EMPLOYMENT TRIBUNALS

Claimant: **Mr A Tidd**

Respondent: **Devon & Somerset Fire & Rescue Service**

Heard at: **Exeter Law Courts** **On:** **19-21 August 2024**

Before: **EJ Danvers**

Representation:

Claimant: **In person**

Respondent: **Mr S Cheetham KC, counsel**

JUDGMENT having been sent to the parties on 19 September 2024 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

INTRODUCTION

1. The Claimant has been employed by the Respondent since 30 November 2013 as an on-call operational firefighter. His job title is currently On-Call Crew Manager, and he is employed at the Respondent's Modbury Fire Station. The key issue before me was whether the periods of time he is 'on-call' (but not actively responding to a call-out) amount to 'working time' under the Working Time Regulations 1998 ('WTR 1998').

CLAIMS AND ISSUES

2. The Claimant notified Acas of a Claim on 22 February 2023 and an Early Conciliation Certificate was issued on 8 March 2023, he submitted a claim on 11 April 2023.

3. A Preliminary Hearing for Case Management took place in front of EJ Smail on 3 May 2024, at which the Claims and Issues were discussed. At the outset of this hearing the Claimant confirmed that the claims he was pursuing were complaints under the Working Time Regulations 1998 ('WTR 1998'). Namely:

    a. a failure to provide a rest period of not less than eleven consecutive hours in each 24-hour period (daily rest) pursuant to Reg 10(1); and

    b. a failure to provide an uninterrupted rest period of not less than 24 hours in each seven-day period (weekly rest) pursuant to Reg 11(1).

4. The Claimant confirmed at the outset that he was not pursuing any claim for a breach of Reg 12 WTR 1998 and, with his agreement, that claim is dismissed on withdrawal.

5. At the outset of the hearing, it was agreed that in the first instance I would determine the primary dispute between the parties, which was whether the time during which the Claimant was 'on-call' amounted to 'working time' within the meaning of Reg 2(1) WTR 1998. It was agreed that if it did not, then the Claimant's claims would fail. If it did, an assessment of what daily and weekly rest periods the Claimant had been entitled to would follow.

6. The Claimant confirmed that the period he was complaining about was from 17 November 2019 onwards. This may give rise to time limit issues, but it was also agreed any such issues would be dealt with after the primary dispute was resolved.

7. Accordingly, the issue that I had to determine at this hearing, as confirmed by the parties at the outset of this hearing, and set out in the Case Management Summary of EJ Smail was as follows:

    a. Is the time spent by the Claimant when he is "on-call" working time within WTR Reg.2(1)? The Tribunal will need to answer the following questions:

        i. When "on-call", is a worker required to be contactable and able to return to the workplace within a given period?

ii. If so, does that requirement objectively and very significantly affect their ability to devote time to other interests?

iii. What is the required response time when on standby or on-call? On the basis that the quicker the response time, the more likely this will be considered as working time.

iv. How frequently are workers called upon when on standby or on-call? The higher the frequency, the more likely this will be considered working time.

DOCUMENTS AND EVIDENCE HEARD

8. I was provided with an agreed PDF bundle running to 344 pages and a further supplemental bundle of additional documents. The Respondent's position was that they did not consider the documents in the Supplemental Bundle to be relevant, but did they did not object to the Claimant referring to them. I was also handed up two further documents in the course of the hearing by the Claimant, which the Respondent did not object to. I explained to both parties that I would not read the bundles from start to finish and would only look at documents insofar as they were referred to in the witness statements or I was taken to them in the course of oral evidence.

9. I read the witness statements of and heard evidence from the Claimant and the following witnesses for the Respondent:

a. Mr Gerald Taylor, Assistant Chief Fire Officer and Director of Service Delivery;

b. Mr Peter Watts, Station Manager within the Plymouth Response Group and On-Call Watch Manager for Modbury Fire Station; and

c. Mr Ed Durante, On-Call Liaison Officer and On-Call Watch Manager for Ivybridge Fire Station, albeit no questions were asked of Mr Durante.

10. Mr Cheetham KC provided 'Outline Submissions on the Applicable Law' in electronic and hard copy form on the first morning on behalf of the Respondent. I heard oral submissions from both him and the Claimant, which I refer to below.

FINDINGS OF FACT

11. The Claimant is one of a large number of on-call firefighters employed by the Respondent. 99 of the 112 fire service engines (or 'appliances') which the Respondent operates daily are crewed by on-call teams. The Respondent provides emergency cover to less populated and rural geographic areas in Devon and Somerset predominantly using on-call teams. They also have several 'wholetime' crews who are situated in areas of higher risk such as high population urban areas. Most on-call firefighters have a primary employment (either with the Respondent or a different organisation) or will also be self-employed in a different role.

12. Since starting as an on-call firefighter at Modbury Fire Station, the Claimant has had various other primary roles both with other organisations, at times self-employed and at times employed on a 'wholetime' basis by the Respondent in addition to his on-call roll.

13. All the individuals who gave evidence, including the Claimant, shared an obvious and commendable, deeply held commitment to the important service they were providing as on-call firefighters to their local communities for whom they were willing to put themselves in dangerous situations to protect.

Operation of the on-call system

14. When he started as an on-call firefighter, the Claimant agreed to undertake a certain number of on-call contracted hours. Initially this was 84 hours and the expectation, as set out in the contractual documentation was that he would attend all calls within his agreed available times (also referred to in evidence as his 'contracted / contractual hours'). The Claimant then filled out a form setting out the times he was available to undertake his contractual hours. As of May 2022, these were Monday – Friday 6pm - 7am and from Saturday at 5pm to Monday at 7am. The availability form was considered by the relevant manager to ensure that the on-call firefighter could respond within the required period and that the hours offered were appropriate for operational capability. Once agreed, those hours were the Claimant's on-call contracted hours.

