

POLICE FEDERATION OF ENGLAND & WALES

WORKING TIME REGULATIONS

a Guide for Joint Branch Boards

February 2010

1. INTRODUCTION

1.1 The Working Time Regulations 1998 came into force on 1 October 1998, and implemented the European Directive on the Organisation of Working Time (EWTD). The WTR have been amended on various occasions. Throughout this Guide, the Working Time Regulations 1998, as amended, will be referred to as the 'WTR'. A copy of the WTR (as amended) is at Annex III.

1.2 The WTR introduced limits on working time and entitlements to rest. The main provisions generally give workers the right to:

- a limit on average weekly working hours of 48
- a limit on night workers' average normal daily hours of 8
- health assessments for night workers
- a minimum daily rest period of 11 consecutive hours
- a minimum weekly uninterrupted rest period of 24 hours
- rest breaks at work (where the working day is more than 6 hours, an uninterrupted period of not less than 20 minutes)
- 4.8 weeks paid annual leave

The WTR are primarily a health and safety provision.

1.3 The above provisions represent minimum standards of protection for the health and safety of workers. Some breaches of the WTR are challengeable in the employment tribunal while others are criminal offences.

1.4 The WTR expressly apply to police service. They apply to all federated ranks, though in limited circumstances a derogation applies the nature of application may differ depending on the duties assigned to the member.

General impact on members

1.5 The Police Regulations continue to govern members' conditions of service. Police Regulations currently provide a statutory framework for the organisation of working time and the WTR have not changed this.

1.6 However, the WTR comprise a health and safety safeguard against potential abuses by management of the organisation of working time within the framework provided by the Police Regulations.

Entitlements under other provisions (*Regulation 17*)

1.7 In many respects Police Regulations provide better conditions than those under the WTR, for example, annual leave, weekly rest and rest breaks (albeit these are subject to the 'exigencies of duty').

Derogations

- 1.8 The EWTD allows certain derogations from some of these provisions in certain circumstances, or in relation to particular workers or groups of workers. The Government has adopted some derogations on a national level by including them in the WTR. It is also possible for many provisions to be varied or excluded by either collective or workforce agreements (see Sections 14 and 16 below).
- 1.9 The WTR expressly authorise “workforce agreements” between chief officers and JBBs (WTRRegulation 41).
- 1.10 This briefing document seeks to provide appropriate guidance to JBBs in dealing with the WTR, and to provide a common framework of broad principles within which the maximum consistency can be achieved across all forces. It covers only those points and provisions of prime relevance to the police service.

2. COVERAGE AND SCOPE

Unmeasured working time (*Regulation 20(1)*)

- 2.1 This regulation does not apply in relation to workers where, on account of specific characteristics of the activity in which they are engaged, the duration of the working time is not measured or pre-determined or can be determined by the workers themselves. Examples of this are managing executives of other persons with autonomous decision-taking powers. We consider that this Regulation does *not* apply to the federated ranks.
- 2.2 However, our advice remains that we do not believe the test in this Regulation applies to the inspecting ranks. In the vast majority of cases, inspectors' and chief inspectors' time (tours of duty) will be predetermined to a large extent and their hours recorded in some way (and thus measured). Further, and importantly, the characteristics of the activities of inspecting ranks do not require the working time not to be measured, etc.

3. WORKING TIME (*Regulation 2*)

- 3.1 'Working time' is defined in Regulation 2 as any period during which a worker is working, at his employer's disposal and carrying out his activity or duties. All three elements must be satisfied for time to be 'working time', as has been confirmed in a European Court of Justice (ECJ) decision in relation to Spanish doctors (see para 3.4).
- 3.2 Working time includes all time comprising duty time within the meaning of the Police Regulations and also includes periods of training provided, directly or indirectly, by the employer. JBBs and chief officers can by local agreement determine that other time may also comprise working time.

Police Regulations 2003

- 3.3 The determination at Annex E for regulation 22 (Duty) provides at paragraph (9) that the following periods should also be included in police officers' working time for the purposes of the WTR:
- (i) travel, outside of normal rostered duty **hours** and not already covered by the travelling time treated as duty provisions, to and from duty at a place other than the normal place of duty, eg travel to and from court;
 - (ii) travel to and from training courses other than at the normal place of duty.

This determination does not preclude JBBs agreeing further, additional periods in a definition of working time, as stated in para 3.2. JBBs should be aware however that, whilst it is possible to agree additional periods in such a definition, it is *not* possible to agree periods which are *not* to be treated as working time.

On call/standby

- 3.4 There have been a number of ECJ cases which have dealt with the issue of "on call". From these cases the following principles emerge:
- (i) in order to be "working time" within the definition of the WTD, which is reproduced in regulation 2 WTR, all three elements the worker is working, at his employer's disposal and carrying out his activity or duties, must be satisfied;
 - (ii) the same period of time cannot be both working time and a rest period;
 - (iii) a worker who is required to be present at the workplace while on call with a view to providing their services if required is to be regarded as carrying out their duties and that such on-call time is therefore classified as 'working time'; and
 - (iv) time spent on call at a place of work will be regarded working time, even if the worker is allowed to sleep and a rest room is provided for that purpose.

- 3.5 So when an officer is required to be at a given workplace location, it is strongly arguable that this should count as working time, even though the officer is described as being “on call”.
- 3.6 It is also strongly arguable that all time spent “held in reserve” should be regarded as working time for the purposes of the WTR, even if 8 hours are not regarded as duty under the Police Regulations. Given the nature of “held in reserve” duties however, there may be arguments that derogations apply under regulations 18 or 21 (see section 14).
- 3.7 As stated in para 3.2, it is open to JBBs to reach agreement that additional periods comprise working time and it is recommended that existing local agreements determining what is duty time be relied upon wherever possible. It may, however, be possible for JBBs to agree with chief officers that some other time, though not duty time for the purposes of the Police Regulations, comprises working time for WTR purposes, eg certain types of on call. JBBs should however be aware that if very tight restrictions are imposed on an officer’s freedom of movement, it might be possible to argue that such time is working time under regulation 2 in any event. We are advised that this argument remains unlikely to succeed in cases where an officer is on call but is otherwise reasonably free to move around.
- 3.8 It is possible that the WTD will be amended so as to introduce a new category of time called “inactive on-call time”, which would be regarded as neither working time nor a rest period. This was agreed by the Council of Ministers in June 2008 but has not been progressed into law. As at November 2009, it is not clear whether it will be. Any such amendment is unlikely to improve the position in relation to on call for police officers being regarded as working time.
- 3.9 Although Staff Side attempted to reach agreement at PNB that ‘on call’ time should be treated as working time for the purposes of the WTR, it was not successful. However, the Official Side has agreed to issue guidance to forces reminding them of their duty of care as employers and in exercising that duty of care to have regard to the nature and extent of on call or standby requirements. A copy of that guidance is attached at Annex X.

4. NIGHT TIME (*Regulation 2*)

- 4.1 Night time is a period of at least 7 hours which **includes the period from midnight to 5 am**. Beyond that, the period can be determined by agreement (eg 10pm – 5am, or 11pm – 7am). This margin can be used to advantage in local negotiations, depending on the shift patterns in your force, or the start of your force day.

Failing agreement on a definition of night time, the WTR fix it as the period from 11pm to 6am

5. NIGHT WORKERS (*Regulation 2*)

5.1 Who is a night worker? The WTR specify a night worker as anyone who works either:

- (i) as a normal course (which will include a member working nights for the majority of the days they work, but will probably include others also - see below) at least 3 hours of their daily working time during night time (see para 4.1); or
- (ii) who is likely during night time to work any other proportion of annual working time determined nationally or agreed by the JBB and the chief officer.

5.2 DTI guidance was that “as a normal course” means on a regular basis.

5.3 This is confirmed and strengthened by a Northern Ireland High Court decision (*R v Attorney General for Northern Ireland ex parte Burns*). This is now contained within Police Regulations and Determinations 22, Annex E.

Police Regulations 2003

5.4 The position in relation to police officers should not be in dispute, given the terms of the determination at Annex E for regulation 22 (Duty). This provides at paragraph (8);

“Any member who regularly works for at least three hours of his daily working time between 11pm and 6am, irrespective of the pattern of duty worked, shall be treated as if he were a night worker for the purposes of regulation 2(1) of the Working Time Regulations 1998”.

6. HEALTH ASSESSMENTS (*Regulation 7*)

- 6.1 All workers classified as night workers are entitled to free (to the worker) health assessments before they are assigned to night work and at appropriate regular intervals.

PNB agreement

- 6.2 The PNB has agreed (PNB Circular 01/2, see Annex IV) that it would be good practice for all police officers, regardless of whether they are ‘night workers’, to be given the opportunity of a free health assessment in accordance with the provisions of WTRegulation 7.

7. LIMITS ON NIGHT WORK (Regulation 6)

- 7.1 An employer must take all reasonable steps to ensure that a night worker's normal hours of work (not just hours of night work) do not exceed an average of 8 hours in each 24 hours over the reference period of 17 weeks. Breach of this provision is a criminal offence.
- 7.2 Normal working hours are considered likely to include overtime which is obligatory and guaranteed or regularly worked.
- 7.3 Under WTR Regulation 6(3)(a), successive reference periods of 17 weeks may be set by a workforce agreement. Where no agreement is reached, the reference period will be any period of 17 weeks in the course of a worker's employment (a rolling reference period). This means that, provided a worker has not worked more than the average in the 17 weeks preceding, including today, then the WTR are not breached in respect of that 17 week period.
- 7.4 It may be to our members' advantage that there is a rolling reference period (that rolling period will include any period of 17 weeks). Hence, if chief officers want to agree otherwise, JBBs should ensure that they obtain something material in return.
- 7.5 To calculate average normal hours, regulation 6(5) takes each worker's entitlement to one rest day a week under the WTR and assumes that the other six are working days. This means the average is calculated by adding up the total number of hours (during day or night) that the worker regularly works over the reference period, and dividing that figure by the total number of working days allowed by the WTR during the reference period. In a standard 17-week reference period there will be 102 working days (17 x 6).
- 7.6 It is not anticipated that this provision will be breached often. However, it may be relevant from time to time, perhaps in particular for inspecting rank members who are night workers and for whom the Police Regulations provide no limitations on working time.

Special hazards (Regulation 6(7))

- 7.7 Where a night worker's work involves special hazards or heavy physical or mental strain, there is a limit of 8 hours *on the actual daily working time* allowed in any 24 hour period during which night work is performed. Breach of this provision is a criminal offence.
- 7.8 7.9 It may be argued that special hazards apply to much of the work of police officers and that, therefore, all officers classified as night workers should be restricted to a limit of 8 hours (per 24 hours) whilst working nights (unless varied by a workforce agreement).
- 7.9 WTR Regulation 6(8) provides that the work of a night worker involves special hazards or heavy physical or mental strain if it has been identified as involving a significant risk to the health and safety of workers in a risk assessment made under regulation 3 of the Management of Health and Safety at Work Regulations 1999.

7.10 WTRegulation 6(8) also allows JBBs to make agreements with chief officers identifying that the work of night workers involves special hazards, or heavy physical or mental strain. In the interests of the health and safety of members, serious consideration should be given by JBBs to reaching agreements that this is the case.

8. MAXIMUM WEEKLY WORKING TIME (*Regulation 4*)

- 8.1 Employers are required to take all reasonable steps to ensure that workers do not exceed an average of 48 hours working time per week over a 17 week period (the standard reference period - but see Sections 14 and 16). The 17 week period may be set by agreement between JBBs and chief officers or, in the absence of an agreement, will be any period of 17 weeks (a rolling reference period).
- 8.2 Police Regulations currently provide for a 40 hour standard working week for full time constables and sergeants. As a normal course, an officer working 8 hours overtime per week for, say, 16 weeks, and 9 hours overtime in the 17th week would therefore be in excess of the weekly working time limit. (There are exceptions to these limits and these are dealt with in Section 14.)

Overtime claim forms or rosters may not necessarily be relied upon to accurately record the number of weekly hours worked. Any periods of working time must be included (including any periods agreed by JBBs in a workforce agreement, and periods covered by annex E, see Section 3). Periods of unpaid overtime should be included in the calculation, as should any travelling time treated as duty; whereas any periods paid for but not worked under Police Regulations (where members are entitled to reckon a minimum of 4 hours) should not be included.

Agreement to exclude the maximum (*Regulation 5*)

- 8.3 This Regulation deals with the provision that has often been referred to as the “individual opt-out” from the maximum 48 hour working week. The WTR allow individual workers to make a written agreement with his/her employer not to apply the maximum working week in his or her own case - subject to certain conditions with which the employer must comply.

It is difficult to see quite how entering into such an agreement will benefit any individual member.

- 8.4 In 1999, the High Court held that a worker has a freestanding contractual right not to be required to work more than an average of 48 hours per week during the reference period (*Barber v RJB Mining (UK) Ltd*). This means that, unless there is an individual written agreement to opt-out, workers who are being asked to work in excess of the limit on working time can bring a claim in the ordinary courts for a declaration of their rights and can seek to enforce their rights by means of an injunction prohibiting the employer from requiring them to work in excess of the limits imposed by the WTR.
- 8.5 Insofar as our members, who do not have contracts, are concerned, we are advised that this case provides authority for the proposition that it is part of our members’ terms and conditions that they cannot be required to work more than an average of 48 hours per week during the reference period. If they are required to do so, then (unless a derogation under regulations 18 or 21 were to apply) relief from the Court can be sought, most likely by way of judicial review seeking an appropriate declaration.

9. DAILY REST (*Regulation 10*)

- 9.1 Workers are entitled to a rest period of not less than 11 consecutive hours in each 24 hour period (but see Sections 14 and 16).
- 9.2 The determination at Annex E for regulation 22, Police Regulations 2003 provides that a duty roster for constables and sergeants shall make provision for an interval of not less than 11 hours between shifts, and an interval between each of rostered rest day not exceeding 7 days (unless in the case of a part-time member, a longer interval has been agreed between the member and the chief officer) unless the JBB agree otherwise, such agreement providing for a period of compensatory rest. Where the exigencies of duty require an alteration to the roster, this should so far as possible avoid breaching these conditions. If the conditions are breached, the member is entitled to an equivalent period of compensatory rest.

10. WEEKLY REST (*Regulation 11*)

- 10.1 Under regulation 11 WTR, workers are entitled to an uninterrupted rest period of not less than 24 hours in each seven day period. This may be averaged at the sole discretion of the employer over each 2 week period, so that workers would be entitled to 2 days' rest per fortnight: either by 2 uninterrupted periods of not less than 24 hours per fortnight or one such period of not less than 48 hours per fortnight. The seven (or fourteen) day periods start whenever agreed in a workforce agreement, or if there is no agreement, at midnight between Sunday and Monday.
- 10.2 Police Regulations already allow for 2 rest days per week and this more favourable condition must prevail. In addition, many, if not most forces currently roster rest days as 2 consecutive days per week.

Any attempt by forces to use the WTR to change this practice should be strongly resisted.

Overlap of daily/weekly rest (*Regulation 11(7)*)

- 10.3 This Regulation provides that periods of daily and weekly rest should not overlap, except *where this is justified by objective or technical reasons or reasons concerning the organisation of work.*
- 10.4 Given that Police Regulations already provide for 2 rest days per week, it is not anticipated that such a dispute will arise.

However, there should be no objective or technical reasons to justify avoiding the effect of the WTR.

11. SHIFT WORKERS (Regulation 22)

11.1 Regulation 22 WTR states that the provisions for daily and weekly rest do not apply to shift workers when changing shift and they *cannot* take a daily or weekly rest period between the end of one shift and the start of the next one.

11.2 The impact of this on members should however be limited as:

- The definition of “shift worker” is such that as many members are unlikely to fall within it; and
- the determination for regulation 22 Police Regulations 2003 at paragraph (3)(e) states that a duty roster shall make provision for:
 - i) An interval of not less than 11 hours between the ending of one shift and the beginning of the next; and
 - ii) an interval between rostered rest days not exceeding 7 days (unless in the case of a part-time member, a longer interval has been agreed between the member and the chief officer);

unless the JBB agrees otherwise, such agreement providing for an equivalent period of compensatory rest.

11.3 This should be borne in mind when agreeing shift systems and rosters in your force which should, in keeping with the protection of the health and safety of workers, wherever possible allow appropriate periods of daily and weekly rest. If they have not already done so, JBBs may need to agree with chief officers that shift patterns accommodate appropriate compensatory rest for members where there is such a breach (such as for instance ensuring that a “quick changeover” is followed by a break well in excess of 11 hours) the daily and weekly rest provisions do not apply to ‘split-shift’ workers. The determination at Annex E for Police Regulation 22 states that, as far as the exigencies of duty permit, the normal daily period of duty shall be performed in one tour of duty. It is understood that few, if any, split shifts are now worked in the police service.

11.4 If, unusually, the shift worker or split shift exclusions do apply, then the force should allow an equivalent period of compensatory rest (see Section 15).

11.5 Annex E Police Regulations also provides that if the JBB agrees to a quick changeover or longer than 7 days between rest days, or if an alteration to the roster resulting from an exigency of duty has a similar effect, then an equivalent period of compensatory rest should be provided.

12. REST BREAKS AT WORK (Regulation 12)

12.1 This Regulation provides that where an adult worker's daily working time is more than 6 hours, he/she is entitled to an uninterrupted rest break of not less than 20 minutes, and is entitled to spend it away from his/her work station (if there is one).

Albeit subject to the exigencies of duty, the position under the Police Regulations 2003, in Annex E, which provides for a minimum 30 minute break on a sliding scale, is more favourable than this WTRegulation and, in most circumstances, should therefore prevail.

12.2. It is not enough to identify retrospectively periods where the worker has not been interrupted. The rest break should be identified at the beginning of the break. The Directgov guidance is that a break cannot be taken off one end of the working day and must be somewhere in the middle.

12.3 A force may be able to rely on an exception under regulation 21 (or, rarely, under regulation 18) see section 14. If regulation 21 applies, there will still be an obligation to allocate compensatory rest (see section 15).

12.4 The duty on an employer is to ensure that workers can take rest breaks, but they do not have to force workers to take breaks. A legal claim (to the employment tribunal – see section 17) arises only if a worker is prevented from exercising the right.

12.5 However, guidance was given by the Advocate-General in *Commission v UK*. She stated that employers must:

- Actively see to it that an atmosphere is created in which the minimum rest periods are observed.
- Ensure that such breaks are scheduled as part of the organisation of working time.
- Ensure that workers are not under pressure to forego breaks, whether directly from the employer, for example through the setting of performance targets, or from other workers who are choosing not to take their breaks and creating peer pressure to do the same.

This guidance may assist in discussions that seek to ensure rest breaks can be taken.

13. ANNUAL LEAVE (Regulation 13)

- 13.1 The WTR provide, in Regulations 13 and 13A, that a worker is entitled to at least 5.6 weeks paid leave in each leave year. The entitlement under the WTR is subject to a maximum of 28 days (although this does not prevent workers having a greater entitlement under other terms and conditions).
- 13.2 This entitlement includes public holidays.
- 13.3 For full time police officers working an average of five 8 hour shifts a week, the WTR right would mean a minimum of (5.6 x 5 =) 28 days a year. For an officer doing a VSA with an average of four 10 hour shifts a week it would mean a minimum of (5.6 x 4 =) 22.4 days a year. In the unlikely event of an officer working more than 5 shifts a week, the WTR entitlement would be capped at 28 days.

Police Regulations currently provide for a minimum of 22 days annual leave (equivalent to 4 weeks and 2 days), depending on length of service, in addition to public holidays (with modifications for those doing VSAs). These provisions are more favourable and must prevail.

Payment in lieu

- 13.4 WTR Regulation 13(9)(b) stipulates that the minimum entitlements to annual leave may not be replaced by a payment in lieu, except where the worker's employment is terminated.
- 13.5 The Police Regulations 2003 provide, at paragraph (6) of the determination for Annex O, that where on termination of service the leave taken is more or less than the entitlement under the Police Regulations, an adjustment shall be made. If the leave taken is less than the entitlement, a payment in lieu is made. If the leave taken is more than the member's entitlement, then the police authority is entitled to an adjustment in payment or additional service. These adjustments apply to the annual leave entitlement under the Police Regulations and are not limited to the WTR entitlement.

Carry over of leave

- 13.6 It is possible that the position in relation to the carry over of annual leave may change following the cases of *Stringer v HMRC* and *Pereda v Madrid Movilidad* (see 13.20 below). The following paragraphs reflect the position as at November 2009.
- 13.7 WTR Regulation 13(9)(a) states that the minimum entitlements to annual leave may only be taken in the leave year in which it is due. Police Regulations currently allow, at the chief officer's discretion and subject to the exigencies of duty, for up to 5 days to be "carried over" to the following leave year (and more than 5 days can be carried over if the chief officer is satisfied that there are exceptional circumstances and that it is in the interests of efficiency to do so). On the face of it, therefore, it might be thought that the WTR would restrict carry over of holiday entitlement to a member's entitlement over and above 28 days.

Whereas it may be disputed which specific leave days have been taken under WTR entitlement and which under Police Regulations entitlement, an Employment Tribunal has held (*Barton & ors v SCC Ltd*) that it was for the worker to choose which weeks he or she took as leave under the WTR and which as contractual. While police officers do not have contracts, we are advised that a similar approach should be applied.

- 13.8 There are however two reasons why this should not be the case. First, since WTR annual leave entitlement can include public holidays, and because members enjoy an additional entitlement to public holidays, it is advised that provided public holidays are counted in the 28 days WTR entitlement, members could nonetheless continue to carry over some leave, the precise position depending on their entitlement under the Police Regulations
- 13.9 The second reason why carry over would be allowed is that the WTR provide a worker with an entitlement to annual leave, but not an obligation to take the entitlement. The right is enforceable in an employment tribunal. A complaint can only be made to a tribunal if the employer “has refused to permit [the worker] to exercise [a relevant] right”. An officer who asks to carry leave over and is allowed to do so is unlikely to want to bring proceedings, and will only be able to do so if the Force refused the WTR entitlement in the original holiday year.
- 13.10 Doubt has been cast on the restriction on the carry over of leave in cases where a worker is unable because of sickness to take annual leave during the leave year. In *Pereda*, the ECJ found that the Directive requires that a worker who is on sick leave during a period of previously scheduled annual leave has the right to take the annual leave after return to work, even if this is in another leave year.
- 13.11 In the earlier case of *Stringer v HMRC*, the ECJ held that member states could not provide that the right to paid annual leave was lost at the end of a leave year where the worker had been unable because of sick leave to take paid annual leave. Given the limitation on carry over, this implied (and HMRC accepted) that in the UK a worker could take paid annual leave during sick leave.
- 13.12 However, in the light of the *Pereda* decision, there is an argument that a member can take untaken WTR annual leave on return to duty (even if this involves carrying it over into the next leave year). This argument is based on the Directive having direct effect for police officers as workers “employed” by the State. While this appears to be a strong argument, and one which may be accepted by police forces, there is caselaw which suggests that the Directive does not have direct effect. A member who does not take annual leave during sick leave but seeks to carry over will therefore take some risk of losing the leave.

Dates on which leave is taken (Regulation 15)

- 13.13 This Regulation sets out the procedures for both employers and workers in giving notice to take annual leave under the WTR. The main requirement is that notice must be given twice as many days in advance of the earliest day specified in the notice as the number of days to which the notice relates. In practice this could be weighted heavily in the employer’s favour. For instance, even if a worker has given notice to take 2 weeks’ leave, say, ten months in advance of taking it, as long as the

employer gives the equivalent amount of notice as the notified leave (ie 2 weeks in this case), the employer could cancel the worker's leave only 2 weeks before the leave is due to be taken.

- 13.14 However, there is no provision in the Police Regulations allowing a police force to direct when an officer takes his or her annual leave, beyond the restriction that the taking of leave is subject to the exigencies of duty. We are advised that the WTR should not override the position under the Police Regulations.

WTR Regulation 15(5) allows JBBs to reach agreement with chief officers to vary or exclude such restrictive procedures, so unless the local arrangements are less favourable, JBBs may want seriously to consider retaining their existing arrangements. In any case where a Force seeks to direct the dates upon which members take their annual leave the matter should be referred to Leatherhead for advice.

Date of commencement of leave year (*Regulation 13(3)*)

- 13.15 This Regulation sets out the date on which the leave year is taken to commence for the purposes of payment under the WTR only. It provides that this will be on such date during the calendar year as may be provided for in a relevant agreement and where there is no such agreement:

- (i) where service commenced on or before 1 October 1998, the leave year begins on 1 October each year;
- (ii) where service commenced after 1 October 1998, the leave year begins on the date on which service began and on the anniversary of that date in each subsequent year.

- 13.16 Regulation 33(1) Police Regulations 2003 provides that the leave year begins on "such date as may from time to time be determined by the police authority". An employment tribunal accepted that this fell within the scope of a relevant agreement and that therefore the leave year commenced on that date. In many forces the date of commencement of the leave year for the purposes of Police Regulations will be well established, but arrangements should be reviewed to ensure that there is no uncertainty about the point. For the avoidance of doubt it may be sensible to include the date in a workforce agreement.

- 13.17 The date of commencement of the leave year can be important. It could impact, for instance, where an individual wishes to pursue an entitlement arising under the WTR on termination of service (see paras 13.4 – 13.5).

Compensation related to entitlement to leave (*Regulation 14*)

- 13.18 This Regulation confers an entitlement to a payment in lieu of leave which has accrued but not been taken on termination of employment. Such sum may either be provided for in a relevant agreement, eg a workforce agreement, or in the absence of such agreement, in accordance with the formula contained in WTR Regulation 14(3)(b).

