provides suitable facilities for sleeping.
217. The claimants were not required to be at or near a place of work for the purpose of working throughout the on-call period. Any duties carried out by the First Man could be done at home or any location, provided that they could get out to a callout within the usual 3 hour response time. There was no need for them to return to the depot before going on any callout they could go either from home or from whatever location they were in at the time. The regulation 32 extension would not apply because they were not required to be at or near a place of work for the purposes of working.
218. The claimants were often at home during their on-call periods as First Man, even though they were not required to be. Thus, the home exception applies. In line with Lady Arden in the Royal Mencap Society case, where workers are at home they are outside the extended meaning of work under regulation 32. They must therefore show that they are actually working for that time to be included for minimum wage purposes
219. The claimants were likely to have been sleeping for at least part of the on-call period between 5:30pm and 8:30pm in the weekdays and during the weekends. In line with Royal Mencap Society, during those periods of time, they cannot be regarded as having been available for work, even if they were awaiting calls.
220. In light of the above the extended definition of work under regulation 32 does not apply to the on-call periods where the claimants were available for work as First Man but were not in fact working. During the on-call shift, the only period of time which counted as 'work' for national minimum wage purposes is when the claimants were actually performing work tasks (i.e. administrative duties or attending call-outs to site.) All that counts as 'time work' for minimum wage purposes is when the claimants were on callouts and undertaking administrative duties.
221. In light of these conclusions the Tribunal will now list a further case management hearing to decide what further action is required in relation to the remaining issues on the list of issues in this case

Approved by:

**Employment Judge Eeley**  
**19 August 2026**

JUDGMENT SENT TO THE PARTIES ON

11 September 2026

FOR THE TRIBUNAL OFFICE

## Notes

All judgments (apart from judgments under Rule 51) and any written full reasons for judgments are published, in full, online at <https://www.gov.uk/employment-tribunal-decisions> shortly after a copy has been sent to the claimant(s) and respondent(s).

If a Tribunal hearing has been recorded, you may request a transcript of the recording. Unless there are exceptional circumstances, you will have to pay for it. If a transcript is produced it will not include any oral judgment or reasons given at the hearing. The transcript will not be checked, approved or verified by a judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings and accompanying Guidance, which can be found here: [www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/](http://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/)