15. In March 2023, by agreement, the Claimant reduced his on-call hours to 49 hours and his contractual hours pattern changed accordingly. Mr Watts' evidence, which was not challenged, and I accept, was that since June 2023 the Claimant has been unable to agree to adhere to those hours or agree a new contractual pattern because he has become an Emergency Care Assistant with the South West Ambulance Foundation Trust. During that period the Claimant has offered alternative availability which has been accommodated on a week-by-week basis on the roster until the new contractual pattern can be resolved.

16. The Respondent's evidence, which was not challenged, and I accept, was that although the contractual hours were set by way of this mechanism (and so were theoretically the same each week) it was possible for on-call firefighters to provide cover for each other or to swap on-call periods (as frequently happened). They could also book leave in advance. Further, Mr Taylor's evidence, which I accept, was that if there was a compelling reason someone could not do an on-call shift (during their contracted hours) because of a family need for example, it was possible to arrange for cover through the Operational Resourcing Centre. The roster was therefore reviewed on a weekly basis to take account of the need for flexibility, discussed by the on-call team, and amended by way of these methods as required before being finalised.

17. On-call firefighters such as the Claimant are paid two different rates by the Respondent during their on-call shift: 'Availability pay' when they are on-call but not called out and 'Activity pay' from as soon as their 'alerter' (a pager that is activated by the Fire Service's control when it receives a 999 call in the area local to the firefighter's station) sounds, until the incident is completed.

Constraints on the Claimant

18. The Claimant's claim relates to the period November 2019 to submission of his claim form. Neither side have suggested that the way in which the on-call shifts worked has significantly changed during that period and so my following findings as to the constraints placed upon the Claimant as an on-call firefighter apply to that whole period.

Having to be contactable and attend the Fire Station when called out

19. As set out above, the contractual documentation confirms that during his on-call hours the Claimant had to attend the Modbury Fire Station when called out (i.e., notified by the alerter that he was required to carry). This requirement was not in dispute and Mr Durante confirmed that if a firefighter is on-call they must attend 100% of call-outs.

20. Mr Watts did say that if an issue occurred during an on-call shift such as a family member going to A&E then the firefighter could let the Watch Manager know and 'book off' the system (i.e., indicate they were not available to attend the station) and there would not be consequences for the firefighter, even if it could not be covered. However, he confirmed that if someone just booked off without permission or cover when they were rostered to be on-call, this would be dealt with as a performance issue albeit initially by trying to understand the cause and only eventually on a formal basis.

5-minute response time

21. It was agreed between the parties that during an on-call shift the Claimant was subjected to a 5-minute response time.

22. There was a dispute as to whether the 5 minutes was measured from the time of the alert to the relevant 'appliance' (i.e., the fire engine or relevant vehicle) being ready to roll out of the door, which was the Claimant's understanding, or from the time of the alert to the Claimant attending at the fire station, which was the Respondent's case.

23. I accept that the Claimant's genuine belief was that the 5-minutes 'stopped' at the time a button was pressed indicating the appliance was ready to roll out the door (i.e., slightly after his attendance at the Fire Station). However, Mr Taylor explained that while they did measure when an appliance is 'mobile', this was for the purposes of analysing the Fire Station's performance: the appliance is expected to be mobile within 7 minutes. This is also part of measuring whether the Fire Station are meeting their emergency response standards (for example, 10 minutes from 999 call to dwelling fire) and to analyse what has caused any delay if that standard is breached. Mr Taylor's evidence was that in terms of the expectation for on-

call firefighters, it is 5 minutes from alerter sounding to attendance at the fire station. I accept Mr Taylor's evidence on this point and note it reflects what is said in the Claimant's 'Statement of Particulars' which is that (own emphasis):

> An employee on this duty system (RDS) is required to be **in attendance** for duty at the station to which the employee is attached within 5 minutes of an emergency call, at any time during the employee's period of availability.

24. Mr Watts confirmed (and the Claimant did not dispute) that the system which was previously referred to as 'RDS' operated in the same way as the on-call shifts during the relevant period.

25. In practice, I am not of the view that it makes much difference whether the response rate is measured to attendance at the fire-station or being in the vehicle and ready to mobilise. Either way, the requirement is to get to the fire station within a very short period (5 minutes).

Location

26. There was no dispute that the Claimant was free to go where he wished while on-call, within the limits of the 5-minute response time. He was not required to remain at the Fire Station or at home or at any other location other than within the geographical location which would allow him to attend the Modbury Fire Station within 5 minutes.

Alcohol intake

27. A further constraint on the Claimant (agreed between the parties) during his on-call shifts was that his blood alcohol content must be less than 25 micrograms of alcohol in 100 millimetres of breath. This is lower than the normal limit for driving and the Claimant's evidence: that it meant he could not have a glass of wine with a meal (such as a Sunday lunch); was not challenged.

Shaving

28. The Respondent also agreed that there was a requirement for facial hair to be shaved within the previous 24 hours when on-call. This related to the need for breathing equipment to fit safely.

Hair style and colour

29. It was agreed that there are also some restrictions on hair style and colour when on duty. Mr Taylor said in evidence, and I accept, that this does not mean someone cannot dye their hair. However, if the hair style or colour was such that it might undermine public confidence when they were attending an incident then that would not be acceptable. He gave the example of not being able to dress up like a clown.

30. The Claimant gave the example of not being able to dye his hair for Halloween or if he was in a play while on-call because there would not be time to change it if he was called-out. It did not seem to be in dispute that he would not be able to attend work during an on-call shift with hair styled or dyed to match a fancy-dress costume at Halloween or for a play. So, in that sense there was some restriction on his hair style and colour.

Uniform

31. The Claimant accepted that he was not required to wear uniform for the duration of an on-call shift. However, when he actually went out on a call-out he had to wear uniform and PPE. This was available at the fire-station and could be put on when they arrived, so it was not necessary to carry it on him during on-call shifts.

Other work

32. It was not in dispute that the Claimant was allowed to undertake other paid work during his on-call shifts subject to the requirement of the 5-minute response rate. However, the Claimant pointed to practical difficulties in undertaking other work caused by that response rate as outlined below.