13.19 Regulation 14(3)(b) says that the payment due shall be “a sum equal to the amount that would be due to the worker under WTR Regulation 16 in respect of a period of leave determined according to the formula $(A \times B) - C$ ”, and it goes on to define that formula. Regulation 16 in turn lays down the method of determining the amount of a week’s pay for holiday purposes, to be used in conjunction with the formula in Regulation 14.

In short, it means that the calculation of holiday pay, for the purposes of compensation in lieu of leave on termination of employment, should include most allowances (though not expenses), in addition to basic pay.

Annual leave during sick leave

13.20 The interaction between annual leave and sick leave has been controversial for many years. In 2009 the ECJ gave two decisions in the separate cases of *Stringer v HMRC* and *Pereda v Madrid Movilidad*. The effect of these two cases is to improve workers’ rights in this area, but uncertainty remains as to the precise position and further litigation and/or amendment of the WTR may follow and effect the position.

Our advice (as at November 2009) on the main questions is summarised below.

What rights does a member on no pay on sick leave have to take annual leave while on sick leave?

We are advised that a claim can be brought if a member is not allowed to take paid annual leave under the WTR while on sick leave.

The entitlement is limited to the WTR leave right (i.e. 28 days including public holidays where the leave year began on or after 1 April 2009).

If a member wants to do so, s/he should ask for permission to take the annual leave. This should be done in a manner which complies with the notification requirements of regulation 15 WTR.

If the annual leave is refused then the time limit for an employment tribunal claim is within three months of the first date of the annual leave period sought.

In the light of the *Pereda* case the member is also in a stronger position to take untaken WTR annual leave on return to duty (even if this involves carrying it over into the next leave year). (See further question on annual leave rights of a member who returns to duty after a period of sick leave below).

What rights does a member on half pay on sick leave have to take annual leave while on sick leave?

The position is exactly the same as for a member on no pay, dealt with in the previous question.

What rights does a member on full pay on sick leave have to take annual leave while on sick leave?

While the member may be less anxious to take annual leave, the position is again the same as for a member on no pay.

What annual leave rights does a member who returns to duty after a period of sick leave have?

Annual leave entitlement under the Police Regulations continues to accrue while on sick leave. During the same leave year, the member will therefore be in the same position as in any other member.

The position is more complicated if the member is unable to take their remaining leave entitlement in the relevant leave year.

In *Stringer* the ECJ held that member states cannot provide that the right to paid annual leave is lost at the end of a leave year where the worker has been unable because of sick leave to take paid annual leave. There is no right under the WTR to carry over leave and it could be argued that annual leave can now be taken during sick leave. However there remains confusion over this and it seems likely that there will be further litigation on this point and/or that the WTR will be amended.

However, in the light of the *Pereda* decision, there is an argument that a member can take untaken WTR annual leave on return to duty (even if this involves carrying it over into the next leave year). This argument is based on the Directive having direct effect for police officers as workers “employed” by the State. While this appears to be a strong argument, and one which may be accepted by police forces, there is caselaw which suggests that the Directive does not have direct effect. A member who does not take annual leave during sick leave but seeks to carry over will therefore take some risk of losing the leave.

In these circumstances, the recommended approach in cases where a member is unlikely to be fit to return from sick leave in sufficient time to take all their outstanding annual leave is as follows:

- the member should consider taking the annual leave during the period of sick leave (as outlined above). S/he may be keen to do this if on half or no pay. If this is not done then there is a risk that the leave will be lost.
- If this is not done, then the first step is that the Force should be asked to allow the member to carry over any untaken leave. If this is refused then the matter should be referred to Leatherhead for further advice.

Is a member who is on annual leave who becomes sick entitled to go on sick leave (and reclaim the annual leave)?

The Police Regulations 2003 do not explicitly deal with the interaction of annual leave and sick leave. We consider that a day cannot simultaneously be regarded as both a day of sick leave and a day of annual leave.

As the Regulations are silent as to the manner of notification and rearrangement of annual leave we consider that an officer who has booked a holiday but who is then injured or becomes ill and unable to take the holiday should be able to cancel the

annual leave and take it at a later date.

With regard to the position of an officer who becomes ill on holiday, we recommend notification of the position to the force as soon as possible so as to maximise the prospect of being able to reclaim annual leave. There is however no clear legal entitlement to do so. While the Pereda decision involved a worker who became sick as the result of a work accident before his holiday, the principle appears to be equally applicable to sickness on holiday. This possible implication has attracted considerable criticism from employers and further litigation may follow on this issue.

It is emphasised that even if it does assist in such cases, the Pereda decision will only apply to the WTR annual leave, and no claim is likely if the member is not prevented from taking 28 days' leave including public holidays.

An officer who is not allowed to reclaim annual leave may not have an easily sustainable case, but any case would need to be considered on its own facts.

14. EXCLUSIONS / SPECIAL CASES (Regulations 18 and 21)

Excluded sectors (Regulation 18)

14.1 Regulation 18(2)(a) disappplies certain of the Working Time Regulations

where characteristics peculiar to certain specified services such as the armed forces or the police, or to certain specific activities in the civil protection services, inevitably conflict with the provisions of these Regulations

The reference to the “civil protection services” also applies to the police (see WTRRegulation 2).

14.2 The Regulations (or parts thereof) which are thus potentially disapplied relate to:

- the maximum average working week
- length of night work
- health assessments for night workers
- daily rest
- weekly rest
- rest breaks at work
- annual leave
- payment for annual leave
- pattern of work (see Section 18)

14.3 These exclusions can apply to the police, therefore, either on the basis of characteristics peculiar either to the police service or to certain specific activities within the service, which inevitably conflict with the provisions of the WTR. It is however clear that the exclusion will not apply as a matter of course to all police activities, as if that were the case there would be no point in regulation 41 WTR extending the regulations to police service.

14.4 There is no definition of ‘inevitable conflict’ in the WTR, however we are advised that these exclusions must not be treated as blanket exclusions. That is to say, they apply only where such characteristics or specific activities which inevitably conflict with the WTR actually occur. We are advised that, having regard to the health and safety purpose of the WTR, and the use of “inevitably”, it is likely that a force will find it hard to convince a tribunal that the exclusion should apply and that it should only apply in wholly exceptional circumstances, such as might arise, for example, during widespread public disorder.

14.5 JBBs are therefore advised to be circumspect if forces attempt to use Regulation 18 to exclude the provisions outlined in para 14.2. We are advised that the burden should fall to chief officers in the first instance to demonstrate cases of ‘inevitable conflict’. In most cases, it may then be possible for JBBs to argue that this exclusion does not apply and that, if there is to be any exclusion, it would be more appropriate to Regulation 21 (see paras 14.6-14.10).

Other special cases (*Regulation 21*)

This is important because Regulation 21 excludes fewer rights and affords workers the protection of compensatory rest (see Section 15).

Any disapplications, under Regulation 21, of the provisions outlined in para 14.6 must be subject to the protections provided by Regulation 24, compensatory rest (see Section 15).

14.6 Regulation 21 also disappplies certain of the Working Time Regulations, in the case of particular workers or groups of workers. In this instance, the Regulations (or parts thereof) which can be disappplied relate to:

length of night work
daily rest
weekly rest
rest breaks at work

14.7 Not only are fewer protective provisions affected here than by disapplication under Regulation 18, any disapplications under this Regulation are **subject to the compensatory rest provisions of Regulation 24** (see Section 15).

14.8 Regulation 21 contains a list of circumstances (largely focussed on workers' activities) which may exclude the provisions outlined in para 14.6. Those most likely to affect the police are:

- where the worker's activities involve the need for continuity of service or production
- where the worker's activities are such that his place of work and place of residence are distant from one another or his different places of work are distant from one another
- where the worker is engaged in security and surveillance activities requiring a permanent presence in order to protect property and persons
- 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; and
 - (iii) an accident or the imminent risk of an accident

The Court of Appeal has held, in *Gallagher v Alpha Catering Services*, that, where the exception relates to the worker's activities, it is necessary to focus on those activities rather than the needs of the employer, so as to avoid an employer being able to deliberately under-staff and then rely on the exclusion.

14.9 Again, this Regulation cannot be interpreted as providing blanket exclusions from the provisions outlined in para 14.6. The Regulation can only disapply those provisions where, and whilst, a particular need exists or the particular activities are being performed by any worker or group of workers.

14.10 JBBs will be best placed to identify which particular activities or needs may be appropriate to this Regulation, in accordance with local circumstances as and when they arise. The WTR permits agreements between JBBs and chief officers on these issues.

15. COMPENSATORY REST (*Regulation 24*)

15.1 This Regulation applies in the following circumstances:

- where any provision of the WTR is excluded by Regulation 21 (special cases) or regulation 22 (shift workers); or
- where any provision is modified or excluded by a workforce agreement

and a worker is as a result required to work during a period which would otherwise be a rest period or rest break.

15.2 In such circumstances the employer must wherever possible allow the worker to take an equivalent period of compensatory rest.

15.3 If, in exceptional cases, it is not possible, for objective reasons, to grant such a period of rest, the employer must provide such protection as may be appropriate in order to safeguard the worker's health and safety. The use of "exceptional" means that this will rarely apply.

15.4 The Regulation is not easy to understand. One tribunal commented that 'it is beyond our own capacities to grasp what [regulation 24b] could possibly mean'.

15.5 The BIS Guidance:

- states that 'Compensatory rest is normally a period of rest the same length as the period of rest, or part of a period of rest, that a worker has missed';
- refers to every worker being entitled to 90 hours of rest in a week (six daily rest periods of 11 hours plus one weekly rest period of 24 hours); and
- concludes that 'the principle is that everyone gets his or her entitlement of 90 hours' rest a week on average, although some rest may come slightly later than normal'.

This can be criticised. The implication of the reference to 90 hours rest is that so long as the employer ensures that there is no more than 78 hours' working time in a week (7 x 24 – 90) then any requirement for compensatory rest will be met. It is not clear how this is compatible with the average of 48 hours weekly working hours.

15.6 The ECJ briefly considered compensatory rest in Jaeger, and:

- emphasised the health and safety objectives of the WTD, and the need to strictly limit exceptions;
- emphasised the importance of rest periods being consecutive and directly following work; and
- held that where it was necessary to allocate compensatory rest, the additional working time which had led to the requirement "... must in principle be offset by the grant of equivalent periods of compensatory rest made up of a number of consecutive hours corresponding to the reduction applied and from which the worker must benefit before commencing the following period of work."

15.7 The EAT considered compensatory rest in *Corps of Commissionaires Management Ltd v Hughes*. H was a security guard. Regulation 21(b) applied to prevent him taking a rest break. He complained that he had not been given compensatory rest for the rest breaks he had not been permitted to take during his 12-hour working

shifts. The EAT held that compensatory rest must be provided at times when the worker would otherwise be required to work.

- 15.8 Hughes, in requiring compensatory rest to be provided at times when the worker would be otherwise be required to work, appears therefore to go beyond Jaegar which required that compensatory rest should be before the next period of work. Hughes involved a rest break rather than a daily rest period, but on the face of it there is little scope for different approaches to rest breaks and daily/weekly rest periods.
- 15.9 From these cases the following principles emerge:
- Compensatory rest should correspond to the reduction in rest (i.e. if daily rest is interrupted by 2 hours, compensatory rest should be 2 hours) (Jaegar).
 - Compensatory rest must be available before the worker next commences work (Jaegar).
 - Compensatory rest must be provided at times when the worker would otherwise be required to work and could not be taken between shifts (Hughes).

Given the tension between the second and third points (and the general difficulties with the concept) further litigation appears likely in this area. In the meantime, JBBs should use these three principles in discussions with the Force.

16. WORKFORCE AGREEMENTS (*Regulation 23*)

- 16.1 As stated in para 1.8, the WTR authorise workforce agreements between chief officers and JBBs (under WTR Regulation 41).
- 16.2 ‘Workforce agreements’ are defined in WTR Regulation 2 and the conditions for workforce agreements are set out in Schedule 1. Not all of these conditions are relevant to the police service, but workforce agreements must be in writing, and must have effect for a specified period *not exceeding 5 years*. Workforce agreements should be signed by or on behalf of the Joint Branch Board and by or on behalf of the chief officer (see also para 18.8).
- 16.3 WTR Regulation 23(b) allows workforce agreements to modify the application of Regulations 4(3) and (4), relating to the maximum working week, by substituting a different reference period to the standard 17 weeks, up to but not exceeding 52 weeks. This may only be done, however, for objective or technical reasons or reasons concerning the organisation of work.
- 16.4 “Reasons concerning the organisation of work” might apply to the design and agreement of shift patterns. It is understood that most shift systems currently in operation in forces fall well within a 17 week cycle. There may be no objective reason, therefore, to consider this option.

It should be noted that any modification beyond the standard 17 week reference period is bound to dilute the protection afforded to the health and safety of workers.

- 16.5 Where workers are affected by the Regulation 21 exclusions (see para 14.8), the reference period for calculating average weekly hours worked will be 26 weeks instead of 17 (by virtue of WTR Regulation 4(5)).
- 16.6 Regulation 23(a) allows workforce agreements to modify or exclude the application of certain provisions (specified in brackets below) of the Regulations relating to:
- | | |
|----------------------|----------------------------------|
| length of night work | (Regulation 6(1) to (3) and (7)) |
| daily rest | (Regulation 10(1)) |
| weekly rest | (Regulation 11(1) and (2)) |
| rest breaks at work | (Regulation 12(1)) |

In these circumstances, however, compensatory rest in accordance with Regulation 24 must be provided - see Section 15.

17. ENFORCEMENT / OFFENCES / REMEDIES (Regulations 28, 29, 29a, 29b, 29c, 29d, 29e, 30, 31, 32, 33 and 34)

Enforcement (Regulation 28)

17.1 Some provisions, defined in regulation 28 as “the relevant requirements”, including in particular, the average weekly limit on working time, the rights of night workers and record keeping, are matters for the Health and Safety Executive and will be enforced in the same way as other health and safety obligations. In some circumstances, local authorities will be responsible for enforcement.

Offences (Regulation 29)

17.2 A breach by an employer of any of the relevant requirements under the WTR will be an offence that may carry with it a fine (or in limited circumstances imprisonment).

Remedies (Regulation 30)

17.3 A worker can make a complaint to an Employment Tribunal that the employer has:

- (i) refused to permit him or her to exercise the right to:
 - daily rest
 - weekly rest
 - a rest break
 - annual leave
 - (where applicable) compensatory rest; or
- (ii) failed to pay him or her the whole or any part of any amount due to him in relation to or in lieu of annual leave.

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

Where a claim succeeds, a tribunal will make a declaration and may make an award of such compensation as is just and equitable in all the circumstances, having regard to the employer's default and any loss sustained by the worker as a result. Where the claim relates to a failure to pay holiday pay, the tribunal must award the pay due.

17.5 Compensation is not designed to be punitive and, in *Miles v Linkage Community Trust Limited* the EAT held that the tribunal had not erred when it decided to make an award of no compensation, despite finding a breach of the WTR.

Right not to suffer detriment (Regulation 31)

17.6 This Regulation makes it unlawful to subject any worker to any detriment for

refusing to exceed any limit on working time, or to work when entitled to rest, or refusing to agree to opt out of the weekly working time limit. Remedy will be by way of complaint to an Employment Tribunal within three months. We are advised that our members are most probably protected by this right. It might also be possible to bring a claim within the whistleblowing provisions of the Employment Rights Act.

Unfair dismissal (*Regulation 32*)

17.7 This Regulation introduces, by way of amendment to the Employment Rights Act 1996 on grounds similar to those outlined in para 17.6 above, a right to make any dismissal automatically unfair. However, this protection will only be available to “employees”, rather than the wider group of workers covered by the WTR, as currently legislation only provides remedies against unfair dismissal for employees.

It will not therefore protect police officers against unfair dismissal. In the event of an attempt to dismiss an officer, the most likely response would be an application for judicial review to prevent and/or challenge such dismissal unless it were possible to bring a whistleblowing claim for unfair dismissal.

Conciliation (*Regulation 33*)

In section 18(1) of the Employment Tribunal Act (cases where conciliation provisions apply).

Appeals (*Regulation 34*)

In section 21 The Appointment Tribunals Act 1996. (Jurisdiction of the Employment Tribunals Procedure).

18. MISCELLANEOUS

Records (*Regulation 9*)

- 18.1 This Regulation places a duty on employers to keep records showing that the limits on average weekly working hours and night work are being complied with. These records must be retained for two years. While there is no express right of access to records in the WTR, JBBs may consider it appropriate to seek to negotiate access on behalf of safety representatives. A police force argued that allowing such access would amount to a breach of the Data Protection Act 1998. The Information Commissioner has however advised that this would not be the case.

Pattern of work (*Regulation 8*)

- 18.2 This Regulation is intended to fully reflect the provisions of Article 13 of the European Working Time Directive. It does not. Those aspects of Article 13 that are omitted from the Regulation require an employer “who intends to organise work according to a certain pattern” to take account of “the general principle of adapting work to the worker ... and safety and health requirements”.
- 18.3 It is widely believed that Article 13 is intended to reinforce the fact that the essence of the Directive is the protection of the health and safety of workers in all aspects of working time. Thus this Article relates as equally to, say, shift patterns and their implications for the health and safety of workers, as it does to the relief of monotonous work by “adequate rest breaks”.

Existing agreements

- 18.4 As outlined in other Sections, workforce agreements are able to modify or exclude many of the provisions of the WTR. In some cases existing agreements entered into by JBBs may be sufficient to achieve any desired flexibility, **but only where the terms of such agreements satisfy the requirements of the WTR**, providing compensatory rest where there are apparent breaches of the relevant WTR provisions.

Workers with more than one employer

- 18.5 Except in the case of young workers, the WTR do not expressly provide that hours worked for more than one employer should be cumulative for the purposes of the Regulations. If they were not, however, then clearly the whole purpose of the WTR would be defeated. Overwork by workers can impact not only on their health and safety but also the safety of others (in the case of the police, meaning not only their work colleagues but also, potentially, members of the public). Overwork can also lead to accidents outside of the work context, for instance, road traffic accidents.
- 18.6 Furthermore, employers are required to take all reasonable steps, in keeping with the need to protect the health and safety of workers, to ensure that working time limits are not exceeded (WTRRegulation 4(2)).

- 18.7 JBBs may therefore wish to consider raising this with chief officers in the context of Specials to ascertain (i) how records will be maintained of time worked by Specials and (ii) the steps to be taken to ascertain the extent of hours worked with another employer, so as to ensure that the hours worked by the Special do not endanger his/her health and safety or that of others. (Home Office Circular 54/1999 – sent under cover of JBB Circular No. 67/99 and included at Annex IX – sets out the latest guidance to chief officers with regard to Specials.)

JBBs should also be aware that similar considerations could impact on members where, with the permission of the chief officer, they take on work outside their employment relationship as police officers.

Further advice

- 18.8 From time to time, updates will be issued to this Guide in the light of further developments (eg case law) or Government advice. Because of the possibility of further developments it is suggested that where JBBs reach local agreements under the terms of the WTR, then fairly short periods of notice to terminate such agreements should be incorporated (rather than tie JBBs in to what could turn out to be less favourable conditions for, say, five years) - see para 16.2.
- 18.9 If, in the meantime, JBBs encounter problems in relation to the WTR, or require further advice, they should first contact the Joint Central Committee through the General Secretary's office.

WORKING TIME REGULATIONS — SUMMARY CHART

RIGHT	DEROGATIONS	RECORDS REQUIRED
<p>Night work limits (Reg 6) - an average of 8 hours in each 24 hour period over a reference period of 17 weeks or an 8 hour limit in any 24 hour periods where a night worker is subject to special hazards</p>	<p>Workforce agreements - Reg 23(a) can modify or exclude</p> <p>Special circumstances derogation - Reg 21 (subject to Reg 24 compensatory rest)</p> <p>Inevitable conflict derogation - Reg 18(2)(a)</p>	<p>Yes - Reg 9</p>
<p>Health assessments for night workers (Reg 7)</p>	<p>Inevitable conflict derogation - Reg 18(2)(a)</p>	<p>Yes - Reg 9</p>
<p>Maximum weekly working time (Reg 4) - an average of 48 hours per week (standard reference period 17 weeks)</p>	<p>Workforce agreements - Reg 23(b) - may vary 17 week reference period up to but not exceeding 52 weeks (for objective or technical reasons concerning the organisation of work)</p> <p>Special circumstances derogation - Reg 4(5) - changes reference period from 17 to 26 weeks</p> <p>Inevitable conflict derogation - Reg 18(2)(a)</p> <p>Individual 'opt out' - Reg 5</p>	<p>Yes - Reg 9</p>

RIGHT	DEROGATIONS	RECORDS REQUIRED
<p>Daily rest (Reg 10) - 11 consecutive hours in each 24 hour period</p> <p>Weekly rest (Reg 11) - 24 hours per week, or 48 hours per fortnight</p>	<p>Workforce agreements - Reg 23(a)</p> <p>Special circumstances derogation - Reg 21 (subject to Reg 24 compensatory rest)</p> <p>Inevitable conflict derogation - Reg 18(2)(a)</p> <p>Shiftworkers - Reg 22 (subject to Reg 24 compensatory rest)</p>	No
<p>Rest breaks at work (Reg 12) - minimum of 20 minutes uninterrupted rest if the working day is longer than 6 hours</p>	<p>Workforce agreements - Reg 23(a)</p> <p>Special circumstances derogation - Reg 21 (subject to Reg 24 compensatory rest)</p> <p>Inevitable conflict derogation - Reg 18(2)(a)</p>	No
<p>Paid annual leave (Reg 13) - 4 weeks</p>	<p>Only the inevitable conflict derogation - Reg 18(2)a - applies</p> <p>- but workforce agreements can vary procedures for giving notice (Reg 15(5))</p>	No

WORKING TIME REGULATIONS – SAMPLE WORKFORCE AGREEMENT

The attached sample agreement and advice was circulated to JBBs under cover of SEC circular 44/98.

It was sent to JBBs for consideration when deciding what, if any, agreement might be negotiated locally and the terms of that agreement.

It should be re-emphasised here that the sample agreement is **not** intended to be a standard agreement; rather it is to give some idea as to the type of agreement which might be reached.

As is made clear elsewhere in this Guide, the terms and conditions of members remain governed by Police Regulations. Those Regulations provide a framework within which working time is more precisely organised within forces and are generally more favourable than the Working Time Regulations.

The Working Time Regulations, however, provide an additional safeguard to those provided under the Police Regulations - a health and safety safeguard.