Other constraints

33. In addition to the constraints outlined above, the Claimant pointed to several practical constraints which he said flowed from the 5-minute response time.

34. First, in his witness statement he said that the response time meant he could not go out shopping or for a meal with his wife. In oral evidence he said that there were some shops in Modbury within the 5-minute response area such as a small food shop. However, he said, and I accept, that the selection was

very restricted. If, for example, he wanted to buy supplies for DIY he would have to travel to the B&Q in Plymouth, which was outside the response area. He also accepted there were some pubs and an Indian takeaway within the response area in Modbury, however again the selection was very limited with (in his view) poor quality food and so he was prevented from going to eat out at places he enjoyed.

35. Second, the Claimant referred to being unable to attend his children's parents' evenings while on-call because the school was outside the 5-minute area. In oral evidence he gave the example of one in April / May 2024 relating to his twins' move to sixth form. He accepted that these sorts of events were notified in advance, and it was possible he could try to get it covered, but that would depend if someone else was free. Alternatively, getting annual leave would only be possible if there would still be enough other people available.

36. Third, he described being unable to undertake work at locations outside the response area. The Claimant undertakes additional work repairing clocks and watches. He gave the example of being asked to repair a grandmother clock during an on-call shift. However, the clock could not be transported to his home and was outside the response area, so he was unable to do it.

37. Fourth, the Claimant referred to being unable to go for a run. He accepted that he could use fitness equipment at the Fire Station and use local facilities like the tennis court, but explained this did not provide the same quality of exercise for him and did not get him into the outdoors in the way that running did.

38. Fifth, in his statement he referred to not being able to go fishing. In his oral evidence he explained this was something that was important to his eldest son which he would like to be able to do with him on Sundays and overnight but it was something he could not do when he was on-call. The Claimant said it had been many years since he had been fishing even outside his on-call periods.

39. Sixth, orally the Claimant referred to not being able to be on stage as part of the local Modbury players group while on-call in case he had an alert. The

Claimant had done Drama and Theatre at school but not been in a play for many years.

40. Finally, orally the Claimant made reference to being restricted in terms of seeing family and friends who live outside the response-area.

41. For completeness I note that the Respondents' witnesses gave evidence of their own experience as on-call firefighters and the many things they felt they were able to do notwithstanding the 5-minute response time including seeing friends and family, going for local walks, working in other jobs, sleeping, exercising etc. I accept their evidence on those matters (which was in any event unchallenged), although I do not consider it took me much further in terms of determining the issue before me.

Average frequency and duration of call-outs

42. The Respondent provided evidence, which the Clamant did not dispute, that in the 45-week period from 24 July 2023 to 2 June 2024 there were 57 incident reports, the Claimant 'turned out' (i.e.., went out in an appliance on a call) on 31 occasions and attended the Fire Station on a further 4 occasions. Some incident reports did not lead to attendance if, for example, the call handler did not consider it necessary. During that period this amounted to an average of 0.69 occasions per week that the Claimant had to 'turn-out' while on-call.

43. Data was also provided by the Respondent, which the Claimant agreed was about right, indicating that:

    a. In 2022 he attended 59 'call-outs' (which I understood to be the same as 'turn-outs) during his on-call hours. This was an average of 4.9 call-outs per month. The average time per month he spent at a call-out was 10hrs 30mins.

    b. In 2023 he attended 40 call-outs (3.3 on average per month) and the average time per month on call-outs was 6hrs 9 mins.

    c. In 2024 up to May, he had attended 10 call-outs (2 on average per month) and the average time per month on call-outs was 5hrs and 52 minutes.

44. In 2022 the Claimant was on call-outs for 2.9% of his contracted on-call hours. The figure was 2.5% for 2023 and 2.2% up until May 2024. In addition, over the period 2022 – May 2024 there were 8 attendances (where the Claimant attended the Station but did not have to go out) which appeared to generally be of short duration.

45. Mr Watts accepted, when it was put to him by the Claimant, that it was impossible to predict in advance how many times he might be called out and for what duration during an on-call shift. To the best of Mr Watts' recollection, the highest number of call-outs from Modbury Fire station in a day during his time working there (around 11 years) was 8-12 call-outs when there was flooding. His evidence, which the Claimant did not dispute was that the average number of calls-outs for Modbury Station in 2021-2023 was 75 per year. He accepted that these could be unevenly distributed (i.e.., more some weeks and very few the next), but said it was rare that there were a large number of call-outs in one day.

THE LAW

46. Reg 2(1) WTR 1998 provides:

> "working time", in relation to a worker, means–
>
> (a) any period during which he is working, at his employer's disposal and carrying out his activity or duties,
>
> (b) any period during which he is receiving relevant training, and
>
> (c) any additional period which is to be treated as working time for the purpose of these Regulations under a relevant agreement;
>
> and "work" shall be construed accordingly;

47. The WTR 1998 implemented Council Directive 93/104/EC on working time, which was subsequently replaced by Council Directive 2003/88/EC.

48. Reg 2(1)(a) WTR 1998, with which we are concerned in this case, mirrors the definition of working time in Article 2 of the 2003 Directive. The definition of working time given in the Directives has been considered by the European

Court of Justice ('ECJ') / Court of Justice of the European Union ('CJEU') on several occasions.

49. The Claimant's claim was submitted on 11 April 2023 which was prior to the date on which amendments to the EU Withdrawal Act 2018 that were set out in the Retained EU Law (Revocation and Reform) Act 2023 took effect.

50. Accordingly, any CJEU case law that existed prior to 31 December 2020 was 'retained law' and any decision made by a domestic court in respect of retained EU law is to be made in accordance with that retained case law (s.6(3) EU Withdrawal Act 2018 prior to amendment). CJEU decisions made from 31 December 2020 onwards are not binding but courts may 'have regard' to such decisions insofar as they are relevant (s.6(2) EU Withdrawal Act 2018).

51. In the case of ***Sindicato de Medicos de Aistencia Publica (SIMAP) v Consellaria de Sanidad and anor*** C-303/98, [2001] ICR 1116, the ECJ noted at para 47 that working time and rest periods are mutually exclusive. Further, it held at paragraphs 48-49, that where healthcare workers were required to be present at their place of work while they were on call, the time on call amounted to 'working time' within the meaning of the 1993 Directive (which was in the same terms as the 2003 Directive). The ECJ noted that the objective of the Directive was to ensure the safety and health of workers by granting them minimum periods of rest and adequate breaks, which the Court considered would be 'seriously undermined' if time when an employee's physical presence was required in the workplace was excluded.

52. However, in respect of healthcare workers who are on call in the sense of needing to be contactable but not present at the workplace, the ECJ found that only the time when they were actually providing primary care services must be regarded as working time. The Court noted that during the rest of the time the doctors '*may manage their time with fewer constraints and pursue their own interests'* (para 50).

53. In ***Landeshauptstadt Kiel v Jaeger*** C-151/02, [2004] ICR 1528 the claimant doctor was required to do on-call shifts during which he had to stay at the hospital and be ready to carry out professional tasks, but could occupy himself as he wished including resting or sleeping in a room at the hospital

when he was not carrying out such tasks. The ECJ held that the whole time he was physically present at the hospital was 'working time'. They noted at para 65:

> It should be added that, as the court has already held in Simap , at p 1147, para 50, in contrast to a doctor on standby, where the doctor is required to be permanently accessible but not present in the health centre, a doctor who is required to keep himself available to his employer at the place determined by him for the whole duration of periods of on-call duty is subject to appreciably greater constraints since he has to remain apart from his family and social environment and has less freedom to manage the time during which his professional services are not required. Under those conditions an employee available at the place determined by the employer cannot be regarded as being at rest during the periods of his on-call duty when he is not actually carrying on any professional activity.

54. In ***Blakley v South Eastern Health and Social Services Trust*** [2009] NICA 62 the Claimant was an estates officer working at various hospital sites. He usually was 'on-call' one week out of every 6 and during that time he was not required to be on the premises or at home, but he did have to be ready to deal with calls that came in. The Court of Appeal in Northern Ireland found that the Tribunal had erred in finding his on-call period amounted to 'working time' noting (at paragraph 22) that '*[w]hile there were constraints on his freedom of action during the on-call period those constraints were not absolute and during the period of his on-call duty his situation was what the ECJ in SIMAP described as 'being contactable' without being obliged to be present and available at the work-place or a place designated by the employer'.* Accordingly, he was only to be treated as working when actually called on to provide services.

55. In the case of ***Ville de Nivelles v Matzak*** C-518/15, [2018] ICR 869, the claimant was a volunteer firefighter for a municipal fire service in Belgium. He was required to be on call for work for one week out of every four, during the evenings and at the weekend, but was paid only in respect of time on active service. The specific question referred to the CJEU (as relevant to this case was (at para 22):

> (4) Does Directive 2003/88 . . . prevent home-based on-call time from being regarded as working time when, although the on-call time is undertaken at the home of the worker, the constraints on him during the on call time (such as the duty to respond to calls from his employer within eight minutes) very significantly restrict the opportunities to undertake other activities?

56. The CJEU held as follows:

> 61. In the case, according to the information available to the court, which it is for the referring court to verify, Mr Matzak was not only to be contactable during his stand-by time. He was, on the one hand, obliged to respond to calls from his employer within eight minutes and, on the other hand, required to be physically present at the place determined by the employer. However, that place was Mr Matzak's home and not, as in the cases which gave rise to the case law cited in paras 57–59 of the present judgment, his place of work.
>
> 62 In that regard, it should be pointed out that, according to the court's case law, the concepts of 'working time' and 'rest period', within the meaning of Directive 2003/88, constitute concepts of EU law which must be defined in accordance with objective characteristics, by reference to the scheme and purpose of that Directive, which is intended to improve workers' living and working conditions: *Federacion de Servicios Privados del sindicato Comisiones obreras (CC OO) v Tyco Integrated Security SL* (Case C-266/14) [2015] ICR1159, para 27.
>
> 63. The obligation to remain physically present at the place determined by the employer and the geographical and temporal constraints resulting from the requirement to reach his place of work within eight minutes are such as to objectively limit the opportunities which a worker in Mr Matzak's circumstances has to devote himself to his personal and social interests.
>
> 64 In the light of those constraints, Mr Matzak's situation differs from that of a worker who, during his stand-by duty, must simply be at his employer's disposal inasmuch as it must be possible to contact him.
>
> 65 In those circumstances, it is necessary to interpret the concept of 'working time' provided for in article 2 of Directive 2003/88 as applying to a

> situation in which a worker is obliged to spend stand-by time at his home, to be available there to his employer and to be able to reach his place of work within eight minutes.
>
> 66 It follows from all the foregoing that the answer to the fourth question is that article 2 of Directive 2003/88 must be interpreted as meaning that 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'.

57. Mr Cheetham KC invited me to conclude that the 'determining factor' in ***Matzak*** was that Mr Matzak was required to be physically present at home whilst on call. However, I do not accept that interpretation of the decision. I consider that puts a gloss on what is said at para 63 above, which is that being required to be physically present at a place determined by his employer *and* the geographical and temporal constraints resulting from needing to reach his place of work within eight minutes were such to 'objectively limit the opportunities' he had to devote himself to his personal social interests and so distinguished him from a worker who merely had to be contactable during an on-call shift. I do not consider the CJEU concluded that one factor or the other was determinative of the working time issue.

58. The Claimant referred in his witness statement to the case of ***R (on the Application of Fire Brigades Union) v South Yorkshire Fire and Rescue Authority*** [2018] EWHC 1229 in which Kerr J found that the shift system operated in that instance contravened the WTR 1998, however I have not found the decision in that case to be on all fours with this case. In that case the firefighters who were on call had to be at the station albeit they could be asleep or relaxing (see para 95).