Advice	Sample Agreement (this is not a standard)
<p><u>Introduction</u></p> <p>The working Time Regulations create a series of rights which may, in certain circumstances, impact on the position of police officers. They also create the possibility of local agreement to shape the effect of many of the rights.</p> <p>The purpose of this paper is to set out a <u>sample</u> agreement (it is not intended to comprise a standard) showing the type of issues you may want to include in an agreement with the Chief Officer. It is difficult to anticipate all eventualities and there may be omissions in the sample. Further, as best practice is developed and cases are heard by Employment Tribunals and other courts, further advice will be issued from time to time.</p> <p>There is no single “correct” agreement which applies to all. What is right for one force’s (or division’s or squad’s) working practices may not be right for another’s. Yet more problematic, different individual officers may have different personal priorities; some may wish to rely on rights to the fullest extent possible. Others may prefer to maximise overtime or to avoid any re-arrangement of working hours so as to provide compensatory rest.</p> <p>Against this background, JBBs need to consider what they and members want.</p> <p>A JBB will have to balance:-</p> <p>a) the health and safety provisions of the Working Time Regulations; and</p>	

Advice	Sample Agreement (this is not a standard)
<p>b) the desire of some (if not all) members to continue to work overtime at current levels. There is, furthermore, the risk that insisting on certain rights will, in practice, simply disrupt members' working patterns, leading to less certainty about their precise working hours.</p> <p>A JBB may consider that it would be inappropriate to reach any agreement or reach only a very limited agreement and then rely on the WTR terms when particularly difficult problems over the organisation of working time arise (e.g. if the Force is being awkward about rostering or related issues, the WTR may provide additional scope for challenge).</p> <p>The JBB should appreciate that once agreed, an agreement of this nature will be binding on the member to whom it applies. For those who enjoy the remuneration associated with long hours any agreement which threatens this (for instance by extending the meaning of working time) may not be popular.</p> <p>The paragraph numbers in this column refer to the paragraph numbers of the sample agreement.</p> <p>Parties</p> <p>For the purposes of Working Time Regulations (WTR), members are treated as employed by their Chief Officer. An agreement between the Joint Branch Board and the Chief Officer is treated as a workforce agreement for the purposes of the WTR (Regulation 41(2)).</p>	<p>This agreement is made this [DAY] day of [MONTH] 20 [YEAR] between:</p> <p>(1) [The Chief Officer] of [FORCE] of [ADDRESS] ("the Chief Officer")</p> <p>- AND-</p>

Advice	Sample Agreement (this is not a standard)
<p><u>Recitals</u></p> <p>It can be useful to give background to the terms of the agreement within Recitals. In particular the words used within the agreement can be defined.</p> <p>You will note that under the definition provision (sample recital (c)) there is express provision confirming the term “Chief Officer” for the purposes of the agreement includes his delegated officers.</p> <p><u>Scope of Agreement</u></p> <p>1. The agreement should make clear to which member it applies.</p> <p>This could be to all Federated rank</p>	<p>(2) [The Joint Branch Board of [NAME] Force] of [ADDRESS}.</p> <p>WHEREAS:-</p> <p>a) This comprises a workforce agreement for the purposes of Regulation 41 of the Working Time Regulations;</p> <p>b) [A] and [B] have been authorised on behalf of the Joint Branch Board to sign this agreement;</p> <p>c) The following terms used in this agreement have the meanings assigned to them below:- “WTR” means Working Time Regulations 1998</p> <p>“Chief Officer”, unless the context otherwise requires, includes any delegate officer.</p> <p><u>1. Scope of Agreement</u></p> <p>1. This agreement shall apply to [all Federated Rank members of the Force] or [all Federated Rank members from time to time belonging to the [B] Division] etc.</p>

Advice	Sample Agreement (this is not a standard)
<p>members, members belonging to a division, a specialist branch, an occupational command unit or even a station or relief.</p> <p><u>Working Time</u></p> <p>1. Under the WTR, working time includes:-</p> <p>a) when working, at the Chief Officer's disposal and carrying out his activities or duties;</p> <p>b) training for employment.</p> <p>Hence there is no need to agree either sample sub-paragraphs (a) or (b); they apply in any event. It is however open to JBB to seek agreement as to what may fall within these sample sub-paragraphs. Whereas it is not possible by agreement to exclude time which would otherwise be treated as working time, one can extend the scope of working time by agreement.</p> <p>It is also open to the JBB to agree additional periods of time which, although not falling within sample sub-paragraphs (a) or (b) could be agreement be treated as a period of working time for the purposes of the WTR. Possible examples of additional time which may be included are given at sample sub-paragraphs (c), (d), (e)</p>	<p><u>Working Time</u></p> <p>1. For the purpose of the WTR working time shall include:-</p> <p>a) Time that the member is undertaking training</p> <p>b) Such periods when the member, when on call or on standby, is interrupted for a work related matter (over the telephone or otherwise)</p> <p>c) Travel on the Chief Officer's instructions between home and any place of duty not being the member's usual place of duty.</p> <p>d) Travel from home to any place where residential training courses are being conducted.</p> <p>e) Travel to an from the member's usual place of duty or such other place of duty as the Chief Officer instructs but at a time other than the rostered starting or finishing time for that day.</p>

Advice	Sample Agreement (this is not a standard)
<p>and (f); there could be others. Such agreement does not make this time duty time under the Police Regulations 1995.</p> <p>Sample (f) suggests two possible ways in outline of addressing on call. The words in brackets would reduce the impact.</p> <p>It may be appropriate to raise the question as to how federation activities not already falling within duty time are dealt with. This will depend on your own relationship with your Chief Officer.</p> <p>Any agreement cannot agree that something is not working time. The JBB will have to consider whether or not a wider definition of working time is appropriate – this depends on the balance to be drawn between securing the health and safety of members and other factors as discussed in the introduction.</p> <p><u>Maximum Working Week</u></p> <ol style="list-style-type: none"> The reference period of 17 weeks (26 for such time as an exception under Regulation 21 applies) can be varied for objective or technical reasons or reasons concerning the organisation of work up to 52 weeks. Such variations could be to a period lower than 17 weeks though it is unlikely that the Chief Officer will agree to a reference period of less than 17 weeks. <p>NB The longer the reference period the less</p>	<p>f) Where the member is on call or on standby [having already been on call or on standby for [NUMBER] hours in that week].</p> <p><u>Maximum Working Week</u></p> <ol style="list-style-type: none"> The reference period for the 48 hour average maximum working week shall be [number] weeks.

Advice	Sample Agreement (this is not a standard)
<p>likely the average will be exceeded. It is therefore anticipated that a force will want a longer period. If so, are you getting something in return?</p> <p>2. The reference period is a rolling period (that is one period commences on day one, another on day two, another on day three and so on) unless otherwise agreed. The alternative, a consecutive period, on the face of it, is less beneficial to the health and safety of members. It is however less complex to monitor. It is therefore to be anticipated that forces will seek to agree consecutive periods. If a consecutive period is to be agreed then Joint Branch Boards are advised to seek to obtain some concession in return. <u>Only if</u> a consecutive period is agreed then terms along the lines of sub-paragraph 2 may be adopted.</p> <p>3. The WTR permit an individual agreement to be reached between a member and the Chief Officer to opt out of the maximum weekly working time provisions. It is open for the individual member to agree such term as he/she wishes as the basis of the opt out. This may include, for instance, agreement that the average will be 50 hours or that in no week will he/she be required to work more than 60 hours. The JBB may however wish to seek to agree with the Chief Officer the standard terms on which individuals agree to opt out though leaving scope for different and/or additional terms to be negotiated by the member if</p>	<p>2. The reference period in paragraph 1 shall apply in relation to successive periods of [NUMBER] weeks; the first such period of [NUMBER] weeks commencing on [DATE].</p> <p>3. The pro forma terms upon which any member may agree with the Chief Officer that the maximum weekly working time not apply in his/her case will be in the form set out in the Schedule to this agreement. Such terms may be added to by agreement between the member and the Chief Officer. Copies of any agreements reached between a member and the Chief Officer shall be kept by [Personnel] and be available for inspection, on reasonable notice, by a representative of the Joint Branch Board or any safety representative appointed from time to time by the Joint Branch Board.</p>

Advice	Sample Agreement (this is not a standard)
<p>appropriate. The purpose of sample paragraph 3 clause is to set out the standard form of agreement to be reached between members and the Chief Officer, to include a notice period (which must be at least seven days but no more than three months) and to confirm that any records maintained of agreements will be available for inspection by a representative of the Joint Branch Board and safety representatives.</p> <p><u>Night Working</u></p> <p>1. Unless otherwise agreed, night time will comprise 11.00 pm to 6.00 am. It is for the JBB to consider whether this is appropriate for the shift patterns operated within the force. If a different period is to be agreed as night time then it should be within the following parameters:-</p> <p>It should include the period 12 midnight to 5.00 am and should be for a period of not less than 7 hours. It can be more and there may be potential advantages in seeking a longer period.</p> <p>2. If no agreement is reached then a night worker will be “a member who, as a normal course, works at least three hours of his/her daily working time during the night” DTI guidance is that “as a normal course” means on a regular basis. This is confirmed and strengthened by a Northern Ireland High Court decision (<i>R v Attorney General for Northern Ireland ex parte</i></p>	<p>4. <u>Night Working</u></p> <p>1. Night time shall comprise the period [SPECIFY HOURS].</p> <p>2. A “night worker” shall mean a member who, as a normal course, works at least three hours of his/her daily working time during the night. [For the avoidance of doubt it is agreed between the Chief Officer and the JBB that this will include members who work a shift pattern which regularly includes a requirement to perform duty during the night time as defined.]</p>

Advice	Sample Agreement (this is not a standard)
<p><i>Burns</i>). In the light of this decision, the PNB agreed the following definition of a ‘night worker’ for the purposes of the police service, which has been endorsed by the Home Secretary:</p> <p>“A police officer who regularly works shifts which include nights, irrespective of the shift pattern actually worked, shall be a ‘night worker’ for the purposes of the Working Time Regulations.</p> <p>This is reflected in the sample agreement in the first of the two alternative paragraphs at 2. Only if a wider definition than this can be agreed should the second alternative or any other variation be included. The Regulations provide that this can be done by agreeing a proportion of annual working time likely to be worked during night time (as defined). Only if a proportion well below 30% is agreed it is likely to be worth agreeing this if you want this provision to have any real practical impact. We say this as for example a normal shift system involving one in three nights is in practice likely to involve less than 30% of total annual working time worked at night time (as defined).</p> <p>3. Where members undertake activities which involve special hazards and/or heavy physical or mental strain then, when they work during the night they should work no more than eight hours during that day (subject to exceptions). Whether a member undertakes</p>	<p><u>OR</u></p> <p>A “night worker” shall mean a member who is likely, during night time as defined, to work at least [X%] of his/her annual working time.</p> <p>3. It is agreed that [all members covered by this agreement] <u>OR</u> [all members engaged in operational duties] shall be regarded for the purposes of the WTR as engaged in work which involves special hazards and/or heavy mental strain.</p>

Advice	Sample Agreement (this is not a standard)
<p>activities involving special hazards and/or mental strain is a matter of fact though there is scope to agree that all or some of the force are so involved. IF a risk assessment undertaken by the Chief Officer identifies a serious risk in any activities then the member will be treated as undertaking such activities. There may be merit in seeking to achieve agreement that all members, or particular groups of members, are engaged in work which involves special hazards and/or heavy mental strain. This may well also assist the force in establishing some certainty. Agreement can establish who is engaged on relevant activities; it cannot determine who is not.</p> <p>4. The reference period of 17 weeks can be varied if any of the exceptions apply or by agreement. It is not thought there is much to be gained by seeking to change the reference period for night workers.</p> <p>5. The reference period is a rolling period (that is one period commences on day one, another on day two, another on day three and so on) unless otherwise agreed. The alternative, a consecutive period, on the face of it, appears less beneficial to the health and safety of members. It is however less complex to monitor. It is therefore anticipated that forces will seek to agree consecutive periods. If a consecutive period is to be agreed then Joint Branch Boards are advised to seek to obtain some concession in return. Only if a</p>	<p>4. The reference period for the purposes of Regulation 6(1) of the WTR shall be [NUMBER] weeks.</p> <p>5. [The reference period in paragraph 4 shall apply in relation to successive periods of [NUMBER] weeks; the first such period of [NUMBER] weeks commencing on [DATE],]</p>

Advice	Sample Agreement (this is not a standard)
<p>consecutive period is agreed then terms along the lines of sample paragraph 5 may be adopted.</p> <p><u>Exceptions</u></p> <p>There may be scope to agree the circumstances in which exceptions may apply, particularly as it may relate to the requirement to work in excess of eight hours when working a shift which includes night working and where the member is engaged in work which involves special hazards and/or heavy mental strain.</p> <p>One possible clause could provide expressly that where there is an interruption of a period of rest while on call which involves breaching the eight hours work in any 24 hours limit then the Chief Officer must secure that the member enjoys a compensatory rest period in addition to the rest entitlement of the member under the WTR within a period thereafter.</p> <p><u>Records</u></p> <p>1. There is no express right of access to records maintained pursuant to the WTR. However, in order that the JBB can properly monitor:-</p> <p>a) The keeping of records; and</p> <p>b) Whether or not the maximum working week and night time working provisions are complied with,</p> <p>the JBB may consider it appropriate to seek to negotiate a term along the lines suggested.</p>	<p>5. <u>Records</u></p> <p>1. It is a condition of this agreement that the Chief Officer shall permit the JBB Secretary (or his/her nominated representative) to inspect on two days' prior written notice, and take copies of, the records maintained by the Chief Officer under Regulation 9 (records showing limits on maximum working week and night time working complied with) and Regulation 5(4) (records relating to members opting out of maximum working week) WTR. The Chief Officer further agrees that all such records will be made available to</p>

Advice	Sample Agreement (this is not a standard)
<p>It would be good industrial relations practice to permit access to these records. The Information Commissioner has confirmed that it would not be a breach of the Data Protection Act for them to be provided.</p> <p><u>Daily Rest</u></p> <p>1. It the JBB wishes to consider agreeing an exception to the entitlement to a rest period of not less than 11 consecutive hours in a 24 hour period, then they may consider that it is appropriate for this to occur either when that 11 consecutive hour period is interrupted due to the exigencies of duty or the interruption of a period of rest occurs whilst the member is on call; in which case provision could be made for the roster to secure an appropriate period of compensatory rest. The JBB nevertheless should be aware that Chief Officers may not necessarily accept that any interruption (e.g. by a phone call of, say, five minutes) should necessarily give rise to an entitlement to a <u>further</u> 11 consecutive hour rest period. The JBB should seriously consider whether, if agreement cannot be reached that interruption of a member on call would lead to a compensatory rest period of 11 consecutive hours rather than a compensatory rest period equivalent to the interruption, the agreement should be silent on this issue. Whether a member would wish to enforce this is a different question.</p>	<p>the safety representatives appointed from time to time throughout the force by Joint Branch Board (or their duly authorised delegates).</p> <p>6. <u>Daily Rest</u></p> <p>1. It is agreed that where, due to the exigencies of duty or the interruption of a period of rest while on call, a member is precluded from enjoying a rest period of not less than 11 consecutive hours in a 24 hour period, the roster for that member shall, if necessary and if the member so wishes, be amended so as to secure that within seven days thereafter the member shall enjoy a compensatory period of 11 consecutive hours rest in addition to the rest entitlement of the member under the WTR within that seven day period.</p>

Advice	Sample Agreement (this is not a standard)
<p>2. There is some doubt as to whether or not the exception under Regulation 22 applies to members. It concerns shift workers who are defined as individuals working a pattern of work where one person replaces another at a “work station”. If, however, the JBB wishes to make some provision for “quick change-overs” then a term along the lines of paragraph 2 may be appropriate. Whether a member would want this is a different matter.</p> <p><u>Weekly Rest Periods</u></p> <p>1. Unless otherwise agreed, the 7/14 day period shall, for the purposes of Regulation 11, commence at 12 midnight Sunday each week. There is scope for the Chief Officer to determine, at his discretion, that compliance with Regulation 11 will be achieved by way of their being two 24 hour periods of rest in each 14 day period or one 48 hour consecutive rest period in each 14 day period. The JBB may wish to clarify with the Chief Officer whether or not the rest periods will be determined over a 7 or 14 day period. If so, it may be sensible to have this set out expressly within the agreement.</p> <p>2. Generally the rights under Regulations 26 of the Police Regulations 2003 to an average of two rest days per week will be more favourable than the WTR. There is scope for seeking to agree the time within which any failure to</p>	<p>2. It is further agreed, pursuant to the terms of Regulation 22 WTR that Regulation 11 shall not apply if the member, in changing shifts, cannot take a daily rest period between the end of one shift and the start of the next shift provided that the member is permitted to enjoy a compensatory rest period of 11 consecutive hours rest within [PERIOD OF TIME] thereafter in addition to the rest entitlement of the member under the WTR within that period of time.</p> <p><u>7. Weekly Rest Periods</u></p> <p>1. The [seven] day period shall, for the purposes of Regulation 11 WTR, commence on [12 midnight Sunday each week].</p> <p>2. It is agreed that where, due to the exigencies of duty or the interruption of a period of rest while on call, a member is not able to enjoy [one/two] uninterrupted rest days in a period of [seven/fourteen] days then the Chief</p>

Advice	Sample Agreement (this is not a standard)
<p>comply with the entitlement to the 24 hour rest period within any 7 or 14 day period should give rise to an entitlement to compensatory rest. A possible clause might be along the lines of sample paragraph 2.</p> <p><u>Daily Rest Breaks</u></p> <p>1. There may be scope to seek to agree the position of a member in circumstances where their entitlement to a daily rest break is interrupted. However the Police Regulations provide better protection here than the WTR. In those circumstances an agreement may be silent on this issue.</p> <p><u>Annual Leave</u></p> <p>1. It may be considered appropriate to re-confirm the commencement of the annual leave year for the purposes of Regulation 13 as comprising the same date as the commencement of the annual leave year for the Police Regulations purposes.</p> <p><u>Notice</u></p> <p>It is important that provision is made as to the term of the agreement and the basis upon which it can be terminated. Here it is suggested that service of between 28 days and three months written notice by one party on the other could terminate the agreement or such part of the agreement as may be specified in the notice.</p>	<p>Officer shall secure that the member will enjoy two periods of not less than 24 hours uninterrupted rest in addition to that to which the member is already entitled under Regulation 11 WTR in the next following two weeks.</p> <p><u>8. Annual Leave</u></p> <p>1. The member’s annual leave year for the purposes of Regulation 13 WTR shall be as determined by the Police Authority under Regulation 33 Police Regulations 2003; that is [DATE].</p> <p><u>10. Notice</u></p> <p>This agreement shall last for [a period not exceeding five years]. The agreement may be terminated by either the JBB or Chief Officer giving to the other no less than [28 days/three months] notice to terminate all or such part of this agreement as may be specified in the notice in relation to all members covered by this agreement or such groups of members as may be specified in the notice.</p>

Advice	Sample Agreement (this is not a standard)
<p><u>Schedule</u></p> <p>This pro forma basis upon which the agreement to be reached between the member and the Chief Officer as to the basis on which the 48 hour maximum working week may be waived. It does not prevent different agreements being reached between an individual member and the Chief Constable as to maximum hours worked in any one week or a different average from the average of 48 being agreed to. (NB This is the only provision which can be individually agreed this way.)</p>	<p>..... Signed by the Chief Officer of the [NAME] force</p> <p>Signed by:</p> <p>.....</p> <p>(a) For and on behalf of the Joint Branch Board of the [NAME] Force</p> <p>Signed by:</p> <p>.....</p> <p>(b) For and on behalf of the Joint Branch Board of the [NAME] Force</p> <p><u>Schedule</u></p> <p>Working Time Regulations 1998</p> <p>X Force</p> <p>Agreement between [the Chief Officer] of [FORCE] of [ADDRESS] (“the Chief Officer”)</p> <p>-AND-</p>

Advice	Sample Agreement (this is not a standard)
	<p data-bbox="858 302 1436 336">[Name of member] Warrant No. [NUMBER}</p> <p data-bbox="858 425 1460 817">I accept that the statutory limit on my average working time of 48 hours in each seven day period in any reference period which may be applicable as set out in Regulation 4 of the above Regulations will not apply in my case. I understand that my acceptance of this waiver does not alter any other terms of my conditions of employment nor does it commit me to undertake any new obligations concerning my working time.</p> <p data-bbox="858 862 1460 1019">I acknowledge that my agreement to disapply the weekly working time limit may be terminated by me giving [seven days] notice in writing to the Chief Officer.</p> <p data-bbox="858 1064 1460 1254">I give permission for the record of my hours of work to be shown to a representative of the Joint Branch Board and any safety representative appointed by the Joint Branch Board (or their delegate).</p>

1998 No 1833

Working Time Regulations 1998

TERMS AND CONDITIONS OF EMPLOYMENT

Made 30th July 1998

Laid before 30th July 1998

Parliament

Coming

into 1st October 1998

force

The Secretary of State, being a Minister designated for the purposes of section 2(2) of the European Communities Act 1972 in relation to measures relating to the organization of working time and measures relating to the employment of children and young persons, in exercise of the powers conferred on him by that provision hereby makes the following Regulations—

Part I General

1 Citation, commencement and extent

(1) These Regulations may be cited as the Working Time Regulations 1998 and shall come into force on 1st October 1998.

(2) These Regulations extend to Great Britain only.

NOTES

Initial Commencement

Specified date

Specified date: 1 October 1998: see para (1) above.

2 Interpretation

(1) In these Regulations—

“the 1996 Act” means the Employment Rights Act 1996;

“adult worker” means a worker who has attained the age of 18;

“the armed forces” means any of the naval, military and air forces of the Crown;

“calendar year” means the period of twelve months beginning with 1st January in any year;

“the civil protection services” includes the police, fire brigades and ambulance services, the security and intelligence services, customs and immigration officers, the prison service, the coastguard, and lifeboat crew and other voluntary rescue services;

“collective agreement” means a collective agreement within the meaning of section 178 of the Trade Union and Labour Relations (Consolidation) Act 1992, the trade union parties to which are independent trade unions within the meaning of section 5 of that Act;

“day” means a period of 24 hours beginning at midnight;

“employer”, in relation to a worker, means the person by whom the worker is (or, where the employment has ceased, was) employed;

“employment”, in relation to a worker, means employment under his contract, and “employed” shall be construed accordingly;

- (b) a reference in a regulation to a numbered paragraph is to the paragraph in that regulation bearing that number; and
- (c) a reference in a paragraph to a lettered sub-paragraph is to the sub-paragraph in that paragraph bearing that letter.

NOTES

Initial Commencement

Specified date

Specified date: 1 October 1998: see reg 1(1).

Amendment

Para (1): definitions “fishing vessel” and “mobile worker” inserted by SI 2003/1684, regs 2, 3(a).

Date in force: 1 August 2003: see SI 2003/1684, reg 1.

Para (1): definition “offshore work” inserted by SI 2003/1684, regs 2, 3(b).

Date in force: 1 August 2003: see SI 2003/1684, reg 1.

Para (1): definition “the restricted period” inserted by SI 2002/3128, regs 2, 3.

Date in force: 6 April 2003: see SI 2002/3128, reg 1.

Para (1): definition “ship” inserted by SI 2003/1684, regs 2, 3(c).

Date in force: 1 August 2003: see SI 2003/1684, reg 1.

Part II

Rights and Obligations Concerning Working Time

3 General

[(1)] The provisions of this Part have effect subject to the exceptions provided for in Part III of these Regulations.

[(2) Where, in this Part, separate provision is made as respects the same matter in relation to workers generally and to young workers, the provision relating to workers generally applies only to adult workers and those young workers to whom, by virtue of any exception in Part 3, the provision relating to young workers does not apply.]

NOTES

Initial Commencement

Specified date

Specified date: 1 October 1998: see reg 1(1).

Amendment

Para (1): numbered as such by SI 2002/3128, regs 2, 4(a).

Date in force: 6 April 2003: see SI 2002/3128, reg 1.

Para (2): inserted by SI 2002/3128, regs 2, 4(b).

Date in force: 6 April 2003: see SI 2002/3128, reg 1.

4 Maximum weekly working time

(1) [Unless his employer has first obtained the worker's agreement in writing to perform such work], a worker's working time, including overtime, in any reference period which is applicable in his case shall not exceed an average of 48 hours for each seven days.

(2) An employer shall take all reasonable steps, in keeping with the need to protect the health and safety of workers, to ensure that the limit specified in paragraph (1) is complied with in the case of each worker employed by him in relation to whom it applies [and shall keep up-to-date records of all workers who carry out work to which it does not apply by reason of the fact that the employer has obtained the worker's agreement as mentioned in paragraph (1)].

(3) Subject to paragraphs (4) and (5) and any agreement under regulation 23(b), the reference periods which apply in the case of a worker are—

- (a) where a relevant agreement provides for the application of this regulation in relation to successive periods of 17 weeks, each such period, or
- (b) in any other case, any period of 17 weeks in the course of his employment.

(4) Where a worker has worked for his employer for less than 17 weeks, the reference period applicable in his case is the period that has elapsed since he started work for his employer.

(5) Paragraphs (3) and (4) shall apply to a worker who is excluded from the scope of certain provisions of these Regulations by regulation 21 as if for each reference to 17 weeks there were substituted a reference to 26 weeks.

(6) For the purposes of this regulation, a worker's average working time for each seven days during a reference period shall be determined according to the formula—

$$(A + B) / C$$

where—

A is the aggregate number of hours comprised in the worker's working time during the course of the reference period;

B is the aggregate number of hours comprised in his working time during the course of the period beginning immediately after the end of the reference period and ending when the number of days in that subsequent period on which he has worked equals the number of excluded days during the reference period; and

C is the number of weeks in the reference period.

(7) In paragraph (6), "excluded days" means days comprised in—

- (a) any period of annual leave taken by the worker in exercise of his entitlement under regulation 13;
- (b) any period of sick leave taken by the worker;
- (c) any period of maternity, [paternity, adoption or parental] leave taken by the worker; and
- (d) any period in respect of which the limit specified in paragraph (1) did not apply in relation to the worker [by reason of the fact that the employer has obtained the worker's agreement as mentioned in paragraph (1)].

NOTES

Initial Commencement

Specified date

Specified date: 1 October 1998: see reg 1(1).

Amendment

Para (1): words from "Unless his employer" to "perform such work" in square brackets substituted by SI 1999/3372, regs 2, 3(1)(a).

Date in force: 17 December 1999: see SI 1999/3372, reg 1(1).

Para (2): words from "and shall keep" to "in paragraph (1)" in square brackets inserted by SI 1999/3372, regs 2, 3(1)(b).

Date in force: 17 December 1999: see SI 1999/3372, reg 1(1).

Para (7): in sub-para (c) words "paternity, adoption or parental" in square brackets inserted by SI 2002/3128, regs 2, 5.

Date in force: 6 April 2003: see SI 2002/3128, reg 1.
Para (7): in sub-para (d) words from “by reason of” to “in paragraph (1)” in square brackets substituted by SI 1999/3372, regs 2, 3(1)(c).
Date in force: 17 December 1999: see SI 1999/3372, reg 1(1).

5 Agreement to exclude the maximum

(1) . . .

(2) An agreement for the purposes of [regulation 4]—

(a) may either relate to a specified period or apply indefinitely; and

(b) subject to any provision in the agreement for a different period of notice, shall be terminable by the worker by giving not less than seven days' notice to his employer in writing.

(3) Where an agreement for the purposes of [regulation 4] makes provision for the termination of the agreement after a period of notice, the notice period provided for shall not exceed three months.

(4) . . .

NOTES

Initial Commencement

Specified date

Specified date: 1 October 1998: see reg 1(1).

Amendment

Para (1): revoked by SI 1999/3372, regs 2, 3(2)(a).

Date in force: 17 December 1999: see SI 1999/3372, reg 1(1).

Para (2): words “regulation 4” in square brackets substituted by SI 1999/3372, regs 2, 3(2)(b).

Date in force: 17 December 1999: see SI 1999/3372, reg 1(1).

Para (3): words “regulation 4” in square brackets substituted by SI 1999/3372, regs 2, 3(2)(b).

Date in force: 17 December 1999: see SI 1999/3372, reg 1(1).

Para (4): revoked by SI 1999/3372, regs 2, 3(2)(a).

Date in force: 17 December 1999: see SI 1999/3372, reg 1(1).