59. The following relevant cases are post-Brexit and therefore are not binding, but are cases to which I may have regard and which I have found of assistance in interpreting the meaning of 'working time'.

60. In, ***DJ v Radiotelevizija Slovenija*** C-433/19, [2021] ICR 1109, DJ was a technician working at two radio and television transmission centres in the Slovenian mountains. When he was required to be on stand-by he could leave the transmission centre, but he had to remain in contact by phone and

be able to attend within one hour if needed. Due to the remote location (including the distance to his home) and lack of leisure facilities nearby, this meant that in fact the claimant remained in the workplace during periods of stand-by in accommodation provided by the employer.

61. The CJEU summarised the relevant principles at paras 33-54. Including:

> 36 Second, the court has held that a period of stand-by time according to a stand-by system must also be classified, in its entirety, as 'working time' within the meaning of Directive 2003/88, even if a worker is not required to remain at his or her workplace, where, having regard to the impact, which is objective and very significant, that the constraints imposed on the worker have on the latter's opportunities to pursue his or her personal and social interests, it differs from a period during which a worker is required simply to be at his or her employer s disposal inasmuch as it must be possible for the employer to contact him or her (see, to that effect, Ville de Nivelles v Matzak, paras 63—66).
>
> 37 It follows from the elements set out in paras 33 to 36 of this judgment and also from the need, recalled in para 27 of this judgment, to interpret article 2(1) of Directive 2003/88 in the light of article 31(2) of the Charter of Fundamental Rights of the European Union, that the concept of 'working time' within the meaning of Directive 2003/88 covers the entirety of periods of stand-by time, including those according to a stand-by 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.
>
> 38 Conversely, where the constraints imposed on a worker during a specific period of stand-by time 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' for the purposes of applying Directive 2003/88 (see, to that effect, Sindicato de Medicos de Asistencia Publica (SIMAP) v Conseller a de Sanidad y Consumo de la Generalidad Valenciana (Case C-303/98) [2001] ICR 1116,

> para 50 and Federacion de Servicios Privados del sindicato Comisiones obreras (CC OO) v Tyco Integrated Security SL (Case C-266/14) [2015] ICR1159, para 37).

62. The CJEU noted that 'organisational difficulties' that a period of stand-by may cause for the worker, which are not caused by the constraints imposed on the worker, but by consequence of natural factors or his / her own free choice should not be taken into account in considering whether they are able to freely manage their own time (para 40). For example, a big distance between a residence that has been freely chosen and the workplace and difficulties caused by that distance is not a relevant criterion for classifying the whole period as working time. Further, the limited nature of the leisure opportunities in the local area meaning that, in practice, an employee has to remain at work is not a relevant factor for deciding if it is 'working time' (para 42). In addition, if a residence is at a workplace or indistinguishable from the workplace the fact that the worker has to remain at it to be available does not suffice for 'working time' as it does not necessarily mean that he or she must '*remain apart from his or her family and social environment*' and is less likely to interfere with '*that worker freely managing the time during which his or her professional services are not required'* (para 43).

63. The CJEU held that it is necessary to have regard to the timeframe within which an employee must be ready to work as well as the average frequency of being called upon (para 46).

64. It goes on to say:

> 48. In that regard, it should be underlined that a period of stand-by time during which the worker may, taking into account the reasonable time period allowed for him or her to resume his or her professional activities, plan his or her personal and social activities does not, a priori, constitute "working time", within the meaning of Directive 2003/88. Conversely, a period of stand-by time during which the time limit within which the worker is required to return to work is limited to a few minutes must, in principle, be regarded, in its entirety, as "working time", within the meaning of that Directive, since in that case the worker is, in practice, strongly dissuaded from planning any kind of recreational activity, even of a short duration.

49. The fact remains that the impact of such a time limit within which the worker has to react must be evaluated following a concrete assessment that takes into account, as appropriate, the other constraints imposed on the worker, just as in the case of the facilities granted to him or her during the period of stand-by time.

…

51. Secondly, coupled with the period of time available to the worker to resume his or her professional activity, the average frequency of the actual services that are normally carried out by that worker during each of those periods of stand-by time, must, where it is possible objectively to estimate them, be taken into account by the national courts.

52. Thus, if the worker is, on average, called upon to act on numerous occasions during a period of stand-by 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 stand-by time, is of a non-negligible duration.

53. 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" within the meaning of Directive 2003/88.

54. However, the fact that, on average, the worker is only rarely called upon to act during the periods of stand-by time cannot lead to those periods being regarded as "rest periods" within the meaning of article 2(2) of Directive 2003/88 where the impact of the time limit imposed on the worker to return to his or her professional activities is such that it suffices to constrain, objectively and very significantly, the ability that he or she has freely to manage, during those periods, the time during which his or her professional services are not required.

65. The CJEU's answer to the question referred to it was (own emphasis):

> 66. It follows from all the foregoing considerations that the answer to the questions referred is that article 2(1) of Directive 2003/88 must be interpreted as meaning that a period of stand-by time according to a stand-by system, during which the worker is required only to be contactable by telephone and able to return to his or her workplace, if necessary, within a time limit of one hour, while being able to stay in service accommodation made available to him or her by his or her employer at that workplace, without being required to remain there, does not constitute, in its entirety, working time within the meaning of that provision, unless **an overall assessment of all the facts of the case, including the consequences of that time limit and, if appropriate, the average frequency of activity during that period, establishes that the constraints imposed on that worker during that period are such as to affect, objectively and very significantly, the latter's ability freely to manage, during the same period, the time during which his or her professional services are not required and to devote that time to his or her own interests.** The limited nature of the opportunities to pursue leisure activities within the immediate vicinity of the place concerned is irrelevant for the purposes of that assessment.