[5A Maximum working time for young workers]

[(1) A young worker's working time shall not exceed—

(a) eight hours a day, or

(b) 40 hours a week.

(2) If, on any day, or, as the case may be, during any week, a young worker is employed by more than one employer, his working time shall be determined for the purpose of paragraph (1) by aggregating the number of hours worked by him for each employer.

(3) For the purposes of paragraphs (1) and (2), a week starts at midnight between Sunday and Monday.

(4) An employer shall take all reasonable steps, in keeping with the need to protect the health and safety of workers, to ensure that the limits specified in paragraph (1) are complied with in the case of each worker employed by him in relation to whom they apply.]

NOTES

Amendment

Inserted by SI 2002/3128, regs 2, 6.

Date in force: 6 April 2003: see SI 2002/3128, reg 1.

6 Length of night work

(1) A night worker's normal hours of work in any reference period which is applicable in his case shall not exceed an average of eight hours for each 24 hours.

(2) An employer shall take all reasonable steps, in keeping with the need to protect the health and safety of workers, to ensure that the limit specified in paragraph (1) is complied with in the case of each night worker employed by him.

(3) The reference periods which apply in the case of a night worker are—

(a) where a relevant agreement provides for the application of this regulation in relation to successive periods of 17 weeks, each such period, or

(b) in any other case, any period of 17 weeks in the course of his employment.

(4) Where a worker has worked for his employer for less than 17 weeks, the reference period applicable in his case is the period that has elapsed since he started work for his employer.

(5) For the purposes of this regulation, a night worker's average normal hours of work for each 24 hours during a reference period shall be determined according to the formula—

$$A / (B - C)$$

where—

A is the number of hours during the reference period which are normal working hours for that worker;

B is the number of days during the reference period, and

C is the total number of hours during the reference period comprised in rest periods spent by the worker in pursuance of his entitlement under regulation 11, divided by 24.

(6) ...

(7) An employer shall ensure that no night worker employed by him whose work involves special hazards or heavy physical or mental strain works for more than eight hours in any 24-hour period during which the night worker performs night work.

(8) For the purposes of paragraph (7), the work of a night worker shall be regarded as involving special hazards or heavy physical or mental strain if—

(a) it is identified as such in—

(i) a collective agreement, or

(ii) a workforce agreement,

which takes account of the specific effects and hazards of night work, or

(b) it is recognised in a risk assessment made by the employer under [regulation 3 of the Management of Health and Safety at Work Regulations 1999] as involving a significant risk to the health or safety of workers employed by him.

NOTES

Initial Commencement

Specified date

Specified date: 1 October 1998: see reg 1(1).

Amendment

Para (6): revoked by SI 2002/3128, regs 2, 7.

Date in force: 6 April 2003: see SI 2002/3128, reg 1.

Para (8): in sub-para (b) words from “regulation 3 of” to “Work Regulations 1999” in square brackets substituted by SI 1999/3242, reg 29(2), Sch 2.

Date in force: 29 December 1999: see SI 1999/3242, reg 1(1).

[6A Night work by young workers]

[An employer shall ensure that no young worker employed by him works during the restricted period.]

NOTES

Amendment

Inserted by SI 2002/3128, regs 2, 8.

Date in force: 6 April 2003: see SI 2002/3128, reg 1.

7 Health assessment and transfer of night workers to day work

(1) An employer—

(a) shall not assign an adult worker to work which is to be undertaken during periods such that the worker will become a night worker unless—

(i) the employer has ensured that the worker will have the opportunity of a free health assessment before he takes up the assignment; or

(ii) the worker had a health assessment before being assigned to work to be undertaken during such periods on an earlier occasion, and the employer has no reason to believe that that assessment is no longer valid, and

(b) shall ensure that each night worker employed by him has the opportunity of a free health assessment at regular intervals of whatever duration may be appropriate in his case.

(2) Subject to paragraph (4), an employer—

(a) shall not assign a young worker to work during [the restricted period] unless—

(i) the employer has ensured that the young worker will have the opportunity of a free assessment of his health and capacities before he takes up the assignment; or

(ii) the young worker had an assessment of his health and capacities before being assigned to work during the restricted period on an earlier occasion, and the employer has no reason to believe that that assessment is no longer valid; and

(b) shall ensure that each young worker employed by him and assigned to work during the restricted period has the opportunity of a free assessment of his health and capacities at regular intervals of whatever duration may be appropriate in his case.

(3) For the purposes of paragraphs (1) and (2), an assessment is free if it is at no cost to the worker to whom it relates.

(4) The requirements in paragraph (2) do not apply in a case where the work a young worker is assigned to do is of an exceptional nature.

(5) No person shall disclose an assessment made for the purposes of this regulation to any person other than the worker to whom it relates, unless—

- (a) the worker has given his consent in writing to the disclosure, or
- (b) the disclosure is confined to a statement that the assessment shows the worker to be fit—
 - (i) in a case where paragraph (1)(a)(i) or (2)(a)(i) applies, to take up an assignment, or
 - (ii) in a case where paragraph (1)(b) or (2)(b) applies, to continue to undertake an assignment.

(6) Where—

- (a) a registered medical practitioner has advised an employer that a worker employed by the employer is suffering from health problems which the practitioner considers to be connected with the fact that the worker performs night work, and
- (b) it is possible for the employer to transfer the worker to work—
 - (i) to which the worker is suited, and
 - (ii) which is to be undertaken during periods such that the worker will cease to be a night worker,

the employer shall transfer the worker accordingly.

NOTES

Initial Commencement

Specified date

Specified date: 1 October 1998: see reg 1(1).

Amendment

Para (2): in sub-para (a) words “the restricted period” in square brackets substituted by SI 2002/3128, regs 2, 9.

Date in force: 6 April 2003: see SI 2002/3128, reg 1.

8 Pattern of work

Where the pattern according to which an employer organizes work is such as to put the health and safety of a worker employed by him at risk, in particular because the work is monotonous or the work-rate is predetermined, the employer shall ensure that the worker is given adequate rest breaks.

NOTES

Initial Commencement

Specified date

Specified date: 1 October 1998: see reg 1(1).

9 Records

An employer shall—

- (a) keep records which are adequate to show whether the limits specified in regulations 4(1)[, 5A(1)] and 6(1) and (7) and the requirements in regulations [6A and] 7(1) and (2) are being complied with in the case of each worker employed by him in relation to whom they apply; and
- (b) retain such records for two years from the date on which they were made.

NOTES

Initial Commencement

Specified date

Specified date: 1 October 1998: see reg 1(1).

Amendment

In para (a) reference to “, 5A(1)” and words “6A and” in square brackets inserted by SI 2002/3128, regs 2, 10.

Date in force: 6 April 2003: see SI 2002/3128, reg 1.

10 Daily rest

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

(2) Subject to paragraph (3), a young worker is entitled to a rest period of not less than

twelve consecutive hours in each 24-hour period during which he works for his employer.

(3) The minimum rest period provided for in paragraph (2) may be interrupted in the case of activities involving periods of work that are split up over the day or of short duration.

NOTES

Initial Commencement

Specified date

Specified date: 1 October 1998: see reg 1(1).

Amendment

Para (1): words "A worker" in square brackets substituted by SI 2002/3128, regs 2, 11.

Date in force: 6 April 2003: see SI 2002/3128, reg 1.

11 Weekly rest period

(1) Subject to paragraph (2), [a worker] is entitled to an uninterrupted rest period of not less than 24 hours in each seven-day period during which he works for his employer.

(2) If his employer so determines, [a worker] shall be entitled to either—

- (a) two uninterrupted rest periods each of not less than 24 hours in each 14-day period during which he works for his employer; or
- (b) one uninterrupted rest period of not less than 48 hours in each such 14-day period, in place of the entitlement provided for in paragraph (1).

(3) Subject to paragraph (8), a young worker is entitled to a rest period of not less than 48 hours in each seven-day period during which he works for his employer.

(4) For the purpose of paragraphs (1) to (3), a seven-day period or (as the case may be) 14-day period shall be taken to begin—

- (a) at such times on such days as may be provided for the purposes of this regulation in a relevant agreement; or
- (b) where there are no provisions of a relevant agreement which apply, at

the start of each week or (as the case may be) every other week.

(5) In a case where, in accordance with paragraph (4), 14-day periods are to be taken to begin at the start of every other week, the first such period applicable in the case of a particular worker shall be taken to begin—

- (a) if the worker's employment began on or before the date on which these Regulations come into force, on 5th October 1998; or
- (b) if the worker's employment begins after the date on which these Regulations come into force, at the start of the week in which that employment begins.

(6) For the purposes of paragraphs (4) and (5), a week starts at midnight between Sunday and Monday.

(7) The minimum rest period to which [a worker] is entitled under paragraph (1) or (2) shall not include any part of a rest period to which the worker is entitled under regulation 10(1), except where this is justified by objective or technical reasons or reasons concerning the organization of work.

(8) The minimum rest period to which a young worker is entitled under paragraph (3)—

- (a) may be interrupted in the case of activities involving periods of work that are split up over the day or are of short duration; and
- (b) may be reduced where this is justified by technical or organization reasons, but not to less than 36 consecutive hours.

NOTES

Initial Commencement

Specified date

Specified date: 1 October 1998: see reg 1(1).

Amendment

Para (1): words "a worker" in square brackets substituted by SI 2002/3128, regs 2, 12.

Date in force: 6 April 2003: see SI 2002/3128, reg 1.

Para (2): words "a worker" in square brackets substituted by SI 2002/3128, regs 2, 12.

Date in force: 6 April 2003: see SI 2002/3128, reg 1.

Para (7): words “a worker” in square brackets substituted by SI 2002/3128, regs 2, 12.

Date in force: 6 April 2003: see SI 2002/3128, reg 1.

12 Rest breaks

(1) Where [a worker's] daily working time is more than six hours, he is entitled to a rest break.

(2) The details of the rest break to which [a worker] is entitled under paragraph (1), including its duration and the terms on which it is granted, shall be in accordance with any provisions for the purposes of this regulation which are contained in a collective agreement or a workforce agreement.

(3) Subject to the provisions of any applicable collective agreement or workforce agreement, the rest break provided for in paragraph (1) is an uninterrupted period of not less than 20 minutes, and the worker is entitled to spend it away from his workstation if he has one.

(4) Where a young worker's daily working time is more than four and a half hours, he is entitled to a rest break of at least 30 minutes, which shall be consecutive if possible, and he is entitled to spend it away from his workstation if he has one.

(5) If, on any day, a young worker is employed by more than one employer, his daily working time shall be determined for the purpose of paragraph (4) by aggregating the number of hours worked by him for each employer.

NOTES

Initial Commencement

Specified date

Specified date: 1 October 1998: see reg 1(1).

Amendment

Para (1): words “a worker's” in square brackets substituted by SI 2002/3128, regs 2, 13(a).

Date in force: 6 April 2003: see SI 2002/3128, reg 1.

Para (2): words “a worker” in square brackets substituted by SI 2002/3128, regs 2, 13 (b).

Date in force: 6 April 2003: see SI 2002/3128, reg 1.

13 Entitlement to annual leave

[(1) Subject to paragraph (5), a worker is entitled to four weeks' annual leave in each leave year.]

(2) . . .

(3) A worker's leave year, for the purposes of this regulation, begins—

(a) on such date during the calendar year as may be provided for in a relevant agreement; or

(b) where there are no provisions of a relevant agreement which apply—

(i) if the worker's employment began on or before 1st October 1998, on that date and each subsequent anniversary of that date; or

(ii) if the worker's employment begins after 1st October 1998, on the date on which that employment begins and each subsequent anniversary of that date.

(4) Paragraph (3) does not apply to a worker to whom Schedule 2 applies (workers employed in agriculture) except where, in the case of a worker partly employed in agriculture, a relevant agreement so provides.

(5) Where the date on which a worker's employment begins is later than the date on which (by virtue of a relevant agreement) his first leave year begins, the leave to which he is entitled in that leave year is a proportion of the period applicable under [paragraph (1)] equal to the proportion of that leave year remaining on the date on which his employment begins.

(6) Where by virtue of paragraph . . . (5) the period of leave to which a worker is entitled is or includes a proportion of a week, the proportion shall be determined in days and any fraction of a day shall be treated as a whole day.

(7) . . .

(8) . . .

(9) Leave to which a worker is entitled under this regulation may be taken in instalments, but—

- (a) it may only be taken in the leave year in respect of which it is due, and
- (b) it may not be replaced by a payment in lieu except where the worker's employment is terminated.

NOTES

Initial Commencement

Specified date

Specified date: 1 October 1998: see reg 1(1).

Amendment

Para (1): substituted by SI 2001/3256, reg 2(1), (2).

Date in force: 25 October 2001: see SI 2001/3256, reg 1(1).

Para (2): revoked by SI 2001/3256, reg 2(1), (3).

Date in force: 25 October 2001: see SI 2001/3256, reg 1(1).

Para (5): words "paragraph (1)" in square brackets substituted by SI 2001/3256, reg 2(1), (4).

Date in force: 25 October 2001: see SI 2001/3256, reg 1(1).

Para (6): words omitted revoked by SI 2001/3256, reg 2(1), (5).

Date in force: 25 October 2001: see SI 2001/3256, reg 1(1).

Paras (7), (8): revoked by SI 2001/3256, reg 2(1), (6).

Date in force: 25 October 2001: see SI 2001/3256, reg 1(1).

14 Compensation related to entitlement to leave

(1) This regulation applies where—

- (a) a worker's employment is terminated during the course of his leave year, and
- (b) on the date on which the termination takes effect ("the termination date"), the proportion he has taken of the leave to which he is entitled in the leave year under [regulation 13] differs from the proportion of the leave year which has expired.

(2) Where the proportion of leave taken by the worker is less than the proportion of the leave year which has expired, his employer shall make him a payment in lieu of leave in accordance with paragraph (3).

(3) The payment due under paragraph (2) shall be—

- (a) such sum as may be provided for the purposes of this regulation in a relevant agreement, or
- (b) where there are no provisions of a relevant agreement which apply, a sum equal to the amount that would be due to the worker under regulation 16 in respect of a period of leave determined according to the formula—

$$(A \times B) - C$$

where—

A is the period of leave to which the worker is entitled under [regulation 13];

B is the proportion of the worker's leave year which expired before the termination date, and

C is the period of leave taken by the worker between the start of the leave year and the termination date.

(4) A relevant agreement may provide that, where the proportion of leave taken by the worker exceeds the proportion of the leave year which has expired, he shall compensate his employer, whether by a payment, by undertaking additional work or otherwise.

NOTES

Initial Commencement

Specified date

Specified date: 1 October 1998: see reg 1(1).

Amendment

Para (1): in sub-para (b) words "regulation 13" in square brackets substituted by SI 2001/3256, reg 3.

Date in force: 25 October 2001: see SI 2001/3256, reg 1(1).

Para (3): words "regulation 13" in square brackets substituted by SI 2001/3256, reg 3.

Date in force: 25 October 2001: see SI 2001/3256, reg 1(1).

15 Dates on which leave is taken

(1) A worker may take leave to which he is entitled under [regulation 13] on such days as he may elect by giving notice to his employer in accordance with paragraph (3), subject to any requirement imposed on him by his employer under paragraph (2).

(2) A worker's employer may require the worker—

(a) to take leave to which the worker is entitled under [regulation 13]; or

(b) not to take such leave,

on particular days, by giving notice to the worker in accordance with paragraph (3).

(3) A notice under paragraph (1) or (2)—

(a) may relate to all or part of the leave to which a worker is entitled in a leave year;

(b) shall specify the days on which leave is or (as the case may be) is not to be taken and, where the leave on a particular day is to be in respect of only part of the day, its duration; and

(c) shall be given to the employer or, as the case may be, the worker before the relevant date.

(4) The relevant date, for the purposes of paragraph (3), is the date—

(a) in the case of a notice under paragraph (1) or (2)(a), twice as many days in advance of the earliest day specified in the notice as the number of days or part-days to which the notice relates, and

(b) in the case of a notice under paragraph (2)(b), as many days in advance of the earliest day so specified as the number of days or part-days to which the notice relates.

(5) Any right or obligation under paragraphs (1) to (4) may be varied or excluded by a relevant agreement.

(6) This regulation does not apply to a worker to whom Schedule 2 applies (workers employed in agriculture) except where, in the case of a worker partly employed in agriculture, a relevant agreement so provides.

NOTES

Initial Commencement

Specified date

Specified date: 1 October 1998: see reg 1(1).

Amendment

Para (1): words "regulation 13" in square brackets substituted by SI 2001/3256, reg 3.

Date in force: 25 October 2001: see SI 2001/3256, reg 1(1).

Para (2): in sub-para (a) words "regulation 13" in square brackets substituted by SI 2001/3256, reg 3.

Date in force: 25 October 2001: see SI 2001/3256, reg 1(1).

[15A Leave during the first year of employment]

[(1) During the first year of his employment, the amount of leave a worker may take at any time in exercise of his entitlement under regulation 13 is limited to the amount which is deemed to have accrued in his case at that time under paragraph (2), as modified under paragraph (3) in a case where that paragraph applies, less the amount of leave (if any) that he has already taken during that year.

(2) For the purposes of paragraph (1), leave is deemed to accrue over the course of the worker's first year of employment, at the rate of one-twelfth of the amount specified in regulation 13(1) on the first day of each month of that year.

(3) Where the amount of leave that has accrued in a particular case includes a fraction of a day other than a half-day, the fraction shall be treated as a half-day if it is less than a half-day and as a whole day if it is more than a half-day.

(4) This regulation does not apply to a worker whose employment began on or before 25th October 2001.]

NOTES

Amendment

Inserted by SI 2001/3256, regs 2(1), 4.

16 Payment in respect of periods of leave

- (1) A worker is entitled to be paid in respect of any period of annual leave to which he is entitled under regulation 13, at the rate of a week's pay in respect of each week of leave.
- (2) Sections 221 to 224 of the 1996 Act shall apply for the purpose of determining the amount of a week's pay for the purposes of this regulation, subject to the modifications set out in paragraph (3).
- (3) The provisions referred to in paragraph (2) shall apply—
- (a) as if references to the employee were references to the worker;
 - (b) as if references to the employee's contract of employment were references to the worker's contract;
 - (c) as if the calculation date were the first day of the period of leave in question; and
 - (d) as if the references to sections 227 and 228 did not apply.
- (4) A right to payment under paragraph (1) does not affect any right of a worker to remuneration under his contract ("contractual remuneration").
- (5) Any contractual remuneration paid to a worker in respect of a period of leave goes towards discharging any liability of the employer to make payments under this regulation in respect of that period; and, conversely, any payment of remuneration under this regulation in respect of a period goes towards discharging any liability of the employer to pay contractual remuneration in respect of that period.

NOTES

Initial Commencement

Specified date

Specified date: 1 October 1998: see reg 1(1).

17 Entitlements under other provisions

Where during any period a worker is entitled to a rest period, rest break or annual leave both under a provision of these Regulations and under a separate provision (including a provision of his contract), he may not exercise the two rights separately, but may, in taking a rest period, break or leave during that period, take advantage of whichever right is, in any particular respect, the more favourable.

NOTES

Initial Commencement

Specified date

Specified date: 1 October 1998: see reg 1(1).

Part III Exceptions

[18 Excluded sectors]

[(1) These Regulations do not apply—

(a) to workers to whom the European Agreement on the organisation of working time of seafarers dated 30th September 1998 and put into effect by Council Directive 1999/63/EC of 21st June 1999 applies;

[(b) to workers to whom the Fishing Vessels (Working Time: Sea-fishermen) Regulations 2004 apply;] or

[(c) to workers to whom the Merchant Shipping (Working Time: Inland Waterways) Regulations 2003 apply].

(2) Regulations 4(1) and (2), 6(1), (2) and (7), 7(1) and (6), 8, 10(1), 11(1) and (2), 12(1), 13 and 16 do not apply—

(a) where characteristics peculiar to certain specific services such as the armed forces or the police, or to certain specific activities in the civil protection services, inevitably conflict with the provisions of these Regulations;

- (b) to workers to whom the European Agreement on the organisation of working time of mobile staff in civil aviation concluded on 22nd March 2000 and implemented by Council Directive 2000/79/EC of 27th November 2000 applies; or
- (c) to the activities of workers who are doctors in training.

(3) Paragraph (2)(c) has effect only until 31st July 2004.

(4) Regulations 4(1) and (2), 6(1), (2) and (7), 8, 10(1), 11(1) and (2) and 12(1) do not apply to workers to whom Directive 2002/15/EC of the European Parliament and of the Council on the organisation of the working time of persons performing mobile road transport activities, dated 11th March 2002 applies.]

NOTES

Amendment

Substituted by SI 2003/1684, regs 2, 4.

Date in force: 1 August 2003: see SI 2003/1684, reg 1.

Para (1): sub-para (b) substituted by SI 2004/1713, reg 21, Sch 2, para 5.

Date in force: 16 August 2004: see SI 2004/1713, reg 1.

Para (1): sub-para (c) substituted by SI 2003/3049, reg 20, Sch 2, para 6.

Date in force: 24 December 2003: see SI 2003/3049, reg 1.

19 Domestic service

Regulations 4(1) and (2), [5A(1) and (4),] 6(1), (2) and (7), [6A,] 7(1), (2) and (6) and 8 do not apply in relation to a worker employed as a domestic servant in a private household.

NOTES

Initial Commencement

Specified date

Specified date: 1 October 1998: see reg 1(1).

Amendment

Words "5A(1) and (4)," and reference to "6A," in square brackets inserted by SI 2002/3128, regs 2, 14.

Date in force: 6 April 2003: see SI 2002/3128, reg 1.

20 Unmeasured working time

[(1)] Regulations 4(1) and (2), 6(1), (2) and (7), 10(1), 11(1) and (2) and 12(1) do not apply in relation to a worker where, on account of the specific characteristics of the activity in which he is engaged, the duration of his working time is not measured or predetermined or can be determined by the worker himself, as may be the case for—

- (a) managing executives or other persons with autonomous decision-taking powers;
- (b) family workers; or
- (c) workers officiating at religious ceremonies in churches and religious communities.

[(2) . . .]

NOTES

Initial Commencement

Specified date

Specified date: 1 October 1998: see reg 1(1).

Amendment

Para (1): numbered as such by SI 1999/3372, regs 2, 4.

Date in force: 17 December 1999: see SI 1999/3372, reg 1(1).

Para (2): inserted by SI 1999/3372, regs 2, 4.

Date in force: 17 December 1999: see SI 1999/3372, reg 1(1).

Para (2): revoked by SI 2006/99, reg 2.

Date in force: 6 April 2006: see SI 2006/99, reg 1.

21 Other special cases

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) where the worker's activities are such that his place of work and place of residence are distant from one another[, including cases where the worker is employed in offshore work,] or his different places of work are distant from one another;
- (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) where there is a foreseeable surge of activity, as may be the case in relation to—
- (i) agriculture;
 - (ii) tourism; and
 - (iii) postal services;
- (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) where the worker works in railway transport and—

(i) his activities are intermittent;

(ii) he spends his working time on board trains; or

(iii) his activities are linked to transport timetables and to ensuring the continuity and regularity of traffic].

NOTES

Initial Commencement

Specified date

Specified date: 1 October 1998: see reg 1(1).

Amendment

In para (a) words “, including cases where the worker is employed in offshore work,” in square brackets inserted by SI 2003/1684, regs 2, 5(a).

Date in force: 1 August 2003: see SI 2003/1684, reg 1.

In para (c)(i) words “(including the activities of doctors in training)” in square brackets inserted by SI 2003/1684, regs 2, 5(b).

Date in force: 1 August 2003: see SI 2003/1684, reg 1.

Para (c)(viii) inserted by SI 2003/1684, regs 2, 5(c).

Date in force: 1 August 2003: see SI 2003/1684, reg 1.

Para (f) inserted by SI 2003/1684, regs 2, 5(d).

Date in force: 1 August 2003: see SI 2003/1684, reg 1.

22 Shift workers

(1) Subject to regulation 24—

(a) regulation 10(1) does not apply in relation to a shift worker when he changes shift and cannot take a daily rest period between the end of one shift and the start of the next one;

- (b) paragraphs (1) and (2) of regulation 11 do not apply in relation to a shift worker when he changes shift and cannot take a weekly rest period between the end of one shift and the start of the next one; and
- (c) neither regulation 10(1) nor paragraphs (1) and (2) of regulation 11 apply to workers engaged in activities involving periods of work split up over the day, as may be the case for cleaning staff.

(2) For the purposes of this regulation—

“shift worker” means any worker whose work schedule is part of shift work; and

“shift work” means any method of organizing work in shifts whereby workers succeed each other at the same workstations according to a certain pattern, including a rotating pattern, and which may be continuous or discontinuous, entailing the need for workers to work at different times over a given period of days or weeks.

NOTES

Initial Commencement

Specified date

Specified date: 1 October 1998: see reg 1(1).

23 Collective and workforce agreements

A collective agreement or a workforce agreement may—

- (a) modify or exclude the application of regulations 6(1) to (3) and (7), 10(1), 11(1) and (2) and 12(1), and
- (b) for objective or technical reasons or reasons concerning the organization of work, modify the application of regulation 4(3) and (4) by the substitution, for each reference to 17 weeks, of a different period, being a period not exceeding 52 weeks,

in relation to particular workers or groups of workers.

NOTES

Initial Commencement

Specified date

Specified date: 1 October 1998: see reg 1(1).