66. In ***RJ v Stadt Offenbach am Main Case C-580/19***, RJ was a firefighter in Germany. During standby, he had to be contactable at any time and have his service uniform and service vehicle with him. He was required to respond to calls and decide what action to take and, in certain cases, to attend the incident or his workplace. During standby, he was required to be able to reach the town boundary, using his traffic privileges and rights of priority, within 20 minutes.

67. In ***RJ*** the court confirmed that nothing in ***Matzak*** precluded a period being 'working time' even if the employee is not required to remain in a place determined by the employer if he / she is '*subject to significant restrictions on the freedom to choose where he or she is present and on the organisation of his or her free time*' (para 19). Further (para 20):

> …The obligation imposed on the worker to reach a specific location within a short period could have such a restrictive effect on the organisation of his or

her free time and amounts to imposing on him or her indirectly the place where he or she is required to be physically present, thereby significantly restricting his or her ability to attend to personal matters.

68. The CJEU went on to set out the test as follows:

38. It follows from the elements set out in paragraphs 34 to 37 of this judgment and also from the need, recalled in paragraph 28 of this judgment, to interpret Article 2(1) of Directive 2003/88 in the light of Article 31(2) of the Charter of Fundamental Rights of the European Union, that the concept of 'working time' within the meaning of Directive 2003/88 covers the entirety of periods of stand-by time, including those according to a stand-by 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.

39. Conversely, where the constraints imposed on a worker during a specific period of stand-by time 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' for the purposes of applying Directive 2003/88 (judgment of today, Radiotelevizija Slovenija (Period of stand-by time in a remote location), C-344/19, paragraph 38 and the case-law cited).

40. In that regard, it should also be specified that only the constraints that are imposed on the worker, whether by the law of the Member State concerned, by a collective agreement or by the employer pursuant, inter alia, to the employment contract, employment regulations or the system of dividing stand-by time between workers, may be taken into consideration in order to determine whether a period of stand-by time is 'working time' within the meaning of Directive 2003/88 (judgment of today, Radiotelevizija Slovenija (Period of stand-by time in a remote location), C 344/19, paragraph 39).

41. By contrast, organisational difficulties that a period of stand-by time may generate for the worker, which are not the result of such constraints

> but are, for example, the consequence of natural factors or of his or her own free choice, may not be taken into account (judgment of today, Radiotelevizija Slovenija (Period of stand-by time in a remote location), C 344/19, paragraph 40).

69. In ***RJ*** the court reiterated that in the absence of a requirement to remain at the workplace the national courts must still determine whether an 'on-call' period amounts to 'working time' due to the '*consequences that all the constraints imposed on the worker have, during that period, for his or her ability freely to manage his or her time… and to pursue his or her own interests*' (para 44). The Court echoed the positions set out in ***DJ*** that it will be necessary to have regard to:

    a. the period within which the employee is required to return to his or her professional activities; coupled with, where appropriate

    b. the average frequency of the activities the worker is actually called upon to undertake (para 45).

70. In ***RJ*** the CJEU also said: '*a period of stand-by time during which the time limit within which the worker is required to return to work is limited to a few minutes must, in principle, be regarded, in its entirety, as 'working time', within the meaning of that directive, since in that case the worker is, in practice, strongly dissuaded from planning any kind of recreational activity, even of a short duration*' (para 47).

71. However, the CJEU made clear this is not an absolute rule. It goes on to say:

> 48. The fact remains that the impact of such a time limit within which the worker has to react must be evaluated following a concrete assessment that takes into account, as appropriate, the other constraints imposed on the worker, just as in the case of the facilities granted to him or her during the period of stand-by time (judgment of today, Radiotelevizija Slovenija (Period of stand-by time in a remote location), C-344/19, paragraph 49).
>
> 49. In particular, it is relevant, when considering the constraints involved by that reaction time, that the worker is obliged to remain at home, without being able to move freely, pending the request from his employer, or to be

> equipped with specific equipment when, following a call-out, he must report to his workplace. It is also relevant, when considering the facilities afforded to the employee, if a service vehicle is made available to that worker enabling him or her to use traffic regulations privileges and rights of priority, or indeed if the worker has the possibility of responding to requests from his or her employer without leaving the place where he or she is located.

72. In ***MG v Dublin City Council*** (C-214/20) the CJEU was concerned with whether a stand-by period during which a firefighter had to respond to an emergency call out and endeavour to attend at a fire station within 5 minutes and observe a maximum turn out time of 10 minutes from the call-out amounted to 'working time'.

73. The CJEU distinguished the situation in that case from that in ***Matzak*** because MG was not required to be in one location during the stand-by period.

74. The Court reiterated the test set out in ***RJ*** and ***DJ*** of whether the constraints imposed reach such a level as to '*affect, objectively, and very significantly the possibility for [the worker] to manage the time during which his or her professional services are not required and to pursue his or her own interests*' (para 38-39) and that this was a question for the referring court to assess in light of all the circumstances in the case. However, in that case the CJEU noted that the following could constitute objective factors from which it may be concluded that MG was not placed under constraints which very significantly affected his ability to manage his own time and pursue his own interests:

    a. the fact that MG could carry out another professional activity during his periods of stand-by (para 43);

    b. that he did not have to be in a specific place during his periods of stand-by time (para 44); and

    c. he did not have to participate in every intervention from the fire station as he was entitled to abstain from responding to 25% of interventions (para 44).

75. At para 45 the ECJ reiterated:

> It is also important to state that organisational difficulties that a period of stand-by time may generate for the worker concerned, such as the choice of residence or places for the pursuit of another professional activity which are more or less distant from the place that he must be able to reach within the time limit set in the context of his post as a retained firefighter, may not be taken into account (see, by analogy, judgment of 9 March 2021, Stadt Offenbach am Main (A firefighter's period of stand-by time) (C-580/19) EU:C:2021:183, paragraphs 41 and 42 and the case-law cited).