24 Compensatory rest

Where the application of any provision of these Regulations is excluded by regulation 21 or 22, or is modified or excluded by means of a collective agreement or a workforce agreement under regulation 23(a), and a worker is accordingly required by his employer to work during a period which would otherwise be a rest period or rest break—

- (a) his employer shall wherever possible allow him to take an equivalent period of compensatory rest, and
- (b) in exceptional cases in which it is not possible, for objective reasons, to grant such a period of rest, his employer shall afford him such protection as may be appropriate in order to safeguard the worker's health and safety.

NOTES

Initial Commencement

Specified date

Specified date: 1 October 1998: see reg 1(1).

[24A Mobile workers]

[(1) Regulations 6(1), (2) and (7), 10(1), 11(1) and (2) and 12(1) do not apply to a mobile worker in relation to whom the application of those regulations is not excluded by any provision of regulation 18.

(2) A mobile worker, to whom paragraph (1) applies, is entitled to adequate rest, except where the worker's activities are affected by any of the matters referred to in regulation 21 (e).

(3) For the purposes of this regulation, "adequate rest" means that a worker has regular rest periods, the duration of which are expressed in units of time and which are sufficiently long and continuous to ensure that, as a result of fatigue or other irregular working patterns, he does not cause injury to himself, to fellow workers or to others and that he does not damage his health, either in the short term or in the longer term.]

NOTES

Amendment

Inserted by SI 2003/1684, regs 2, 6.

Date in force: 1 August 2003: see SI 2003/1684, reg 1.

25 Workers in the armed forces

(1) Regulation 9 does not apply in relation to a worker serving as a member of the armed forces.

(2) Regulations [5A, 6A,] 10(2) and 11(3) do not apply in relation to a young worker serving as a member of the armed forces.

(3) In a case where a young worker is accordingly required to work during [the restricted period, or is not permitted the minimum rest period provided for in regulation 10(2) or 11(3),] he shall be allowed an appropriate period of compensatory rest.

NOTES

Initial Commencement

Specified date

Specified date: 1 October 1998: see reg 1(1).

Amendment

Para (2): reference to "5A, 6A," in square brackets inserted by SI 2002/3128, regs 2, 15(a).

Date in force: 6 April 2003: see SI 2002/3128, reg 1.

Para (3): words "the restricted period, or is not permitted the minimum rest period provided for in regulation 10(2) or 11(3)," in square brackets substituted by SI 2002/3128, regs 2, 15(b).

Date in force: 6 April 2003: see SI 2002/3128, reg 1.

[25A Doctors in training]

[(1) Paragraph (1) of regulation 4 is modified in its application to workers who are doctors in training as follows—

- (a) for the reference to 48 hours there is substituted a reference to 58 hours with effect from 1st August 2004 until 31st July 2007;

- (b) for the reference to 48 hours there is substituted a reference to 56 hours with effect from 1st August 2007 until 31st July 2009.

(2) In the case of workers who are doctors in training, paragraphs (3)–(5) of regulation 4 shall not apply and paragraphs (3) and (4) of this regulation shall apply in their place.

(3) Subject to paragraph (4), the reference period which applies in the case of a worker who is a doctor in training is, with effect from 1st August 2004—

- (a) where a relevant agreement provides for the application of this regulation in relation to successive periods of 26 weeks, each such period; and

- (b) in any other case, any period of 26 weeks in the course of his employment.

(4) Where a doctor in training has worked for his employer for less than 26 weeks, the reference period applicable in his case is the period that has elapsed since he started work for his employer.]

NOTES

Amendment

Inserted by SI 2003/1684, regs 2, 7.

Date in force: 1 August 2004: see SI 2003/1684, reg 1.

[25B Workers employed in offshore work]

[(1) In the case of workers employed in offshore work, paragraphs (3)–(5) of regulation 4 shall not apply and paragraphs (2) and (3) of this regulation shall apply in their place.

(2) Subject to paragraph (3), the reference period which applies in the case of workers employed in offshore work is—

- (a) where a relevant agreement provides for the application of this regulation in relation to successive periods of 52 weeks, each such period; and

- (b) in any other case, any period of 52 weeks in the course of his employment.

(3) Where a worker employed in offshore work has worked for his employer for less than 52 weeks, the reference period applicable in his case is the period that has elapsed since he started work for his employer.]

NOTES

Amendment

Inserted by SI 2003/1684, regs 2, 8.

Date in force: 1 August 2003: see SI 2003/1684, reg 1.

26 . . .

. . .

NOTES

Amendment

Revoked by SI 2003/1684, regs 2, 9.

Date in force: 1 August 2003: see SI 2003/1684, reg 1.

27 Young workers: force majeure

(1) Regulations [5A, 6A,] 10(2) and 12(4) do not apply in relation to a young worker where his employer requires him to undertake work which no adult worker is available to perform and which—

(a) is occasioned by either—

(i) an occurrence due to unusual and unforeseeable circumstances, beyond the employer's control, or

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

(b) is of a temporary nature; and

(c) must be performed immediately.

(2) Where the application of regulation [5A, 6A,] 10(2) or 12(4) is excluded by paragraph (1), and a young worker is accordingly required to work during a period which would otherwise be a rest period or rest break, his employer shall allow him to take an equivalent period of compensatory rest within the following three weeks.

NOTES

Initial Commencement

Specified date

Specified date: 1 October 1998: see reg 1(1).

Amendment

Para (1): reference to "5A, 6A," in square brackets inserted by SI 2002/3128, regs 2, 18(a).

Date in force: 6 April 2003: see SI 2002/3128, reg 1.

Para (2): reference to "5A, 6A," in square brackets inserted by SI 2002/3128, regs 2, 18(b).

Date in force: 6 April 2003: see SI 2002/3128, reg 1.

[27A Other exceptions relating to young workers]

[(1) Regulation 5A does not apply in relation to a young worker where—

- (a) the young worker's employer requires him to undertake work which is necessary either to maintain continuity of service or production or to respond to a surge in demand for a service or product;
- (b) no adult worker is available to perform the work, and
- (c) performing the work would not adversely affect the young worker's education or training.

(2) Regulation 6A does not apply in relation to a young worker employed—

- (a) in a hospital or similar establishment, or
- (b) in connection with cultural, artistic, sporting or advertising activities,

in the circumstances referred to in paragraph (1).

(3) Regulation 6A does not apply, except in so far as it prohibits work between midnight and 4 a.m., in relation to a young worker employed in—

- (a) agriculture;
- (b) retail trading;
- (c) postal or newspaper deliveries;
- (d) a catering business;
- (e) a hotel, public house, restaurant, bar or similar establishment, or
- (f) a bakery,

in the circumstances referred to in paragraph (1).

(4) Where the application of regulation 6A is excluded by paragraph (2) or (3), and a young worker is accordingly required to work during a period which would otherwise be a rest period or rest break—

- (a) he shall be supervised by an adult worker where such supervision is necessary for the young worker's protection, and
- (b) he shall be allowed an equivalent period of compensatory rest.]

NOTES

Amendment

Inserted by SI 2002/3128, regs 2, 17.

Date in force: 6 April 2003: see SI 2002/3128, reg 1.

Part IV
Miscellaneous

[28 Enforcement]

[(1) In this regulation, regulations 29–29E and Schedule 3—

“the 1974 Act” means the Health and Safety at Work etc Act 1974;

“the Civil Aviation Authority” means the authority referred to in section 2(1) of the Civil Aviation Act 1982;

“code of practice” includes a standard, a specification and any other documentary form of practical guidance;

“the Commission” means the Health and Safety Commission referred to in section 10(2) of the 1974 Act;

“enforcement authority” means the Executive, a local authority, the Civil Aviation Authority[, VOSA or the Office of Rail Regulation];

“the Executive” means the Health and Safety Executive referred to in section 10 (5) of the 1974 Act;

“local authority” means—

(a) in relation to England, a county council so far as they are the council for an area for which there are no district councils, a district council, a London borough council, the Common Council of the City of London, the Sub-Treasurer of the Inner Temple or the Under-Treasurer of the Middle Temple;

(b) in relation to Wales, a county council or a county borough council;

(c) in relation to Scotland, a council constituted under section 2 of the Local Government etc (Scotland) Act 1994;

“premises” includes any place and, in particular, includes—

(a) any vehicle, vessel, aircraft or hovercraft;

(b) any installation on land (including the foreshore and other land intermittently covered by water), any offshore installation, and any other

installation (whether floating, or resting on the seabed or the subsoil thereof, or resting on other land covered with water or the subsoil thereof) and

(c) any tent or movable structure;

“relevant civil aviation worker” means a mobile worker who works mainly on board civil aircraft, excluding any worker to whom regulation 18(2)(b) applies;

“the relevant requirements” means the following provisions—

(a) regulations 4(2), 5A(4), 6(2) and (7), 6A, 7(1), (2) and (6), 8, 9 and 27A(4)(a);

(b) regulation 24, in so far as it applies where regulation 6(1), (2) or (7) is modified or excluded, and

(c) regulation 24A(2), in so far as it applies where regulations 6(1), (2) or (7) is excluded;

“relevant road transport worker” means a mobile worker to whom one or more of the following applies—

(a) Council Regulation (EEC) 3820/85,

(b) the European Agreement concerning the Work of Crews of Vehicles engaged in International Road Transport (AETR) of 1st July 1970, and

(c) the United Kingdom domestic driver’s hours code, which is set out in Part VI of the Transport Act 1968;

“the relevant statutory provisions” means—

(a) the provisions of the 1974 Act and of any regulations made under powers contained in that Act; and

(b) while and to the extent that they remain in force, the provisions of the Acts mentioned in Schedule 1 to the 1974 Act and which are specified in the third column of that Schedule and the regulations, orders or other

instruments of a legislative character made or having effect under a provision so specified; and

“VOSA” means the Vehicle and Operator Services Agency.

(2) It shall be the duty of the Executive to make adequate arrangements for the enforcement of the relevant requirements except to the extent that—

- (a) a local authority is made responsible for their enforcement by paragraph (3);
- (b) the Civil Aviation Authority is made responsible for their enforcement by paragraph (5); . . .
- (c) VOSA is made responsible for their enforcement by paragraph (6);
- [(d) the Office of Rail Regulation is made responsible for their enforcement by paragraph (3A)].

(3) Where the relevant requirements apply in relation to workers employed in premises in respect of which a local authority is responsible, under the Health and Safety (Enforcing Authority) Regulations 1998, for enforcing any of the relevant statutory provisions, it shall be the duty of that authority to enforce those requirements.

[(3A) Where the relevant requirements apply in relation to workers employed in the carrying out of any of the activities specified in regulation 3(2) of the Health and Safety (Enforcing Authority for Railways and Other Guided Transport Systems) Regulations 2006 it shall be the duty of the Office of Rail Regulation to enforce those requirements.]

(4) The duty imposed on local authorities by paragraph (3) shall be performed in accordance with such guidance as may be given to them by the Commission.

(5) It shall be the duty of the Civil Aviation Authority to enforce the relevant requirements in relation to relevant civil aviation workers.

(6) It shall be the duty of VOSA to enforce the relevant requirements in relation to relevant road transport workers.

(7) The provisions of Schedule 3 shall apply in relation to the enforcement of the relevant requirements.

(8) Any function of the Commission under the 1974 Act which is exercisable in relation to the enforcement by the Executive of the relevant statutory provisions shall be exercisable in relation to the enforcement by the Executive of the relevant requirements.]

NOTES

Amendment

Substituted by SI 2003/1684, regs 2, 10.

Date in force: 1 August 2003: see SI 2003/1684, reg 1.

Para (1): in definition “enforcement authority” words “, VOSA or the Office of Rail Regulation” in square brackets substituted by SI 2006/557, reg 6, Schedule, para 7 (a).

Date in force: 1 April 2006: see SI 2006/557, reg 1; for transitional provisions see reg 7 thereof.

Para (2): in sub-para (b) word omitted revoked by SI 2006/557, reg 6, Schedule, para 7(b)(i).

Date in force: 1 April 2006: see SI 2006/557, reg 1; for transitional provisions see reg 7 thereof.

Para (2): sub-para (d) inserted by SI 2006/557, reg 6, Schedule, para 7(b)(ii).

Date in force: 1 April 2006: see SI 2006/557, reg 1; for transitional provisions see reg 7 thereof.

Para (3A): inserted by SI 2006/557, reg 6, Schedule, para 7(c).

Date in force: 1 April 2006: see SI 2006/557, reg 1; for transitional provisions see reg 7 thereof.

[29 Offences]

[(1) An employer who fails to comply with any of the relevant requirements shall be guilty of an offence.

(2) The provisions of paragraph (3) shall apply where an inspector is exercising or has exercised any power conferred by Schedule 3.

(3) It is an offence for a person—

(a) to contravene any requirement imposed by the inspector under paragraph 2 of Schedule 3;

(b) to prevent or attempt to prevent any other person from appearing before

the inspector or from answering any question to which the inspector may by virtue of paragraph 2(2)(e) of Schedule 3 require an answer;

- (c) to contravene any requirement or prohibition imposed by an improvement notice or a prohibition notice (including any such notice as is modified on appeal);
- (d) intentionally to obstruct the inspector in the exercise or performance of his powers or duties;
- (e) to use or disclose any information in contravention of paragraph 8 of Schedule 3;
- (f) to make a statement which he knows to be false or recklessly to make a statement which is false, where the statement is made in purported compliance with a requirement to furnish any information imposed by or under these Regulations.

(4) An employer guilty of an offence under paragraph (1) shall be liable—

- (a) on summary conviction, to a fine not exceeding the statutory maximum;
- (b) on conviction on indictment, to a fine.

(5) A person guilty of an offence under paragraph (3) shall be liable to the penalty prescribed in relation to that provision by paragraphs (6), (7) or (8) as the case may be.

(6) A person guilty of an offence under sub-paragraph (3)(a), (b) or (d) shall be liable on summary conviction to a fine not exceeding level 5 on the standard scale.

(7) A person guilty of an offence under sub-paragraph (3)(c) shall be liable—

- (a) on summary conviction, to imprisonment for a term not exceeding three months, or a fine not exceeding the statutory maximum;
- (b) on conviction on indictment, to imprisonment for a term not exceeding two years, or a fine, or both.

(8) A person guilty of an offence under any of the sub-paragraphs of paragraph (3) not falling within paragraphs (6) or (7) above, shall be liable—

(a) on summary conviction, to a fine not exceeding the statutory maximum;

(b) on conviction on indictment—

(i) if the offence is under sub-paragraph (3)(e), to imprisonment for a term not exceeding two years or a fine or both;

(ii) if the offence is not one to which the preceding sub-paragraph applies, to a fine.

(9) The provisions set out in regulations 29A–29E below shall apply in relation to the offences provided for in paragraphs (1) and (3).]

NOTES

Amendment

Substituted, together with regs 29A–29E for this reg as originally enacted, by SI 2003/1684, regs 2, 10.

Date in force: 1 August 2003: see SI 2003/1684, reg 1.

[29A Offences due to fault of other person]

[Where the commission by any person of an offence is due to the act or default of some other person, that other person shall be guilty of the offence, and a person may be charged with and convicted of the offence by virtue of this paragraph whether or not proceedings are taken against the first-mentioned person.]

NOTES

Amendment

Substituted, together with regs 29, 29B–29E for reg 29 as originally enacted, by SI 2003/1684, regs 2, 10.

Date in force: 1 August 2003: see SI 2003/1684, reg 1.

[29B Offences by bodies corporate]

[(1) Where an offence committed by a body corporate is proved to have been committed with the consent or connivance of, or to have been attributable to any neglect on the part of, any director, manager, secretary or other similar officer of the body corporate or a person who was purporting to act in any such capacity, he as well as the body corporate shall be guilty of that offence and shall be liable to be proceeded against and punished accordingly.]

(2) Where the affairs of a body corporate are managed by its members, the preceding paragraph shall apply in relation to the acts and defaults of a member in connection with his functions of management as if he were a director of the body corporate.]

NOTES

Amendment

Substituted, together with regs 29, 29A, 29C–29E for reg 29 as originally enacted, by SI 2003/1684, regs 2, 10.

Date in force: 1 August 2003: see SI 2003/1684, reg 1.

[29C Restriction on institution of proceedings in England and Wales]

[Proceedings for an offence shall not, in England and Wales, be instituted except by an inspector or by or with the consent of the Director of Public Prosecutions.]

NOTES

Amendment

Substituted, together with regs 29, 29A, 29B, 29D, 29E for reg 29 as originally enacted, by SI 2003/1684, regs 2, 10.

Date in force: 1 August 2003: see SI 2003/1684, reg 1.

[29D Prosecutions by inspectors]

[(1) An inspector, if authorised in that behalf by an enforcement authority, may, although not of counsel or a solicitor, prosecute before a magistrate's court proceedings for an offence under these Regulations.]

(2) This regulation shall not apply to Scotland.]

NOTES

Amendment

Substituted, together with regs 29, 29A–29C, 29E for reg 29 as originally enacted, by SI 2003/1684, regs 2, 10.

Date in force: 1 August 2003: see SI 2003/1684, reg 1.

[29E Power of court to order cause of offence to be remedied]

[(1) Where a person is convicted of an offence in respect of any matters which appear to the court to be matters which it is in his power to remedy, the court may, in addition to or instead of imposing any punishment, order him, within such time as may be fixed by the order, to take such steps as may be specified in the order for remedying the said matters.

(2) The time fixed by an order under paragraph (1) may be extended or further extended by order of the court on an application made before the end of that time as originally fixed or as extended under this paragraph, as the case may be.

(3) Where a person is ordered under paragraph (1) to remedy any matters, that person shall not be liable under these Regulations in respect of those matters in so far as they continue during the time fixed by the order or any further time allowed under paragraph (2).]

NOTES

Amendment

Substituted, together with regs 29, 29A–29D for reg 29 as originally enacted, by SI 2003/1684, regs 2, 10.

Date in force: 1 August 2003: see SI 2003/1684, reg 1.

30 Remedies

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

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

(i) regulation 10(1) or (2), 11(1), (2) or (3), 12(1) or (4) or [13];

(ii) regulation 24, in so far as it applies where regulation 10(1), 11(1) or (2) or 12(1) is modified or excluded; . . .

[(iii) regulation 24A, in so far as it applies where regulation 10(1), 11(1) or (2) or 12(1) is excluded; or

(iv) regulation 25(3), 27A(4)(b) or 27(2); or]

(b) has failed to pay him the whole or any part of any amount due to him under regulation 14(2) or 16(1).

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

(a) before the end of the period of three months (or, in a case to which regulation 38(2) applies, six months) beginning with the date on which it is alleged that the exercise of the right should have been permitted (or in the case of a rest period or leave extending over more than one day, the date on which it should have been permitted to begin) or, as the case may be, the payment should have been made;

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

[(2A) Where the period within which a complaint must be presented in accordance with paragraph (2) is extended by regulation 15 of the Employment Act 2002 (Dispute Resolution) Regulations 2004, the period within which the complaint must be presented shall be the extended period rather than the period in paragraph (2).]

(3) Where an employment tribunal finds a complaint under paragraph (1)(a) well-founded, the tribunal—

(a) shall make a declaration to that effect, and

(b) may make an award of compensation to be paid by the employer to the worker.

(4) The amount of the compensation shall be such as the tribunal considers just and equitable in all the circumstances having regard to—

(a) the employer's default in refusing to permit the worker to exercise his right, and

- (b) any loss sustained by the worker which is attributable to the matters complained of.

(5) Where on a complaint under paragraph (1)(b) an employment tribunal finds that an employer has failed to pay a worker in accordance with regulation 14(2) or 16(1), it shall order the employer to pay to the worker the amount which it finds to be due to him.

NOTES

Initial Commencement

Specified date

Specified date: 1 October 1998: see reg 1(1).

Amendment

Para (1): in sub-para (a)(i) reference to “13” in square brackets substituted by virtue of SI 2001/3256, reg 3.

Date in force: 25 October 2001: see SI 2001/3256, reg 1(1).

Para (1): in sub-para (a)(ii) word omitted revoked by SI 2003/1684, regs 2, 11.

Date in force: 1 August 2003: see SI 2003/1684, reg 1.

Para (1): sub-paras (a)(iii), (iv) substituted, for sub-para (iii) as originally enacted, by SI 2003/1684, regs 2, 11.

Date in force: 1 August 2003: see SI 2003/1684, reg 1.

Para (2A): inserted by SI 2004/752, reg 17(f).

Date in force: 1 October 2004: see SI 2004/752, reg 1; for transitional provisions see reg 18 thereof.

31 Right not to suffer detriment

(1) After section 45 of the 1996 Act there shall be inserted—

“45A Working time cases

(1) A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker—

- (a) refused (or proposed to refuse) to comply with a requirement which the employer imposed (or proposed to impose) in contravention of the Working Time Regulations 1998,
- (b) refused (or proposed to refuse) to forgo a right conferred on him by those Regulations,

- (c) failed to sign a workforce agreement for the purposes of those Regulations, or to enter into, or agree to vary or extend, any other agreement with his employer which is provided for in those Regulations,
- (d) being—
 - (i) a representative of members of the workforce for the purposes of Schedule 1 to those Regulations, or
 - (ii) a candidate in an election in which any person elected will, on being elected, be such a representative,
 performed (or proposed to perform) any functions or activities as such a representative or candidate,
- (e) brought proceedings against the employer to enforce a right conferred on him by those Regulations, or
- (f) alleged that the employer had infringed such a right.

(2) It is immaterial for the purposes of subsection (1)(e) or (f)—

- (a) whether or not the worker has the right, or
- (b) whether or not the right has been infringed,

but, for those provisions to apply, the claim to the right and that it has been infringed must be made in good faith.

(3) It is sufficient for subsection (1)(f) to apply that the worker, without specifying the right, made it reasonably clear to the employer what the right claimed to have been infringed was.

(4) This section does not apply where a worker is an employee and the detriment in question amounts to dismissal within the meaning of Part X, unless the dismissal is in circumstances in which, by virtue of section 197, Part X does not apply.”

(2) After section 48(1) of the 1996 Act there shall be inserted the following subsection—

“(1ZA) A worker may present a complaint to an employment tribunal that he has been subjected to a detriment in contravention of section 45A.”

(3) In section 49 of the 1996 Act (remedies)—

(a) in subsection (2), for “subsection (6)” there shall be substituted “subsections (5A) and (6)”, and

(b) after subsection (5), there shall be inserted—

“(5A) Where—

(a) the complaint is made under section 48 (1ZA),

(b) the detriment to which the worker is subjected is the termination of his worker’s contract, and

(c) that contract is not a contract of employment,

any compensation must not exceed the compensation that would be payable under Chapter II of Part X if the worker had been an employee and had been dismissed for the reason specified in section 101A.”

(4) In section 192(2) of the 1996 Act (provisions applicable in relation to service in the armed forces), after paragraph (a) there shall be inserted—

“(aa) in Part V, section 45A, and sections 48 and 49 so far as relating to that section,”.

(5) In sections 194(2)(c), 195(2)(c) and 202(2)(b) of the 1996 Act, for “sections 44 and 47” there shall be substituted “sections 44, 45A and 47”.

(6) In section 200(1) of the 1996 Act (which lists provisions of the Act which do not apply

to employment in police service), after “45,” there shall be inserted “45A,”.

(7) In section 205 of the 1996 Act (remedy for infringement of certain rights), after subsection (1) there shall be inserted the following subsection—

“(1ZA) In relation to the right conferred by section 45A, the reference in subsection (1) to an employee has effect as a reference to a worker.”

NOTES

Initial Commencement

Specified date

Specified date: 1 October 1998: see reg 1(1).

32 Unfair dismissal

(1) After section 101 of the 1996 Act there shall be inserted the following section—

“101A Working time cases

An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee—

- (a) refused (or proposed to refuse) to comply with a requirement which the employer imposed (or proposed to impose) in contravention of the Working Time Regulations 1998,
- (b) refused (or proposed to refuse) to forgo a right conferred on him by those Regulations,
- (c) failed to sign a workforce agreement for the purposes of those Regulations, or to enter into, or agree to vary or extend, any other agreement with his employer which is provided for in those Regulations, or
- (d) being—

(i) a representative of members of the workforce for the purposes of Schedule 1 to those Regulations, or

(ii) a candidate in an election in which any person elected will, on being elected, be such a representative,

performed (or proposed to perform) any functions or activities as such a representative or candidate.”

(2) In section 104 of the 1996 Act (right of employees not to be unfairly dismissed for asserting particular rights) in subsection (4)—

(a) at the end of paragraph (b), the word “and” shall be omitted, and

(b) after paragraph (c), there shall be inserted the words—

“and

(d) the rights conferred by the Working Time Regulations 1998.”

(3) In section 105 of the 1996 Act (redundancy as unfair dismissal), after subsection (4) there shall be inserted the following subsection—

“(4A) This subsection applies if the reason (or, if more than one, the principal reason) for which the employee was selected for dismissal was one of those specified in section 101A.”

(4) In sections 108(3) and 109(2) of the 1996 Act, after paragraph (d) there shall be inserted—

“(dd) section 101A applies,”.

(5) In sections 117(4)(b), 118(3), 120(1), 122(3), 128(1)(b) and 129(1) of the 1996 Act, after “100(1)(a) and (b),” there shall be inserted “101A(d),”.

(6) In section 202(2) (cases where disclosure of information is restricted on ground of

national security)—

- (a) in paragraph (g)(i), after “100” there shall be inserted “, 101A(d)”, and
- (b) in paragraph (g)(ii), after “of that section,” there shall be inserted “or by reason of the application of subsection (4A) in so far as it applies where the reason (or, if more than one, the principal reason) for which an employee was selected for dismissal was that specified in section 101A (d)”.