Summary

76. From the above authorities I draw the following principles of relevance to this case.

77. First, when considering whether an 'on-call' period, during which a worker is not required to be at their place of work is 'working time' (i.e., a period during which he is working, at his employer's disposal and carrying out his activity or duties) the test is whether the constraints imposed on the worker are such as to affect, objectively and very significantly, the possibility for the worker freely to manage the time during which his or her professional services are not required and to pursue his or her own interests (*SIMAP, Matzak, DJ, RJ & MG).*

78. Second, the focus is on constraints imposed by the employer, as opposed to 'organisational difficulties' that might arise from natural factors or factors of the worker's own free choice such as the location of leisure facilities, the worker's choice of residence or places for pursuit of another professional activity (*DJ, RJ & MG*).

79. Third, if the worker is required to remain in one specific place (such as at home) during their on-call period this is a factor that is likely to suggest that it amounts to 'working time' (*Matzak)*.

80. Fourth, if the worker is required to be available to attend work during an on-call period within a few minutes that, in principle, suggests that period is 'working time' as it will mean that, in practice, the worker will be strongly dissuaded from planning any kind of recreational activity even of a short duration. However, even in those circumstances the impact of such a time

limit must be evaluated together with any other constraints imposed and whether, in fact it has the objective and very significant impact required (*DJ, RJ & MG).*

81. Other 'objective' factors which may be relevant to the assessment are:

    a. the average frequency and duration of call-outs during an 'on-call' period (*DJ, RJ)*;

    b. whether the worker is or is not constrained by the employer from undertaking other professional activities during that time (*MG*);

    c. whether or not the worker has to respond to every call-out (*MG*).

CONCLUSIONS

Preliminary point

82. At the outset of the hearing Mr Cheetham KC, for the Respondent, raised the possibility that my judgment in this case may have significant implications for the operation of the fire service nationally which relies on on-call firefighters such as the Claimant. He acknowledged this was merely the context rather than a relevant factor in my determination.

83. I note that the authorities are clear that the decision as to whether a period of time amounts to 'working time' is fact specific and my decision in this case relates only to the Claimant's circumstances. In any event, and for the avoidance of doubt, the potential wider implications for the Respondent (insofar as there would be such implications) are a matter that I have put to one side as not being relevant to the decision that I have to make in respect of whether the Claimant's on-call shifts are 'working time' under the WTR 1998. As frequently repeated within the authorities, the purpose of the Directives which the WTR 1998 implemented is to lay down minimum safety and health requirements for the organisation of working time including by granting minimum periods of rest and adequate breaks (see for example, ***SIMAP*** at para 49). That objective would be undermined if the impact on the employer of complying with that legislation in any particular scenario, were to be taken into account in determining what was working time.

Relevant test

84. The Claimant was not required to be present at the workplace during his on-call shifts in the manner of some of the healthcare workers in ***SIMAP*** and therefore his on-call shifts are not to be considered 'working time' for that reason.

85. The question which I have considered is whether constraints imposed on him by the Respondent were such as to affect, objectively and very significantly, the possibility for him to freely manage the time during which his professional services were not required and to pursue his own interests. For the avoidance of doubt, it is accepted by all that the period during which he was actually responding to a call-out is working time and so my decision relates to the period where he is 'on-call' but not actively responding to a call-out.

Response requirement and time

86. The most significant constraints placed on the Claimant by the Respondent during his on-call shifts are the requirements that he respond to every call out and that he do so by attending at the Modbury Fire Station within 5 minutes. The Claimant could notify his manager and 'book off' if there was an emergency, but I do not consider this materially affects the fact that otherwise he had to respond to every call: this was not a case where the Claimant could pick and choose what alerts he responded to or was only required to respond to a certain percentage (as was the case in ***MG***). I note the guidance in ***RJ*** and ***DJ***, that where a worker is required to return to work within a period of a few minutes that must, in principle, be regarded as 'working time' as the worker would in practice be strongly dissuaded from planning any kind of recreational activity. However, that is only the position 'in principle' and I must nonetheless evaluate the impact of that time limit following a 'concrete assessment' that takes account where appropriate, other constraints imposed on the Claimant.

Location

87. In this case, unlike in ***Matzak*** the Claimant was not required to remain at home during his on-call shifts or at the workplace or in any other specific

place. The Claimant submitted that such a short response time effectively meant that he was consigned to a relatively small geographical area. While I accept that this was a constraint, I do not consider that this is of the same magnitude as being required to be at home at all times, as was the case in ***Matzak.*** Further, I do not consider that this constraint of staying in a geographical area within 5 minutes' reach of the workplace to be 'very significant' in and of itself given that a worker with such a restraint would still have some choice about where they could choose to spend their on-call period and could spend time outside of the home or workplace if they wished to do so.

Alcohol intake / shaving / hair style / uniform

88. I accept that the Respondent did place constraints on the Claimant in respect of drinking alcohol, needing to be shaven and his hair style during his on-call shifts. In respect of uniform, the Claimant was not required to be in a particular uniform when on-call, although he had to change when he attended at the Station for a call-out. Looking at these matters objectively, I do not conclude that these constraints had 'very significant' impacts on his ability to freely manage his time and pursue his own interests during his on-call period. Having to have shaved within the last 24 hours is not, objectively such an onerous undertaking as to impact significantly on someone's ability to manage their time freely nor is having to keep hair styled / coloured in such a way as not to undermine public confidence. I accept that not being able to drink alcohol has some objective impact on how a person might pursue their interests, however, it does not prevent them from pursuing those interests at all or, for example, spending time with friends and family and socialising.

89. When looking at these matters, I have considered them objectively, in accordance with the guidance in the case law.

90. However, for the avoidance of doubt, even if considered subjectively, with regard to the Claimant's specific evidence on how he liked to spend his time, I would not have concluded these constraints significantly impacted on his ability to freely manage his time or pursue his own interests. The Claimant did cite not being able to have a glass of wine with lunch on a Sunday or a

drink on Christmas day, but did not suggest this stopped him from nonetheless participating in those social occasions. He was not able to cite a recent or frequent example of the impact of having to shave or have his hair in a particular style. He did refer to not being able to dye his hair for Halloween, however again there was no indication he was unable to participate in such festivities entirely.