(7) In section 209(2) of the 1996 Act (which lists provisions excluded from the scope of the power to amend the Act by order), after “101,” in paragraph (e) there shall be inserted “101A,”.

(8) In sections 237(1A) and 238(2A) of the Trade Union and Labour Relations (Consolidation) Act 1992 (cases where employee can complain of unfair dismissal notwithstanding industrial action at time of dismissal), after “100” there shall be inserted “, 101A(d)”.

(9) In section 10(5)(a) of the Employment Tribunals Act 1996 (cases where Minister’s certificate is not conclusive evidence that action was taken to safeguard national security), after “100” there shall be inserted “, 101A(d)”.

NOTES

Initial Commencement

Specified date

Specified date: 1 October 1998: see reg 1(1).

33 Conciliation

In section 18(1) of the Employment Tribunals Act 1996 (cases where conciliation provisions apply)—

- (a) at the end of paragraph (e), the word “or” shall be omitted, and
- (b) after paragraph (f), there shall be inserted the words

“or

(ff) under regulation 30 of the Working Time Regulations 1998,”.

NOTES

Initial Commencement

Specified date

Specified date: 1 October 1998: see reg 1(1).

34 Appeals

In section 21 of the Employment Tribunals Act 1996 (jurisdiction of the Employment Appeal Tribunal)—

- (a) at the end of subsection (1) (which confers jurisdiction by reference to Acts under or by virtue of which decisions are made) there shall be inserted—

“or under the Working Time Regulations 1998.”;

- (b) in subsection (2), after “the Acts listed” there shall be inserted—

“or the Regulations referred to”.

NOTES

Initial Commencement

Specified date

Specified date: 1 October 1998: see reg 1(1).

35 Restrictions on contracting out

(1) Any provision in an agreement (whether a contract of employment or not) is void in so far as it purports—

- (a) to exclude or limit the operation of any provision of these Regulations, save in so far as these Regulations provide for an agreement to have that effect, or

- (b) to preclude a person from bringing proceedings under these Regulations before an employment tribunal.

(2) Paragraph (1) does not apply to—

- (a) any agreement to refrain from instituting or continuing proceedings where a conciliation officer has taken action under section 18 of the Employment Tribunals Act 1996 (conciliation); or
- (b) any agreement to refrain from instituting or continuing proceedings within section 18(1)(ff) of the Employment Tribunals Act 1996 (proceedings under these Regulations where conciliation is available), if the conditions regulating compromise agreements under these Regulations are satisfied in relation to the agreement.

(3) For the purposes of paragraph (2)(b) the conditions regulating compromise agreements under these Regulations are that—

- (a) the agreement must be in writing,
- (b) the agreement must relate to the particular complaint,
- (c) the worker must have received advice from a relevant independent adviser as to the terms and effect of the proposed agreement and, in particular, its effect on his ability to pursue his rights before an employment tribunal,
- (d) there must be in force, when the adviser gives the advice, a contract of insurance, or an indemnity provided for members of a profession or professional body, covering the risk of a claim by the worker in respect of loss arising in consequence of the advice,
- (e) the agreement must identify the adviser, and
- (f) the agreement must state that the conditions regulating compromise agreements under these Regulations are satisfied.

(4) A person is a relevant independent adviser for the purposes of paragraph (3)(c)—

- (a) if he is a qualified lawyer,
- (b) if he is an officer, official, employee or member of an independent trade union who has been certified in writing by the trade union as competent to give advice and as authorised to do so on behalf of the trade union, or
- (c) if he works at an advice centre (whether as an employee or as a volunteer) and has been certified in writing by the centre as competent to give advice and as authorised to do so on behalf of the centre.

(5) But a person is not a relevant independent adviser for the purposes of paragraph (3)(c) in relation to the worker—

- (a) if he, is employed by or is acting in the matter for the employer or an associated employer,
- (b) in the case of a person within paragraph (4)(b) or (c), if the trade union or advice centre is the employer or an associated employer, or
- (c) in the case of a person within paragraph (4)(c), if the worker makes a payment for the advice received from him.

(6) In paragraph (4)(a), “qualified lawyer” means—

- (a) as respects England and Wales, a barrister (whether in practice as such or employed to give legal advice), a solicitor who holds a practising certificate, or a person other than a barrister or solicitor who is an authorised advocate or authorised litigator (within the meaning of the Courts and Legal Services Act 1990); and
- (b) as respects Scotland, an advocate (whether in practice as such or employed to give legal advice), or a solicitor who holds a practising certificate.

[(6A) A person shall be treated as being a qualified lawyer within paragraph (6)(a) if he is a Fellow of the Institute of Legal Executives employed by a solicitors’ practice.]

(7) For the purposes of paragraph (5) any two employers shall be treated as associated

- (a) one is a company of which the other (directly or indirectly) has control; or
- (b) both are companies of which a third person (directly or indirectly) has control; and “associated employer” shall be construed accordingly.

NOTES

Initial Commencement

Specified date

Specified date: 1 October 1998: see reg 1(1).

Amendment

Para (6A): inserted by SI 2004/2516, reg 2.

Date in force: 1 October 2004: see SI 2004/2516, reg 1(1).

[35A]

[(1) The Secretary of State shall, after consulting persons appearing to him to represent the two sides of industry, arrange for the publication, in such form and manner as he considers appropriate, of information and advice concerning the operation of these Regulations.

(2) The information and advice shall be such as appear to him best calculated to enable employers and workers affected by these Regulations to understand their respective rights and obligations under them.]

NOTES

Amendment

Inserted by SI 1999/3372, regs 2, 5.

Date in force: 17 December 1999: see SI 1999/3372, reg 1(1).

Part V Special Classes of Person

36 Agency workers not otherwise “workers”

(1) This regulation applies in any case where an individual (“the agency worker”)—

- (a) is supplied by a person (“the agent”) to do work for another (“the principal”) under a contract or other arrangements made between the agent and the principal; but
- (b) is not, as respects that work, a worker, because of the absence of a worker’s contract between the individual and the agent or the principal; and
- (c) is not a party to a contract under which he undertakes to do the work for another party to the contract whose status is, by virtue of the contract, that of a client or customer of any profession or business undertaking carried on by the individual.

(2) In a case where this regulation applies, the other provisions of these Regulations shall have effect as if there were a worker’s contract for the doing of the work by the agency worker made between the agency worker and—

- (a) whichever of the agent and the principal is responsible for paying the agency worker in respect of the work; or
- (b) if neither the agent nor the principal is so responsible, whichever of them pays the agency worker in respect of the work,

and as if that person were the agency worker’s employer.

NOTES

Initial Commencement

Specified date

Specified date: 1 October 1998: see reg 1(1).

37 Crown employment

(1) Subject to paragraph (4) and regulation 38, these Regulations have effect in relation to Crown employment and persons in Crown employment as they have effect in relation to other employment and other workers.

(2) In paragraph (1) “Crown employment” means employment under or for the purposes of a government department or any officer or body exercising on behalf of the Crown functions conferred by a statutory provision.

(3) For the purposes of the application of the provisions of these Regulations in relation to Crown employment in accordance with paragraph (1)—

- (a) references to a worker shall be construed as references to a person in Crown employment; and
- (b) references to a worker's contract shall be construed as references to the terms of employment of a person in Crown employment.

(4) No act or omission by the Crown which is an offence under regulation 29 shall make the Crown criminally liable, but the High Court or, in Scotland, the Court of Session may, on the application of a person appearing to the Court to have an interest, declare any such act or omission unlawful.

NOTES

Initial Commencement

Specified date

Specified date: 1 October 1998: see reg 1(1).

38 Armed forces

(1) Regulation 37 applies—

- (a) subject to paragraph (2), to service as a member of the armed forces, and
- (b) to employment by an association established for the purposes of Part XI of the Reserve Forces Act 1996.

(2) No complaint concerning the service of any person as a member of the armed forces may be presented to an employment tribunal under regulation 30 unless—

- (a) that person has made a complaint in respect of the same matter to an officer under the service redress procedures, and
- (b) that complaint has not been withdrawn.

(3) For the purpose of paragraph (2)(b), a person shall be treated as having withdrawn his complaint if, having made a complaint to an officer under the service redress procedures, he fails to submit the complaint to the Defence Council under those procedures.

(4) Where a complaint of the kind referred to in paragraph (2) is presented to an employment tribunal, the service redress procedures may continue after the complaint is presented.

(5) In this regulation, “the service redress procedures” means the procedures, excluding those which relate to the making of a report on a complaint to Her Majesty, referred to in section 180 of the Army Act 1955, section 180 of the Air Force Act 1955 and section 130 of the Naval Discipline Act 1957.

NOTES

Initial Commencement

Specified date

Specified date: 1 October 1998: see reg 1(1).

39 House of Lords staff

(1) These Regulations have effect in relation to employment as a relevant member of the House of Lords staff as they have effect in relation to other employment.

(2) Nothing in any rule of law or the law or practice of Parliament prevents a relevant member of the House of Lords staff from presenting a complaint to an employment tribunal under regulation 30.

(3) In this regulation “relevant member of the House of Lords staff” means any person who is employed under a worker’s contract with the Corporate Officer of the House of Lords.

NOTES

Initial Commencement

Specified date

Specified date: 1 October 1998: see reg 1(1).

40 House of Commons staff

(1) These Regulations have effect in relation to employment as a relevant member of the House of Commons staff as they have effect in relation to other employment.

(2) For the purposes of the application of the provisions of these Regulations in relation to a relevant member of the House of Commons staff—

- (a) references to a worker shall be construed as references to a relevant member of the House of Commons staff; and
- (b) references to a worker's contract shall be construed as references to the terms of employment of a relevant member of the House of Commons staff.

(3) Nothing in any rule of law or the law or practice of Parliament prevents a relevant member of the House of Commons staff from presenting a complaint to an employment tribunal under regulation 30.

(4) In this regulation "relevant member of the House of Commons staff" means any person—

- (a) who was appointed by the House of Commons Commission; or
- (b) who is a member of the Speaker's personal staff.

NOTES

Initial Commencement

Specified date

Specified date: 1 October 1998: see reg 1(1).

41 Police service

(1) [Subject to paragraph (1A),] for the purposes of these Regulations, the holding, otherwise than under a contract of employment, of the office of constable or an appointment as a police cadet shall be treated as employment, under a worker's contract, by the relevant officer.

[(1A) For the purposes of these Regulations, any constable who has been seconded to

the Serious Organised Crime Agency to serve as a member of its staff shall be treated as employed by the Serious Organised Crime Agency.]

(2) Any matter relating to the employment of a worker which may be provided for the purposes of these Regulations in a workforce agreement may be provided for the same purposes in relation to the service of a person holding the office of constable or an appointment as a police cadet by an agreement between the relevant officer and a joint branch board.

(3) In this regulation—

“a joint branch board” means a joint branch board constituted in accordance with regulation 7(3) of the Police Federation Regulations 1969 or regulation 7(3) of the Police Federation (Scotland) Regulations 1985, and

“the relevant officer” means—

(a) in relation to a member of a police force or a special constable or police cadet appointed for a police area, the chief officer of police (or, in Scotland, the chief constable);

(b) . . . and

(c) in relation to any other person holding the office of constable or an appointment as a police cadet, the person who has the direction and control of the body of constables or cadets in question.

[(4) For the purposes of these Regulations the relevant officer, as defined by paragraph (3), shall be treated as a corporation sole.

(5) Where, in a case in which the relevant officer, as so defined, is guilty of an offence under these Regulations, it is proved—

(a) that the office-holder personally consented to the commission of the offence;

(b) that he personally connived in its commission; or

- (c) that the commission of the offence was attributable to personal neglect on his part,

the office-holder (as well as the corporation sole) shall be guilty of an offence and shall be liable to be proceeded against and punished accordingly.

(6) In paragraph (5) above “the office-holder”, in relation to the relevant officer, means an individual who, at the time of the consent, connivance or neglect—

- (a) held the office or other position mentioned in paragraph (3) above as the office or position of that officer; or
- (b) was for the time being responsible for exercising and performing the powers and duties of that office or position.

(7) In the application of this regulation to Scotland—

- (a) paragraph (4) shall have effect as if for the words “corporation sole” there were substituted “distinct juristic person (that is to say, as a juristic person distinct from the individual who for the time being is the office-holder)”;
- (b) paragraph (5) shall have effect as if for the words “corporation sole” there were substituted “juristic person”; and
- (c) paragraph (6) shall have effect as if for the words “paragraph (5)” there were substituted “paragraphs (4) and (5)”.]

NOTES

Initial Commencement

Specified date

Specified date: 1 October 1998: see reg 1(1).

Amendment

Para (1): words “Subject to paragraph (1A),” in square brackets inserted by SI 2006/594, art 2, Schedule, para 16(1), (2).

Date in force: 1 April 2006: see SI 2006/594, art 1.

Para (1A): inserted by SI 2006/594, art 2, Schedule, para 16(1), (3).

Date in force: 1 April 2006: see SI 2006/594, art 1.

Para (3): in definition “the relevant officer” para (b) revoked by SI 2006/594, art 2, Schedule, para 16(1), (4).

Date in force: 1 April 2006: see SI 2006/594, art 1.

Paras (4)–(7): inserted by SI 2005/2241, art 2.

Date in force: 1 September 2005: see SI 2005/2241, art 1(1); for transitional provisions see art 3 thereof.

42 Non-employed trainees

For the purposes of these Regulations, a person receiving relevant training, otherwise than under a contract of employment, shall be regarded as a worker, and the person whose undertaking is providing the training shall be regarded as his employer.

NOTES

Initial Commencement

Specified date

Specified date: 1 October 1998: see reg 1(1).

43 Agricultural workers

The provisions of Schedule 2 have effect in relation to workers employed in agriculture.

NOTES

Initial Commencement

Specified date

Specified date: 1 October 1998: see reg 1(1).

Ian McCartney

Minister of State,

Department of Trade and Industry

30th July 1998

SCHEDULE 1 WORKFORCE AGREEMENTS

1

An agreement is a workforce agreement for the purposes of these Regulations if the following conditions are satisfied—

- (a) the agreement is in writing;
- (b) it has effect for a specified period not exceeding five years;
- (c) it applies either—
 - (i) to all of the relevant members of the workforce, or
 - (ii) to all of the relevant members of the workforce who belong to a particular group;
- (d) the agreement is signed—
 - (i) in the case of an agreement of the kind referred to in sub-paragraph (c)(i), by the representatives of the workforce, and in the case of an agreement of the kind referred to in sub-paragraph (c)(ii) by the representatives of the group to which the agreement applies (excluding, in either case, any representative not a relevant member of the workforce on the date on which the agreement was first made available for signature), or
 - (ii) if the employer employed 20 or fewer workers on the date referred to in sub-paragraph (d)(i), either by the appropriate representatives in accordance with that sub-paragraph or by the majority of the workers employed by him;
- (e) before the agreement was made available for signature, the employer provided all the workers to whom it was intended to apply on the date on which it came into effect with copies of the text of the agreement and such guidance as those workers might reasonably require in order to understand it fully.

2

For the purposes of this Schedule—

“a particular group” is a group of the relevant members of a workforce who undertake a particular function, work at a particular workplace or belong to a particular department or unit within their employer’s business;

“relevant members of the workforce” are all of the workers employed by a particular employer, excluding any worker whose terms and conditions of employment are provided for, wholly or in part, in a collective agreement;

“representatives of the workforce” are workers duly elected to represent the relevant members of the workforce, “representatives of the group” are workers duly elected to represent the members of a particular group, and representatives are “duly elected” if the election at which they were elected satisfied the requirements of paragraph 3 of this Schedule.

3

The requirements concerning elections referred to in paragraph 2 are that—

- (a) the number of representatives to be elected is determined by the employer;
- (b) the candidates for election as representatives of the workforce are relevant members of the workforce, and the candidates for election as representatives of a group are members of the group;
- (c) no worker who is eligible to be a candidate is unreasonably excluded from standing for election;
- (d) all the relevant members of the workforce are entitled to vote for representatives of the workforce, and all the members of a particular group are entitled to vote for representatives of the group;
- (e) the workers entitled to vote may vote for as many candidates as there are representatives to be elected;

- (f) the election is conducted so as to secure that—
 - (i) so far as is reasonably practicable, those voting do so in secret, and
 - (ii) the votes given at the election are fairly and accurately counted.

NOTES

Initial Commencement

Specified date

Specified date: 1 October 1998: see reg 1(1).

SCHEDULE 2 WORKERS EMPLOYED IN AGRICULTURE

Regulations 13(4), 15(6) and 43

1

Except where, in the case of a worker partly employed in agriculture, different provision is made by a relevant agreement—

- (a) for the purposes of regulation 13, the leave year of a worker employed in agriculture begins on 6th April each year or such other date as may be specified in an agricultural wages order which applies to him; and
- (b) the dates on which leave is taken by a worker employed in agriculture shall be determined in accordance with an agricultural wages order which applies to him.

2

Where, in the case referred to in paragraph 1 above, a relevant agreement makes provision different from sub-paragraph (a) or (b) of that paragraph—

- (a) neither section 11 of the Agricultural Wages Act 1948 nor section 11 of the Agricultural Wages (Scotland) Act 1949 shall apply to that provision; and

- (b) an employer giving effect to that provision shall not thereby be taken to have failed to comply with the requirements of an agricultural wages order.

3

In this Schedule, “an agricultural wages order” means an order under section 3 of the Agricultural Wages Act 1948 or section 3 of the Agricultural Wages (Scotland) Act 1949.

NOTES

Initial Commencement

Specified date

Specified date: 1 October 1998: see reg 1(1).

[SCHEDULE 3 ENFORCEMENT]

NOTES

Amendment

Inserted by SI 2003/1684, regs 2, 12.

Date in force: 1 August 2003: see SI 2003/1684, reg 1.

[Regulation 28(7)]

NOTES

Amendment

Inserted by SI 2003/1684, regs 2, 12.

Date in force: 1 August 2003: see SI 2003/1684, reg 1.

[Appointment of inspectors

1

(1) Each enforcement authority may appoint as inspectors (under whatever title it may from time to time determine) such persons having suitable qualifications as it thinks necessary for carrying into effect these Regulations within its field of responsibility, and may terminate any appointment made under this paragraph.

(2) Every appointment of a person as an inspector under this paragraph shall be made by an instrument in writing specifying which of the powers conferred on inspectors by these Regulations are to be exercisable by the person appointed; and an inspector shall in right of his appointment under this paragraph—

- (a) be entitled to exercise only such of those powers as are so specified; and
- (b) be entitled to exercise the powers so specified only within the field of responsibility of the authority which appointed him.

(3) So much of an inspector's instrument of appointment as specifies the powers which he is entitled to exercise may be varied by the enforcement authority which appointed him.

(4) An inspector shall, if so required when exercising or seeking to exercise any power conferred on him by these Regulations, produce his instrument of appointment or a duly authenticated copy thereof.

Powers of inspectors

2

(1) Subject to the provisions of paragraph 1 and this sub-paragraph, an inspector may, for the purpose of carrying into effect these Regulations within the field of responsibility of the enforcement authority which appointed him, exercise the powers set out in sub-paragraph (2) below.

(2) The powers of an inspector referred to in the preceding sub-paragraph are the following, namely—

- (a) at any reasonable time (or, in a situation which in his opinion is or may be dangerous, at any time) to enter any premises which he has reason to believe it is necessary for him to enter for the purpose mentioned in sub-paragraph (1) above;
- (b) to take with him a constable if he has reasonable cause to apprehend any serious obstruction in the execution of his duty;

- (c) without prejudice to the preceding sub-paragraph, on entering any premises by virtue of paragraph (a) above to take with him—
 - (i) any other person duly authorised by the inspector's enforcement authority; and
 - (ii) any equipment or materials required for any purpose for which the power of entry is being exercised;
- (d) to make such examination and investigation as may in any circumstances be necessary for the purpose mentioned in sub-paragraph (1) above;
- (e) to require any person whom he has reasonable cause to believe to be able to give any information relevant to any examination or investigation under paragraph (d) above to answer (in the absence of persons other than a person nominated by him to be present and any persons whom the inspector may allow to be present) such questions as the inspector thinks fit to ask and to sign a declaration of the truth of his answers;
- (f) to require the production of, inspect, and take copies of or of any entry in—
 - (i) any records which by virtue of these Regulations are required to be kept, and
 - (ii) any other books, records or documents which it is necessary for him to see for the purposes of any examination or investigation under paragraph (d) above;
- (g) to require any person to afford him such facilities and assistance with respect to any matters or things within that person's control or in relation to which that person has responsibilities as are necessary to enable the inspector to exercise any of the powers conferred on him by this paragraph;
- (h) any other power which is necessary for the purpose mentioned in sub-paragraph (1) above.

(3) No answer given by a person in pursuance of a requirement imposed under sub-paragraph (2)(e) above shall be admissible in evidence against that person or the husband or wife of that person in any proceedings.

(4) Nothing in this paragraph shall be taken to compel the production by any person of a document of which he would on grounds of legal professional privilege be entitled to withhold production on an order for discovery in an action in the High Court or, as the case may be, on an order for the production of documents in an action in the Court of Session.

Improvement notices

3

If an inspector is of the opinion that a person—

- (a) is contravening one or more of these Regulations; or
- (b) has contravened one or more of these Regulations in circumstances that make it likely that the contravention will continue or be repeated,

he may serve on him a notice (in this Schedule referred to as “an improvement notice”) stating that he is of that opinion, specifying the provision or provisions as to which he is of that opinion, giving particulars of the reasons why he is of that opinion, and requiring that person to remedy the contravention or, as the case may be, the matters occasioning it within such period (ending not earlier than the period within which an appeal against the notice can be brought under paragraph 6) as may be specified in the notice.

Prohibition notices

4

(1) This paragraph applies to any activities which are being or are likely to be carried on by or under the control of any person, being activities to or in relation to which any of these Regulations apply or will, if the activities are so carried on, apply.

(2) If as regards any activities to which this paragraph applies an inspector is of the opinion that, as carried on or likely to be carried on by or under the control of the person in question, the activities involve or, as the case may be, will involve a risk of serious personal injury, the inspector may serve on that person a notice (in this Schedule referred to as “a prohibition notice”).

(3) A prohibition notice shall—

- (a) state that the inspector is of the said opinion;
- (b) specify the matters which in his opinion give or, as the case may be, will give rise to the said risk;
- (c) where in his opinion any of those matters involves or, as the case may be, will involve a contravention of any of these Regulations, state that he is of that opinion, specify the regulation or regulations as to which he is of that opinion, and give particulars of the reasons why he is of that opinion; and
- (d) direct that the activities to which the notice relates shall not be carried on by or under the control of the person on whom the notice is served unless the matters specified in the notice in pursuance of paragraph (b) above and any associated contraventions of provisions so specified in pursuance of paragraph (c) above have been remedied.

(4) A direction contained in a prohibition notice in pursuance of sub-paragraph (3)(d) above shall take effect—

- (a) at the end of the period specified in the notice; or
- (b) if the notice so declares, immediately.

Provisions supplementary to paragraphs 3 and 4

5

(1) In this paragraph “a notice” means an improvement notice or a prohibition notice.

(2) A notice may (but need not) include directions as to the measures to be taken to remedy any contravention or matter to which the notice relates; and any such directions—

- (a) may be framed to any extent by reference to any approved code of practice; and

- (b) may be framed so as to afford the person on whom the notice is served a choice between different ways of remedying the contravention or matter.

(3) Where an improvement notice or a prohibition notice which is not to take immediate effect has been served—

- (a) the notice may be withdrawn by an inspector at any time before the end of the period specified therein in pursuance of paragraph 3 or paragraph 4 (4) as the case may be; and
- (b) the period so specified may be extended or further extended by an inspector at any time when an appeal against the notice is not pending.

Appeal against improvement or prohibition notice

6

(1) In this paragraph “a notice” means an improvement or a prohibition notice.

(2) A person on whom a notice is served may within 21 days from the date of its service appeal to an employment tribunal; and on such an appeal the tribunal may either cancel or affirm the notice and, if it affirms it, may do so either in its original form or with such modifications as the tribunal may in the circumstances think fit.

(3) Where an appeal under this paragraph is brought against a notice within the period allowed under the preceding sub-paragraph, then—

- (a) in the case of an improvement notice, the bringing of the appeal shall have the effect of suspending the operation of the notice until the appeal is finally disposed of or, if the appeal is withdrawn, until the withdrawal of the appeal;
- (b) in the case of a prohibition notice, the bringing of the appeal shall have the like effect if, but only if, on the application of the appellant the tribunal so directs (and then only from the giving of the direction).

(4) One or more assessors may be appointed for the purposes of any proceedings brought before an employment tribunal under this paragraph.

Power of enforcement authority to indemnify inspectors

7

Where an action has been brought against an inspector in respect of an act done in the execution or purported execution of these Regulations and the circumstances are such that he is not legally entitled to require the enforcement authority to indemnify him, that authority may, nevertheless, indemnify him against the whole or part of any damages and costs or expenses which he may have been ordered to pay or may have incurred, if the authority is satisfied that the inspector honestly believed that the act complained of was within his powers and that his duty as an inspector required or entitled him to do it.

Restrictions on disclosure of information

8

(1) In this and the two following sub-paragraphs—

- (a) “relevant information” means information obtained by an inspector in pursuance of a requirement imposed under paragraph 2(2)(e) or (f); and
- (b) “the recipient”, in relation to any relevant information, means the person by whom that information was so obtained or to whom that information was so furnished, as the case may be.