Professional activities

91. There was no specific constraint placed upon the Claimant by the Respondent in respect of undertaking other work either on an employed or self-employed basis during his on-call hours. This is a matter, per ***MG***, that is indicative of the Claimant's ability to pursue his own interests *not* being significantly affected.

92. The Claimant raised that although he was theoretically able to work and did do some work from home mending watches, the 5-minute response time prevented him from attending some jobs. I have concluded that this is not a constraint which is imposed by the Respondent, but by the sorts of 'organisational difficulties' i.e., location of work which the CJEU in ***MG, DJ*** and ***RJ*** suggested are not relevant to the assessment of whether on-call time is 'working time' as they are (at least to some extent) within the control of the worker.

93. However, even if I were to take the practical limitation imposed by the 5-minute response time on the Claimant's ability to undertake alternative professional activities into account, I would not conclude this to be 'very significant'. The Claimant was still able to undertake other work, most of which he did from home, and was only restricted in terms of being able to travel to jobs where a clock could not be moved: he only gave one example of this happening.

Other constraints

94. I conclude that the other constraints that the Claimant cited (as set out in my findings of fact) were limitations which flowed from the 5-minute response time, rather than constraints imposed directly by the Respondent.

95. Again, these fall into the bracket of 'organisational constraints' arising from natural factors such as the location of places that he can fish or where some members of his family reside or factors arising from his own free choice such as his preference about where he would like to eat out. Accordingly, I have concluded they are not relevant to my determination as to whether there were very significant constraints imposed by the Respondent on the Claimant's ability to freely manage his time or pursue his own interests in accordance with CJEU guidance.

96. However, for completeness, had I considered it was appropriate to take those matters into account, I would not have concluded, even taking account of the Claimant's evidence and preferences, that these placed 'very significant constraints' on the Claimant. The location of the Modbury Fire Station, the Claimant's home and amenities within the Modbury village meant that the Claimant was not restricted in being able to spend time with his immediate family at home (a factor the ECJ considered important in ***Jaeger***). Further he could still go for dinner with his wife, do some shopping, and undertake physical activity. I accept he could not pursue these interests in the manner he preferred, but he could still pursue them to some extent and I do not consider the limitations 'very significant'. I do accept that the response-time meant he could not attend his children's school for parents' evening. However, I am of the view that the significance of this constraint was mitigated by the fact that he could ask for his shift to be covered or swapped and I accept Mr Watts' evidence that there was a significant degree of flexibility allowed to take account of on-call firefighters' other responsibilities, as evidenced by the flexibility around the Claimant's current uncertain shift pattern in his primary role.

Frequency and duration of call-outs

97. When the Claimant is called out, the average duration of the work he has to do is not short: Mr Watts' evidence and the data provided suggests a call-out will normally take a couple of hours, although I recognise this is an average so it could be longer or shorter.

98. However, the data provided by the Respondent and not disputed by the Claimant indicates that call-outs are relatively infrequent averaging for the

Claimant in 2023-2024 fewer than once a week. I of course take into account the Claimant's point that call-outs are unpredictable, but note that for each of 2022, 2023 and up until May 2024 the period of his time on-call during which he was actually called-out was less than 3%. So for 97% of the time he was on-call, he was free (albeit with the constraints set out above) to pursue his own interests and manage his time as he wished. This is a matter which I consider to be relevant to the significance of the impact of the constraints on the Claimant.

Conclusion

99. In reaching my conclusion as to whether the constraints imposed on the Claimant by the Respondent are such as to affect, objectively and very significantly, the possibility for him to freely manage the time during which he was not on call-outs and to pursue his own interests, I have taken account of the cumulative impact of those constraints. I do consider the 5-minute response time and requirement to attend each call-out to have a significant impact on him for the reasons set out in ***DJ*** and ***RJ*** in terms of dissuading a worker from undertaking other activities. This is not a case, as in ***MG*** in which the Claimant had a choice to not respond to some calls and the response time was clearly very short.

100. However, I have also taken into account the other constraints placed upon him by the Respondent (which I find to be relatively minimal) and in particular taken into account that he is not required to be in one place during his on-call shifts (e.g., at work or at home) and is not constrained by the Respondent in terms of undertaking other professional activities or interests such as spending time with his family or from sleeping and the frequency of call-outs was low.

101. For those reasons, and looking at the relevant factors as a whole, I have concluded that during his on-call shifts the constraints imposed on the Claimant by the Respondent are <u>not</u> such as to affect, objectively and very significantly, the possibility for him to freely manage the time during which he was not on call-outs and to pursue his own interests.

102. In reaching this decision I have discounted the subjective impact of 'organisational difficulties' caused to the Claimant by being on-call and

arising from, for example, the location of amenities, other work or from his own preferences. However, for the avoidance of doubt and for the reasons given above if I had factored in the Claimant's evidence on the subjective impact the 5-minute response rate and other constraints had on his ability to manage his free time and pursue other interests I would not have concluded such impact was very significant. I do not seek to underestimate or devalue the inconvenience that is from time to time caused to the Claimant and his family by him being on-call, nor the sacrifices he makes to provide this important service to his local community (albeit on a paid basis). However, I do not consider that the constraints on him reaches the bar (whether considered objectively or subjectively) of having the 'very significant' effect required, such as to mean his time on-call when he is not actually responding to a call-out is 'working time' rather than rest time under the WTR 1998.

103. In light of my conclusion that the periods during which the Claimant was on-call (and not called-out) do not amount to 'working time' under Reg 2(1) WTR 1998, the Claimant's claims under Reg 10 and Reg 11 ETR 1998 fail and are dismissed.

Employment Judge Danvers

29 September 2024

REASONS SENT TO THE PARTIES ON
11 October 2024 By Mr J McCormick

FOR THE TRIBUNAL OFFICE