(2) Subject to the following sub-paragraph, no relevant information shall be disclosed without the consent of the person by whom it was furnished.

(3) The preceding sub-paragraph shall not apply to—

- (a) disclosure of information to the Commission, a government department or any enforcement authority;
- (b) without prejudice to paragraph (a) above, disclosure by the recipient of information to any person for the purpose of any function conferred on the recipient by or under any of the relevant statutory provisions or under these Regulations;

- (c) without prejudice to paragraph (a) above, disclosure by the recipient of information to—
 - (i) an officer of a local authority who is authorised by that authority to receive it; or
 - (ii) a constable authorised by a chief officer of police to receive it; or
- (d) disclosure by the recipient of information in a form calculated to prevent it from being identified as relating to a particular person or case.

(4) In the preceding sub-paragraph any reference to the Commission, a government department or an enforcement authority includes respectively a reference to an officer of that body or authority (including in the case of an enforcement authority, any inspector appointed by it), and also, in the case of a reference to the Commission, includes a reference to—

- (a) a person performing any functions of the Commission or the Executive on its behalf by virtue of section 13(1)(a) of the 1974 Act;
- (b) an officer of a body which is so performing any such functions; and
- (c) an adviser appointed in pursuance of section 13(1)(d) of the 1974 Act.

(5) A person to whom information is disclosed in pursuance of sub-paragraph (3) above shall not use the information for a purpose other than—

- (a) in a case falling within sub-paragraph (3)(a), a purpose of the Commission, of the government department, or of the enforcement authority in question in connection with these Regulations or with the relevant statutory provisions, as the case may be;
- (b) in the case of information given to an officer of a body which is a local authority, the purposes of the body in connection with the relevant statutory provisions or any enactment whatsoever relating to working time, public health, public safety or the protection of the environment;
- (c) in the case of information given to a constable, the purposes of the police in connection with these Regulations, the relevant statutory provisions or

any enactment whatsoever relating to working time, public health, public safety or the safety of the State.

(6) A person shall not disclose any information obtained by him as a result of the exercise of any power conferred by paragraph 2 of this Schedule (including in particular any information with respect to any trade secret obtained by him in any premises entered by him by virtue of any such power) except—

- (a) for the purposes of his functions;
- (b) for the purposes of any legal proceedings; or
- (c) with the relevant consent.

In this sub-paragraph “the relevant consent” means the consent of the person who furnished it, and, in any other case, the consent of a person having responsibilities in relation to the premises where the information was obtained.

(7) Notwithstanding anything in the preceding sub-paragraph an inspector shall, in circumstances in which it is necessary to do so for the purpose of assisting in keeping persons (or the representatives of persons) employed at any premises adequately informed about matters affecting their health, safety and welfare or working time, give to such persons or their representatives the following descriptions of information, that is to say—

- (a) factual information obtained by him as mentioned in that sub-paragraph which relates to those premises or anything which was or is therein or was or is being done therein; and
- (b) information with respect to any action which he has taken or proposes to take in or in connection with those premises in the performance of his functions;

and, where an inspector does as aforesaid, he shall give the like information to the employer of the first-mentioned persons.

(8) Notwithstanding anything in sub-paragraph (6) above, a person who has obtained such information as is referred to in that sub-paragraph may furnish to a person who appears to him to be likely to be a party to any civil proceedings arising out of any accident, occurrence, situation or other matter, a written statement of the relevant facts observed by him in the course of exercising any of the powers referred to in that sub-paragraph.]

NOTES

Amendment

Inserted by SI 2003/1684, regs 2, 12.

Date in force: 1 August 2003: see SI 2003/1684, reg 1.

EXPLANATORY NOTE

(This note is not part of the Regulations)

These Regulations implement Council Directive 93/104/EC concerning certain aspects of the organization of working time (OJ No L307, 13.12.93, p 18) and provisions concerning working time in Council Directive 94/33/EC on the protection of young people at work (OJ No L216, 20.8.94, p 12). The provisions in the latter Directive which are implemented relate only to adolescents (those aged between 15 and 18 who are over compulsory school age); provisions in that Directive in relation to adolescents employed on ships are to be included in separate regulations to be made shortly after the date on which these Regulations are made, and adolescents employed on ships are accordingly excluded from the scope of these Regulations (regulation 26).

Regulations 4 to 9 in these Regulations impose obligations on employers, enforceable by the Health and Safety Executive and local authorities; failure to comply is an offence. The obligations concern the maximum average weekly working time of workers (subject to provisions for individual workers to agree that the maximum should not apply to them), the average normal hours of night workers, the provision of health assessments for night workers, and rest breaks to be given to workers engaged in certain kinds of work; employers are also required to keep record of workers' hours of work.

Regulations 10 to 17 confer rights on workers, enforceable by proceedings before employment tribunals. The rights are to a rest period in every 24 hours during which a worker works for his employer and longer rest periods each week or fortnight, to a rest break in the course of a working day, and to a period of paid annual leave.

Regulations 18 to 27 provide for particular regulations not to apply, either in relation to workers engaged in certain kinds of work or where particular circumstances arise. There is also provision for groups of workers and their employers to agree to modify or exclude the application of particular regulations.

The remaining regulations make provision in relation to enforcement and remedies, and in respect of agency workers, Crown servants, Parliamentary staff, the police, trainees and agricultural workers. The Employment Rights Act 1996 is amended to include a right for workers not to be subjected to any detriment for refusing to comply with a requirement contrary to these Regulations or to forgo a right conferred by them, and to provide that the dismissal of an employee on account of any such refusal is unfair dismissal for the

purposes of that Act.

end of selection

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HO Circular No. 21/2002

29 April 2002

THE APPLICATION OF THE WORKING TIME REGULATIONS TO THE POLICE SERVICE

From: POLICE RESOURCES UNIT

For more information contact: Claire Griffin
PRU, Home Office
50 Queen Anne's Gate
London SW1H 9AT
Tel: 020 7273 3242
Email: claire.griffin@homeoffice.gsi.gov.uk

Or Katie Edwards
Tel: 020 7273 3568
Email: katie.edwards@homeoffice.gsi.gov.uk
(Fax: 020 7273 2501)

This circular is addressed to: Chief Officers of Police in England and Wales

Copies are being sent to: Clerks to Police Authorities

Dear Chief Officer

1. This circular gives general guidance on the application of the Working Time Regulations 1998 (SI 1998 No 1833) and 1999 (SI 1999 No 3372) to the Police Service; It does not seek to comment on all the ramifications of the legislation but offers an interpretation on how they affect the Police Service. It follows the PNB Circular 01/2 which has been endorsed by the Home Secretary.

2. This document in no way removes the necessity for forces to make their own assessment of the impact of the Working Time Regulations (WTR) on their staff. All forces are subject to H&S legislation and should already have made their own assessment of how the WTR should be applied. The Home Office can not provide a comprehensive "you must do" document because forces operate different shift patterns with different staff/staffing levels. Further, the Regulations are complex and open to interpretation; the following guidance for managers is not definitive, but is simply one interpretation. The guidance remains subject to change in the light of discussion with the staff representative bodies and through emerging case law.

3. This guidance should be read in conjunction with the Working Time Regulations 1998 (SI 1998 No 1833) and 1999 (SI 1999 No 3372) and the DTI document "A Guide to the Working Time Regulations".

APPLICATION OF THE WORKING TIME REGULATIONS (WTR) TO THE POLICE

4. The Working Time Regulations (WTR) 1998 and 1999 provided new rights for all workers to ensure that they do not have to work excessive hours. There are certain derogations under the Regulations, and certain areas where agreements can be made between the employer and worker to vary the Regulations. One of these derogations is where a duty 'inevitably conflicts' with the WTR provisions.

5. The Working Time Regulations (WTR) implement the Working Time Directive and the Young Workers Directive (in respect of adolescent workers) which are EC Directives. Regulation 41 states that for the purposes of the Regulations the holding of the office of constable shall be treated as employment. Therefore, the WTR apply to police officers unless any particular circumstances of a police operation inevitably conflict with the provisions of the Regulations. In this latter case those Regulations in respect of the average 48 hours a week limit, rest periods and breaks, as well as some of the stipulations relating to night work do not apply - Regulation 18(c) refers.

Principal requirements of the Regulations

- set a maximum average working week of 48 hours, excluding daily rest periods (Regulation 4);
- provide a rest period of not less than 11 consecutive hours in a 24hour period (Regulation 10);
- provide an uninterrupted rest period of not less than 24 hours in a 7day period (Regulation 11);
- set a maximum average limit of 8 hours night work in a 24-hour period (Regulation 6(7));
- entitle a worker, whose normal working time exceeds 6 hours, to a rest break (Regulation 12);
- require an employer to keep adequate records for two years to show whether the limit on the hours of the working week is being complied with (Regulation 9); and
- require an employer to complete free health assessments on night workers

6. It should be noted that Regulation 5 permits a worker to agree with their employer in writing that the 48 hour per week limit should not apply to that worker. Workers with more than one employment would need to have agreements with each employer.

Scope of the Regulations

7. For the purposes of these Regulations all police officers, special constables, civil staff (including traffic wardens and school crossing patrols) and casual staff are subject to these Regulations. The application of the Regulations to agency and contract staff is a matter for their separate employers.

8. Whilst it is intended that the limits and entitlements of WTR should apply to all workers currently within the scope, it is recognised that in some circumstances certain provisions of the Regulations cannot be applied in full because of conflicting needs. In particular regulation 18 states that certain provisions do not apply "where characteristics peculiar to certain specific services such as ... the police ... or to certain specific activities in the civil protection services, inevitably conflict with the provisions of these Regulations." The HSE has interpreted this to mean that in most circumstances the duration and pattern of working time for those in the

police service must still conform with the provisions of Part II (Rights and Obligations) of the Regulations (subject to modification by workforce or individual agreements). This exclusion has to be considered in the light of specific activities: it is not intended to mean that every aspect of police work inevitably conflicts and that the Regulations do not therefore apply.

9. There is no definition of inevitable conflict. The DTI guide states on page 6 that the police service should identify which activities conflict with the Regulations. The time spent on these activities would not be counted as working time. The employer should identify what characteristics peculiar to the police or specific activities inevitably conflict with the provisions of the Regulations. The HSE gives examples of the types of activities that might fall outside the scope of the Regulations as dealing with civil unrest, murder investigations, terrorism etc. Where the issue is purely related to staffing matters, (such as some, shift-based, static surveillance operations), the exclusion provided by Regulation 18 does not apply.

10. The exclusions provided by regulation 18 apply to those holding the office of constable, or an appointment as a police cadet and not to civilian staff.

Definition of working time

11. Working time is defined in the interpretation part of the Regulations as being that time when a worker is working, at his employer's disposal and carrying out his activities and duties. This will include any period during which a worker is receiving relevant training. It is recognised that this definition may not be easily applied to some aspects of work e.g. driving outside work hours, and so a workforce agreement can be made to define additional periods of time as being working time for the purposes of the Regulations. DTI guidance states that time spent travelling to and from a place of work is unlikely to be working time as the worker would probably be neither working nor carrying out their duties, unless engaged in travel that is required by the job. Time when a worker is "on call", but otherwise free to pursue their own activities, would not be working time, as the worker would not be working.

12. The Working Time Regulations, as stated, include in the interpretation of 'working time' under Regulation 2(1) provision for "any additional period which is to be treated as working time for the purpose of these Regulations under a relevant agreement". Workers and employer can come to an agreement on the grey areas. PNB agreement has been reached that the following periods should be included in the national definition of police officers' working time:

- (i) travel, outside of normal rostered duty hours and not currently covered by Police Regulation 32 (England and Wales) (and equivalent regulations for Scotland and Northern Ireland), to and from duty at a place other than the normal place of duty, e.g. travel to and from court;
- (ii) travel to and from training courses other than at the normal place of duty.

13. The following circumstances will also normally count as working time:

- a) on the exceptional occasions where staff are at the disposal of and are actively engaged on the Service's business during their meal breaks and rest breaks;
- b) where staff are on call and are actively working at the Service's disposal and performing their activities or duties, including travelling time when called out;
- c) where staff are travelling in the exercise of their work duties, excluding time spent travelling between home and the normal place of work. An example would be travelling to

- a business meeting or such occasions as an individual may be required to work at, or report to, a location other than his or her normal place of work (except as in (b));
- d) where work is performed away from the normal place of work on a basis agreed with the individual's manager and the time is properly recorded e.g. welfare visits to staff at home, drafting a document at home;
- e) where staff are required to attend work-related functions as part of their duties; or
- f) where staff are spending agreed time carrying out staff association, trade union or health and safety responsibilities.

Maximum 48 hour week

14. A worker's working time, including overtime, is limited to a maximum of 48 hours for each seven-day period. This maximum is an average, based on the number of hours worked over what may be termed a 'referencing period'. The Regulations set the referencing period at 17 weeks, but where there are technical or objective reasons a workforce agreement can be made to reduce the reference period or extend it, up to a maximum of 52 weeks. Where a worker is employed for less than 17 weeks, the reference period will be the period worked.

15. The working time limit does not apply to workers exempted or derogated under Regulation 21; the reference period is extended to 26 weeks. Workers not exempted or derogated under the above regulations may sign personal agreements to waive their rights.

Calculation of the average working time

16. The calculation of average weekly working time must take account of periods where a worker is absent due to their annual leave entitlement, sick leave or maternity leave or any working days covered by an agreement in which the worker has agreed to work in excess of the weekly working time limit. Extra time is added to the total number of hours worked to compensate for such absences by adding the hours worked in the first working days after the reference period. The number of working days' hours added should be the same as the number of days missed through absence.

17. However, because the Regulations only provide for 4 weeks paid annual leave it is only the first three weeks of a worker's annual leave that will be "added on" to any calculation of average weekly working time. The definition of annual leave includes Bank Holidays, public holidays and privilege leave where they are given as paid leave. Any additional contractual annual leave over and above the first three weeks paid annual leave does not have to be added back to the reference period and therefore each day of additional holiday is effectively a credit against the maximum working time.

18. This only becomes an issue where a member of staff is likely to exceed the 48 hour limit and the calculation will not be necessary for the large majority of staff.

19. The average weekly working time is calculated by dividing the number of hours worked by the number of weeks in the reference period. Use the equation:

A+B over C

where

A is the total number of hours worked during the reference period

B is the total number of hours worked, immediately after the reference period, during the number

of working days equal to the number of days missed due to i) the first three weeks of annual leave in any year or ii) sick leave or iii) maternity leave; and
C is the number of weeks in the reference period.

20. Extra time is added to the [17] week reference period to compensate for such absences.

Agreement to exclude the maximum

21. Regulation 5 allows an agreement to be reached, on an individual basis between a worker and his employer to exclude the maximum of 48 working hours in a seven-day period. The agreement may relate to either a specified period or apply indefinitely, but the worker must be able to terminate the agreement by giving a period of notice to his employer. The period of termination must not be less than seven days, but may be extended by agreement up to three months.

Unmeasured working time

22. Certain provisions of the Regulations do not apply to workers where, because of the work they carry out, their working time is not predetermined or measured, or where it can be decided by the worker him/herself. The HSE advises that the structure and responsibilities of police forces appear to preclude those ranks below Assistant Chief Constable from applying this derogation.

Rest Breaks

23. The Regulations provide for the following entitlements:

- A worker is entitled to a rest period of 11 consecutive hours between each working day (12 hours if they are under 18 years of age)
- A worker is entitled additionally to an uninterrupted rest period of not less than 24 hours in each 7 day period; although this may be averaged over a 2 week period allowing for two days rest a fortnight (in the case of workers under age 18, the rest period should be 2 days in each 7 day period and this can not be averaged.)

24. The provisions for rest periods do not apply to workers exempted/derogated under Regulations 18, 20 or 21. Adequate provisions for rest periods are included in Police Regulations and Civil Staff conditions of service.

25. In the event that these periods can not be taken due to a change in shift, as long as compensatory rest is granted, the rest periods do not apply.

26. The Regulations provide that a worker is entitled to an uninterrupted break of 20 minutes when daily working time is more than 6 hours. In the case of workers who are under 18 years of age, the rest period should be 30 minutes when daily working time is more than 4 1/2 hours.

Entitlement to Daily Rest

27. Regulation 10 provides for an entitlement to "a rest period of not less than eleven consecutive hours in each 24-hour period", which is at variance with the eight hours currently conferred by Police Regulations. The PNB has therefore agreed that regulations should be amended as follows to take account of this entitlement:

28. Regulation 27(4)(a) (England and Wales) (and equivalent regulations for Scotland and Northern Ireland) - 11 hours to be substituted for the current 8 hours; and consequent amendments to Schedule 1 (Modification for part-time service);

29. Regulation 27(4) (England and Wales) (and equivalent regulations for Scotland and Northern Ireland) - after "unless the joint branch board agrees otherwise": insert "subject to an equivalent period of compensatory rest".

Annual Leave

30. The Regulations provide for a minimum of 4 weeks paid leave a year, but public holidays, bank holidays and privilege days, where appropriate, may be counted against this entitlement. They also provide for payment of untaken leave on termination and for providing notice for the taking and cancellation of leave.

31. Police Regulations and Civil Staff conditions of service make adequate provision for the annual leave requirements of the regulations, with one exception. In the case of police officers, Police Regulations do not currently provide for payment for untaken leave on termination. Forces should try to ensure that all police officers take any outstanding leave before termination, but where this is not possible PNB agreement has been reached as follows:

Compensation related to entitlement to annual leave

32. Regulation 14 of the Working Time Regulations provides that, on termination of employment during the course of a leave year, "where the proportion of leave taken by the worker is less than the proportion of the leave year which has expired, his employer shall make him a payment in lieu of leave". Thus, a police officer who, on termination of service has taken less than his/her annual leave entitlement under the Working Time Regulations, is entitled to payment in lieu of the untaken days.

33. PNB has agreed that, in addition to this right, if an officer on termination of service has not been able to take his/her leave then the provisions of Regulation 14 should apply to all the officer's remaining annual leave entitlement, and is not limited to the annual leave entitlement under the Working Time Regulations.

34. The formula in Working Time Regulations 14(3) should be used to make the calculation. This states that the payment due shall be a sum equal to the amount that would be due to the worker under regulation 16 (viz. at the rate of a week's pay in respect of each week of leave calculated by reference to sections 221-224 of the Employment Rights Act 1996 as modified) with a day's pay for this purpose comprising, for a full time member, a week's pay divided by 5 and, for a part-time member, comprising a week's pay multiplied by the appropriate factor for that member and divided by 5, in respect of a period of leave determined according to the formula -

(AxB)-C

where-

A is the period of leave to which the worker is entitled

B is the proportion of the worker's leave year which expired before the termination date, and

C is the period of leave taken by the worker between the start of the leave year and the termination date.

Acting up

35. Where an officer is acting up in another rank and takes annual leave, he/she should be paid at the lowest rate at the rank in which he is acting up. For example, a sergeant acting up as Inspector would be paid at the lowest Inspectorial rate for any annual leave taken during that period. Managers may wish to consider candidate's annual leave commitments when determining their suitability for acting up, particularly where very short periods are concerned. Should an officer leave the service during their period of acting-up, this should be taken in to consideration when calculating the above.

Shift workers

36. Where a shift worker changes shift and cannot take any part of the entitlements provided by the Regulations, his employer must provide him with equivalent compensatory rest for the amount of time the worker lost. Where a worker is unable to take part of their daily rest because of the changing shift pattern, the equivalent period of compensatory rest should be given within a few weeks. Where a worker is unable to take part of their weekly rest period, this time should be provided to the worker as compensatory rest within a couple of months. Only in exceptional circumstances is the employer allowed not to provide equivalent compensatory rest, but this does not absolve the employer from taking steps to ensure the health and safety of his worker is not put at risk by the hours worked.

Night Workers

37. Forces should take all reasonable steps to ensure that the 'normal' hours of their night workers do not exceed an average of 8 hours for each 24 hours over a 17week period. Night workers should not be rostered to work more than 8 hours, though they may perform additional hours as overtime. Night workers whose duties involve special hazards or heavy physical or mental strain should not work more than 8 hours. The above limits do not apply to workers exempted/derogated under Regulations 18, 20 or 21.

38. Forces should identify any night workers not exempted/derogated from the night work limits whose working arrangements exceed the limits. In any such cases the force must consider adjustments to the working arrangements to ensure that the limits are not breached.

39. Night-time is a period of at least 7 hours which includes the period from midnight to 5.00am. The period is usually taken to be 11pm to 6am although an alternative can be determined by local agreement (e.g. 12am to 7am). A night worker is defined in the WTR as a person who works at least three hours of their daily working time between 2300 and 0600 hours ("night-time") as a normal course. This definition was further clarified in the WTR as a person who "works as a normal course (without prejudice to the generality of that expression) if he works such hours on the majority of days on which he works." DTI guidance on this definition was confirmed and strengthened by a Northern Ireland High Court decision (R. v. Attorney General for Northern Ireland ex parte Burns).

40. The decision in the Burns case was that a worker on a 'standard' rotating shift system (where one in three shifts is at night) is a 'night worker' for the purposes of the Regulations (even though the night shifts do not occur on the majority of days worked). In the light of this decision the PNB has adopted the following definition of a 'night worker' for the purposes of the police service:

that a police officer who regularly works shifts which include nights, irrespective of the shift pattern actually worked, should be a 'night worker' for the purposes of the Working Time Regulations.

41. Any worker classified as a night worker must, under the terms of Regulation 7, be given the opportunity of a free health assessment before undertaking night work and be moved from night work where a doctor has advised that his or her health may be suffering. However, the PNB has also agreed that it would be good practice for all police officers, regardless of whether they are 'night workers', to be given the opportunity of a free health assessment.

Health assessment for night workers

42. The Regulations provide that individuals becoming night workers should be offered free health assessments and that these should be reviewed regularly thereafter. Workers should be transferred from night work where medical opinion advises that they may not be fit for such work. The health assessment may take the form of a questionnaire and completed questionnaires should be scrutinised by Occupational Health.

43. As a one-off exercise, forces should identify all night workers in their service and provide them with a questionnaire to complete. Thereafter questionnaires should be provided to all new night workers. DTI guidance suggests that in many cases it will be appropriate to do this once a year; the department retaining these records should contact line managers where an individual should be temporarily transferred from night work.

Special cases

44. Where the employer can demonstrate that

- (1) there is a special reason why it is necessary for individual workers to work into their rest entitlements, or
- (2) there is a need to put the limit of eight normal working hours in a 24 hour period for individual night-workers aside, this is allowed by the Regulations.

45. An example of where a special case may be necessary would be where the worker is engaged in covert or some surveillance activities. However, the employer must still provide that worker with equivalent compensatory rest for the rest periods or rest breaks the worker has been required to work through.

Record Keeping

46. Forces should keep adequate records to demonstrate that they have complied with the WTR. Records must be made and retained for 2 years on the maximum weekly working time, the length of night work and any health assessments made of a worker. These records must be adequate to highlight where excess hours are being worked.

Exemptions and Derogations from the Working Time Regulations

47. There are three regulations which apply to certain ranks/grades, roles and functions within the police service which exclude all or parts of the limits and entitlements because of the nature of the work undertaken.

48. In general, although reference should be made to the WTR where it is thought these exemptions apply;

49. Regulation 18 exempts those police duties which inevitably conflict with the limits and entitlements and disapply the provisions relating to the maximum weekly working time limit, the restrictions on the length of night work (including night work involving special hazards or strains) the need for health assessments and the entitlement to rest periods and rest breaks, and annual leave.

50. Regulation 20 derogates those duties where the duration of working time is not measured or predetermined or can be determined by the worker himself. Regulation 20 disapplies the provisions relating to the maximum weekly working time limit, the restrictions on the length of night work (including night work involving special hazards or strains) the need for health assessments and the entitlement to rest periods and rest breaks.

51. Regulation 21 derogates duties for a number of reasons including those where the worker is engaged in security or surveillance activities where there is a need for continuity of service, where there is a foreseeable surge in activity or where the workers activities are affected by unusual or unforeseen circumstances, exceptional events, or an accident or imminent risk of one. Regulation 21 disapplies the restrictions on the length of night work (including night work involving special hazards or strains) the need for health assessments and the entitlement to rest periods and rest breaks.

Workforce agreements

52. Workforce agreements may be made between the employer and individual workers or groups of workers to modify or exclude the limit of eight normal working hours in a 24 hour period for a night-worker and to modify or exclude rest period entitlements provided by the Regulations. A workforce agreement can also be made to change the reference period over which the limits on working hours are averaged (up to 52 weeks).

53. Where staff are identified as falling under the scope of the regulations but wish to derogate their rights, the individual should be asked to sign a standard agreement. Signed copies should be retained by the force.

54. If a worker does not wish to exceed working time limits, or to forgo a rest break or annual leave, or to sign a workforce agreement as provided for by the WTR, he/she may not be discriminated against. Arrangements to reduce the workers hours below the limit, or to re-assign the worker to other duties, must be made. Separate records will need to be maintained in certain circumstances.

Special Constables

55. Regulation 4(2) requires employers to take all reasonable steps to ensure that workers do not exceed an average of 48 hours of weekly working time. Such steps would include enquiring of the worker whether he was working elsewhere (or requesting that they be notified on the worker getting other work) and, if so, adjusting working arrangements accordingly.

56. Where a worker works for two or more employers, each employer should make reasonable enquiries to determine the number of hours that the worker does in total in a

seven-day period. All the hours that the worker does are aggregated in order to determine whether the limit of 48 hours per week is being complied with. If a worker were working more than an average of 48 hours per week in total, (ie the aggregate of the hours worked for both employers), Regulation 5 permits a worker to agree with their employer in writing that the 48 hour per week limit should not apply to them. Specials will need to be advised that workers with more than one employment would need to have agreements with each employer.

57. In addition to the maximum of 48 hours per week, the WTR provide entitlements to certain rest periods and breaks. These must be made available to special constables (subject to the provisions of the WTR), but a special constable may choose to waive those entitlements by agreement.

58. A special constable should not be encouraged to exceed the 48 hours limit unless they wish to do so and the force is satisfied that the health and safety of the officer is not adversely affected. In exercising their duty of care, a force may consider it appropriate to restrict the number of hours duty performed by a special if it is believed that the special may endanger the health and wellbeing of either the individual or others who may be affected by their actions.

59. It should be noted that an employer has no right to try to restrict the number of hours a worker works for the other employer (or performs duty for the police in the case of a special constable) in order to restrict the aggregated hours to an average of 48 per week. Furthermore, the WTR do not restrict the activities of a worker during those breaks. For example, during a rest period from employment of not less than 11 consecutive hours in a 24-hour period, a special constable may perform police duty and vice versa.

60. It is recommended that specials be advised to notify their employers of their voluntary work for the police service and the number of hours performed per week. This will assist an employer to discharge its duty of care towards its employees.

61. Although the WTR states that records should be kept of the duty hours performed for a minimum of two year, it is recommended that records for specials are kept for six years, because a civil claim can be made up to three years after the effect of the symptoms alleged in the claim become apparent.

62. (An example waiver agreement is annexed to this circular at C.)

Young Persons

63. Adolescent workers are entitled to free health and capacity assessments for night work, 12 hours rest in a day, 2 days off a week and an in-work rest break where the working day is longer than 4½ hours. The Health and Safety (Young Persons) Regulations of 1997 also require risk assessments to be made for young workers.

Next Steps

64. Chief Officers (or their delegated authority) must consider whether their workers are within the scope of the regulations. This will involve assessing individual posts and their regular duties, as well as determining which staff are affected by which assessment.

65. Forces should identify from local records all workers who are not exempted/derogated

under Regulations 18 and 20, and who exceed an average of 48 hours working time a week. In the case of those workers derogated under Regulation 21, the average should be measured over 26 weeks.

Enforcement of the Regulations

66. The Health and Safety Executive is responsible for the enforcement of the limits set out in the Regulations and fines may be imposed on organisations in breach of the Regulations. Where the Regulations confer entitlements the remedy is by way of individual complaint to an Employment Tribunal.

Yours sincerely

JOHN USHER

Annex A: Calculating average weekly working time : Worked example:

A worker has a standard working week of 36 hours net and does overtime of 20 hours per week for the first 10 weeks of the 17-week period. The first five days of his 30 days annual leave entitlement is also taken during the reference period. **The total hours worked in the reference period** is 16 weeks (of 36 hours per week) and 20 hours overtime for 10 weeks:

$$(16 \times 36) + (10 \times 20) = 776 \text{ hours}$$

To this, must be added the five days of his annual leave entitlement (i.e. by adding the first five working days after the reference period). If the worker does no overtime, 36 hours must be added to the total, making a grand total of 812 hours. Therefore the average is the total number of hours divided by the number of weeks:

812 over 17 = 47.77 hours and the average of 48 hours has not been exceeded.

OR

If the first five days **annual leave** did not have to be **added** because the individual's statutory annual leave entitlement (including Bank holidays and privilege days) was exhausted, the calculation would have been:

776 over 17 = 45.65 hours and the average of 48 hours has not been exceeded.

Annex B : [flowchart]

flowchart not reproduced

Annex C: Example Waiver Form

..... POLICE / CONSTABULARY

I hereby agree that the 48 hour limit on average weekly working time shall not apply in my case.

I understand that this agreement:

(* delete as appropriate)

* is for an indefinite period

* will end on Date:

but I can terminate it after giving 7 days' notice of my intention to do so or such other period of notice as I may agree with my line manager.

I also agree to ensure that:

– my holding the office of special constable will in no way adversely affect my ability to perform in my normal occupation to the standard required by my employer.

– I will not jeopardise the safety of myself, my colleagues in the police service, or the public by reporting for duty when not in a fit state owing to an inadequate period of rest prior to the commencement of that duty.

Signed

Name

Grade

Number

Date

Copies of this agreement and any subsequent amendments should be retained by the officer and their line manager (a copy should be retained on the officer's personal file).

WORKING TIME REGULATIONS – Frequently asked questions

Set out on the following pages is the advice which has been issued from time to time in response to some frequently asked questions.

1. To what extent can the application of the Working Time Regulations to police service be excluded under Regulation 18?

Material parts of the Working Time Regulations (those parts being referred to as “the relevant Regulations”) are excluded from applying (without any requirement for compensatory rest):

“where characteristics peculiar to certain specific services such as the armed forces or the police, or to certain specific activities in the civil protection services, inevitably conflict with the provisions of these Regulations” (Regulation 18(2)(a)).

This provision does not exclude the relevant regulations in respect of all police activity. There is express provision in the Working Time Regulations governing the application of the Regulations, both to the police service and to the armed forces so that it was anticipated that Regulations will generally apply to both services.

We are advised that it is only where the specific activity of the member(s) in question are such as to mean that there is an inevitable conflict with the Working Time Regulations that the relevant regulations do not apply. Even when excluded, by reason of the European Working Time Directive (Article 2(2)), the “safety and health of workers must be ensured as far as is possible in the light of the objectives of [the Working Time] Directive”.

A very restrictive interpretation of the exclusion under Regulation 18 is likely. The exclusion is therefore only likely to apply in the context of ongoing public disturbances during which members are required to perform duty.

2. How does a “quick changeover” fit within the terms of the Working Time Regulations and how is compensatory rest accounted for?

3. What is a “special hazard” and how can a refusal on the part of the Force to accept that particular duties raise a “special hazard” or involve heavy “mental strain” be challenged?

As material, the Working Time Regulations provide:

“6(7) An employer shall ensure that no night worker employed by him whose work involves special hazards or heavy physical or mental strain works for more than 8 hours in any 24 hour period during which the night worker performs night work.

6(8) For the purposes of paragraph (7), the work of a night worker shall be regarded as involving special hazards or heavy physical or mental strain if:-

(a) it is identified as such in:-

(i) a collective agreement; or

(ii) a workforce agreement, which takes account of the specific effects and hazards of night work; or

(b) it is recognised in a risk assessment made by the employer under regulation 3 of the Management of Health and Safety at Work Regulations 1999 as involving a significant risk to the health or safety of workers employed by him.”

The relevant part of the European Working Time Directive (on which members can rely) provides that:

“Member states shall take measures necessary to ensure that ... night workers whose work involves special hazards or heavy physical or mental strain do not work more than 8 hours in any period of 24 hours during which they perform night work.”

It further provides:

“For the purposes of [the aforementioned], work involving special hazards or heavy physical or mental strain shall be defined by national legislation and/or practice or by collective agreements or agreements concluded between the two sides of industry, taking account of the special effects and hazards of night work.”

It is therefore open for the kind of work of members which involves special hazards or heavy physical or mental strain, to be identified by agreement between the Joint Branch Board and the Chief Officer. In the absence of such agreement, the Working Time Regulations provide that such work will be identified if recognised in a risk assessment made by the Chief Officer “as involving a significant risk to the health or safety of workers employed by him”.

The question is therefore raised as to what, if any, remedy there may be if the Chief Officer refuses to accept that a particular activity involves special hazards or heavy physical or mental strain under an agreement with the Joint Branch Board and does not identify, in a risk assessment, that such activity involves a “significant risk”.

We are advised that the position under the Working Time Regulations is unsatisfactory and that the issue may ultimately have to be resolved by the European Court as it may be that the Working Time Directive has not been adequately implemented in the United Kingdom, providing no obvious remedy in the event that there is no agreement and an inadequate risk assessment is conducted.

However, the Management of Health and Safety at Work Regulations 1999 require every employer to make a suitable and sufficient assessment of

- (a) the risks to the health and safety of his employees to which they are exposed whilst they are at work; and
- (b) the risks to the health and safety of persons not in his employment arising out of or in connection with the conduct by him of his undertaking for the purpose of identifying the measures he needs to take to comply with the requirements and prohibitions imposed upon him by or under the relevant statutory provisions.

The HSE's Approved Codes of Practice on risk assessment and specific topics provide

additional guidance. The HSE also produces Guidance Notes on specific hazards.

What to do if you consider a manager or the force is failing to comply with obligations

Everyone has or should have an interest in the promotion and development of an effective health and safety culture. It is to be hoped that senior managers will recognise the importance of the issue. There will however inevitably be occasions where a disagreement arises or where a force appears not to be meeting its obligations. It is important that such matters are dealt with in a structured fashion. Generally, the first step will be for any issue to be raised by safety representatives at safety committee meetings or with the appropriate manager. If this does not resolve the matter the JBB should consider raising the matter with the chief constable. JBBs may wish to put in place their own structure for dealing with such issues. If the issue is still not resolved it may well be appropriate to contact the local HSE and/or forward papers for legal advice.

4. Refreshment breaks; when should they be taken and how can a failure on the part of management to allow them be challenged?

By reason of Regulation 12(1):

“Where an adult worker’s daily working time is more than 6 hours, he is entitled to a rest break”.

There is provision that this rest break should be an uninterrupted period of not less than 20 minutes and be away from the worker’s “workstation” if he has one (Regulation 12(3)).

Importantly Regulation 12(2) provides:

“The details of the rest break to which an adult worker is entitled under paragraph (1), including its duration and the terms on which it is granted, shall be in accordance with any provisions for the purposes of this regulation which are contained in a collective agreement or a workforce agreement”.

We are advised that the Working Time Regulations right to a rest break for our members is likely to be 20 minutes. The question has been raised as to when the rest break should be taken. Whereas the Regulations are silent on this, we are advised it is to be anticipated that it should be taken in circumstances where the member works no more than 6 hours without enjoying a rest break. If, therefore, there is a rostered tour of duty of 8 hours, then it will be inappropriate for the WTR rest break of 20 minutes to occur earlier than after 1 hour 40 minutes of the tour (though, of course, members remain entitled, subject to the exigencies of duty, to 45 minutes rest break).

If the rest break is, for instance, taken at the beginning of the 8th hour of the tour then the member will have been required to work 7 hours without a rest break and we advise that this is likely to be viewed as contrary to the spirit (if not the letter) of the Working Time Regulations. It has been reported that in some Forces there are regular breaches of the provisions of Regulation 12 of the Working Time Regulations. The question was raised as to how this entitlement can be enforced. A member may present a complaint to an Employment Tribunal that the Chief Officer has refused to permit him to exercise any right he has under Regulation 12 (a rest break provision). Such a complaint must be filed within 3 months less one day of

the date it is alleged the exercise of the right should have been permitted. This is not a complaint that there is a breach of Regulation 12 but rather a complaint that there has been a refusal on the part of the employer “to permit” the member to exercise that right.

We are therefore advised that where there are concerns that these rights are being breached, members should notify in writing their supervising officer that they wish to insist on their entitlement to a rest break in accordance with the terms of the Working Time Regulations and seek their proposals to ensure that these provisions can be complied with. There is of course scope for the entitlement to be disapplied either by way of agreement between the Joint Branch Board and the Chief Officer (or by reference to one of the special cases under Regulation 21) but in both instances, there is a requirement for compensatory rest (or protection as may be appropriate in order to safeguard the worker’s health and safety).

An example of a successful complaint of a breach of regulation 12 is the decision of the Employment Tribunal in *Roberts v Chief Constable of North Wales*, a copy of which appears at Annex [NUMBER]. While tribunal decisions are not binding on other tribunals and cases will be affected by their own facts, the following points are worthy of note:

1. The Tribunal accepted that the canteen within the custody suite was away from the Claimant’s work station;
2. the Tribunal attached significance to the fact that while it might have been possible retrospectively to identify periods in excess of 20 minutes during which the Claimant might have taken a break, this could not be done in advance;
3. The Tribunal applied the European cases on all call and concluded that the whole of the shift was working time;
4. The Tribunal rejected an argument that Regulation 18 might apply. It found there to be no “inevitable conflict”;
5. The Tribunal found that Regulation 21 did apply but that the Force was still in breach because of the failure to provide compensatory rest.

It should however be noted that the *Roberts* decision was before the decision of the Court of Appeal, in *Gallagher v Alpha Catering Services*, where it was held that in considering regulation 21, it is necessary to focus on the worker’s activities rather than the needs of the employer, so as to avoid an employer being able to deliberately under-staff and then rely on the exclusion.

5. What is the extent of the impact of Regulation 21?

Under Regulation 21 of the Working Time Regulations (which applies to the disapplication of certain regulations provided compensatory rest is available) one of a number of specific cases is where a 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”.

This provision may well apply to members on protection duties. It is less likely to apply on all types of surveillance activity but rather likely to be limited only to those who are on surveillance activities “for the purposes of protecting property or persons” rather than for the purposes of pursuing enquiries.

If there is a requirement however for the continuity of service for surveillance activities undertaken for the purpose of conducting enquiries, then this may fall under Regulation 21(c) as a different type of “special case”.

The Court of Appeal has held, in *Gallagher v Alpha Catering Services*, that it is necessary in considering regulation 21 to focus on the *worker’s activities* rather than the needs of the employer, so as to avoid an employer being able to deliberately under-staff and then rely on the exclusion.

7. How might remedies under the Working Time Regulations be used (for example in challenging a failure to provide sufficient compensatory rest when a member, on call, is interrupted for duty purposes?)

Assume that a member is on call and is, for work purposes, interrupted at various times throughout that period of on-call such that he/she is unable to enjoy either a period of uninterrupted rest of 11 hours (the daily rest entitlement and/or 24 hour rest period for weekly entitlement).

The remedy under the Working Time Regulations is by way of a complaint to an Employment Tribunal that the Chief Officer “has refused to permit [the member] to exercise any right” to the daily or weekly rest period (or compensatory rest). Such a complaint should be filed before the end of the period of 3 months beginning with the date on which it is alleged that the exercise of the right should have been permitted. It is emphasised that a complaint can only be brought in relation to a refusal to permit a relevant right to be exercised, it is not sufficient that the officer did not have the relevant rest.

It is unlikely that proceedings would be appropriate for a one-off breach. However, the Working Time Regulations should assist in negotiating a resolution or a basis for proceedings when there is an extensive requirement for on-call duties and work interruptions of what would otherwise be uninterrupted rest periods. Legal advice should be sought when appropriate.

THIS CIRCULAR WAS ISSUED IN 2000 BUT HAS BEEN UPDATED TO REFER TO THE EQUIVALENT PROVISIONS IN THE POLICE REGULATIONS 2003

JBB Circular No. 53/00

10th October 2000

To: The Secretary
All Branch Boards
Dear Colleague

Exigencies of Duty - Rostering and Related Issues

1. This circular summarises the legal advice, which the Federation has received on the meaning of "exigencies of duty" and the implications of that advice, together with advice received about the Working Time Regulations on members' rights in relation to the annual roster and related issues.

Police Regulations 2003

2. A number of rights, particularly related to duty, overtime and leave issues, are expressed in the Regulations to be subject to "the exigencies of duty". These rights include:-

(i) The rights under regulation 22 to perform the normal period of duty in one tour and to have an interval of 45 minutes for refreshment "as far as the exigencies of duty permit":

(ii) The determination for regulation 22 provides for duty rosters. Such a roster can be altered "owing to the exigencies of duty".

(iii) The determination for regulation 22 provides that a member below the rank of inspector shall, "so far as the exigencies of duty permit", be allowed a day's leave on each public holiday and be granted rest days at the rate of two rest days in respect of each week.

(iv) The same determination provides that an inspector or chief inspector shall, "so far as the exigencies of duty permit", be allowed a day's leave on each public holiday and be granted rest days at the rate of two rest days in each week and where the exigencies of duty preclude such allowance or grant to such a member he shall, "so far as the exigencies of duty permit", be allowed a day's leave in lieu.

Working Time Regulations 1998

3. These Regulations ("WTR") apply to police service. They provide, amongst other things, for:-

(i) a right to a rest break of an uninterrupted period of not less than 20 minutes where daily working time is more than 6 hours;

(ii) a right to a daily rest period of not less than 11 consecutive hours in each 24 hour period;

(iii) a right (in addition to daily rest) to weekly rest of not less than 24 hours in each 7 day period (or at the chief officer's discretion two uninterrupted rest periods each of not less than

24 hours in each 14 day period or one uninterrupted rest period of not less than 48 hours in each such 14 day period); and

(iv) a night worker whose work involves special hazards or heavy physical or mental strain shall work no more than 8 hours in any 24-hour period during which s/he performs night work.

4. All these rights can be modified or excluded by a workforce agreement, subject to an obligation to provide wherever possible equivalent compensatory rest.

5. There are a number of exceptions to such rights under the WTR including:-

(i) under regulation 18, where characteristics peculiar to the police inevitably conflict with the provisions of the WTR; and

(ii) under regulation 21, where the worker's activities are affected by factors such as an occurrence due to unusual and unforeseeable circumstances or exceptional events, the consequences of which could not have been avoided despite the exercise of all due care by the employer.

PNB Circular 86/9

6. The PNB Agreement states that "because rosters are produced annually, a number of unforeseen reasons for changes may subsequently arise". The Agreement then provides examples of unforeseen reasons such as "public order situations, court attendance and essential training."

7. The PNB Agreement does not expressly exclude foreseen circumstances. It states that the word "pressing" relates to "the expected situation at the time when the duty is to be performed rather than the time when the duty roster is changed i.e. the reasons for a change may be known many months in advance and still be pressing".

8. The Federation is advised that it would be difficult to argue that only unforeseen circumstances may constitute exigencies of duty. Accordingly, foreseen circumstances are capable of falling within the definition.

9. The Circular sets out the PNB's agreement on the meaning of "exigencies of duty" for the purposes of alterations to a duty roster after its publication. It states that the term "exigencies of duty" should be interpreted as relating to situations where:-

"a pressing demand, need or requirement is perceived but is not reasonably avoidable and necessitates a change of roster".

10. While the PNB Agreement only applies to alterations to a duty roster, the interpretation of "exigencies of duty" in this manner could apply to other regulations where the phrase is used.

11. The Agreement also provides that changes to rosters should only be made after full consideration of welfare, operational and practical circumstances rather than purely on financial grounds.

12. A PNB Agreement does not have the force of law. However, a court may have regard to the definition provided by the representatives of parties who are affected directly by the provision.

The meaning of "exigencies of duty"

13. The Federation is advised that there is no use of the word "exigency" in any statute or statutory instrument other than the Police Regulations. Further, there is no reported case which considers the meaning of "exigency". The Oxford English Dictionary identifies two definitions of the words "exigency":-

(i) "pressing state (of circumstances, etc), stringency (of requirements), urgent want, pressing necessity...pressing needs, straits; and

(ii) that which is needed or required; demands, needs, requirements."

14. While in the absence of a case on the point, there is scope for argument as to the correct interpretation of the expression, the Federation is advised that a court may interpret the phrase as meaning simply "need" rather than "pressing need" particularly as interpreting the phrase as "pressing need" would be likely to restrict the operational management of police forces, which the courts are reluctant to do.

Specific issues

Refreshment Breaks

15. A member is entitled to a refreshment break "subject to the exigencies of duty". As indicated above, it is likely that this phrase will be given a wide interpretation as meaning "needs" of duty, rather than "pressing needs". However, the existence of the right to a rest break under the Working Time Regulations is potentially of considerable assistance.

16. First, the exceptional circumstances in which the WTR obligation does not apply, as summarised above, are limited. It is likely that a force would have to show a real emergency. Second, although the entitlement to a rest break under the WTR is only to 20 minutes, in most circumstances if it is possible to allow an officer a rest break of 20 minutes it is likely to be difficult for a force to establish that the exigencies of duty, even if narrowly defined, did not allow a 45 minute rest break in accordance with the determination for regulation 22.

Alterations to the Duty Roster

17. A legal challenge to an individual alteration to a roster on the basis that the reason for the alteration does not amount to an "exigency of duty" is likely to be extremely difficult indeed. First, the court is likely to interpret "exigencies of duty" in a manner favourable to the force. Second, the court is most unlikely to be willing to interfere with the operational needs of a particular situation.

18. If a roster fails to take into account scheduled or regular events which will necessarily make extra demands on police manpower, it may be possible to challenge the roster by way of judicial review on the basis that the relevant chief officer has failed to take into account a relevant consideration and as a result has reached a decision that no reasonable decision maker would have made taking into account all relevant considerations. It should however be

emphasised that such challenges are also unlikely to be straightforward. Insofar as they may be possible it will be necessary to move quickly before or shortly after the publication of the relevant roster.

19. Once again the WTR may assist. There may be circumstances in which alterations to the roster conflict with the right to daily or weekly rest or with the limitation upon work to be performed by night workers under the WTR. A failure to allow daily or weekly rest is challengeable in an employment tribunal. A breach of the night working restriction is a criminal offence. A court or tribunal considering such a claim would be likely to scrutinise carefully any attempt by a force to rely upon the limited exceptions under regulations 18 and 21 to which reference is made above.

20. Thus, Branch Boards may wish to examine any alterations to rosters for evidence of the following:-

(i) the result that a night worker performs more than 8 work during any 24 hour period during which s/he performs night work. It is emphasised that it is only necessary for some night work to be performed for this obligation to arise. It is not necessary for all the relevant hours to be night work for the provision to be breached; or

(ii) the failure to give a member 11 hours uninterrupted rest in each 24 hour period; or

(iii) the failure to give the member appropriate weekly rest of at least 24 hours in each 7 day period (in addition to the 11 consecutive hours daily rest entitlement) or, where the Chief Constable has so determined, to either two uninterrupted rest periods each of not less than 24 hours in each 14 day period or one uninterrupted rest period of not less than 48 hours in each such 14 day period.

21. Where members' rights to daily or weekly rest have not been complied with then claims to an employment tribunal may be brought. Such claims would need to be commenced within three months of the date on which it is alleged that the relevant right should have been permitted. An employment tribunal may make a declaration that a complaint is well founded and award compensation. Successful claims may well assist Branch Boards in protecting members against further abuses of the rostering arrangements.

22. Any breach of the night work restrictions is a criminal offence enforceable by the Health and Safety Executive. The risk of such a breach may provide a useful negotiating tool.

Yours sincerely,

Jeff Moseley
General Secretary

JBB Circular No. 20/2001

11th April 2001

**To: The Chairman and Secretaries
All Branch Boards**

Dear Colleague

Annual Leave Under the Working Time Regulations 1998

A recent employment tribunal case arising in South Wales has highlighted an issue in relation to the calculation of annual leave.

Annual leave for a police officer is primarily dealt with by the Police Regulations 1995. Schedule 4 to those Regulations sets out the annual leave to which an officer is entitled and by paragraph 6 of that Schedule it is for the Police Authority to determine the date on which the leave year commences. The Police Regulations 1995 do not contain any provision for payment in respect of untaken annual leave to an officer who is retiring from the force. The Police Negotiating Board had indicated in Circular 01/2 (Advisory) dated 26 February 2001 that agreement has been reached that the Police Regulations should be amended to provide for payment for all untaken leave on termination of service, but there is no legally enforceable right to payment under Police Regulations until such time as they are amended.

However, a right to payment for untaken annual leave does arise under the provisions of the Working Time Regulations 1998 which came into force on 1 October 1998. Regulation 13 provides for a minimum period of paid annual leave (generally 4 weeks) and Regulation 14 provides that where employment is terminated in the course of a leave year, payment must be made in respect of annual leave which has accrued in that leave year but which has not yet been taken.

There are detailed rules for calculating the amount due, but the issue which arose in the recent case was the date on which the leave year commences.

Date of Commencement of Leave Year

Regulation 13 of the Working Time Regulations 1998 sets out the date on which the leave year is taken to commence for the purposes of payment under those Regulations only.

In essence there are three possible dates:

- (i) Where police service commences on or before 1 October 1998, the leave year begins on 1 October each year.
- (ii) Where police service began after 1 October 1998, the leave year begins on the date on which employment began and on the anniversary of that date in each subsequent year.
- (iii) If there has been a "relevant agreement", the leave year can begin on whichever date is specified in that agreement.

In South Wales there was a Force Standing Order from 1990 providing that the leave year began 1 April each year. This was plainly effective for the purpose of the leave year under the Police Regulations, but the issue was whether it constituted a “relevant agreement” under the Working Time Regulations 1998. This was important because the officer concerned retired on medical grounds in July 1999 and therefore it was in his interests to establish that the leave year began on the “default” date of 1 October 1998 because he would have served for a much greater proportion of his final year and therefore his entitlement to payment would be greater.

Relevant Agreement

A “relevant agreement” is defined in Regulation 2 of the Working Time Regulations as one of three documents:

- (i) Any provision of a collective agreement which forms parts of a contract between worker and his employer. This is extremely unlikely to apply in the police service because the definition of collective agreement incorporates the involvement of an independent trade union. The Police Federation is not a trade union.
- (ii) Any other agreement in writing which is legally enforceable between the worker and his employer. In general this would require a written document signed by the individual which was in the form of a legally binding contract. There was no such document in the South Wales case.
- (iii) A “workforce agreement”

A workforce agreement is an agreement between the employer and properly elected representatives of the workforce. There are certain conditions which must be satisfied before the agreement is effective, including the fact that the agreement must be in writing, must be for a specified period not exceeding 5 years and must be signed by the Chief Constable. The agreement must also be circulated to all workers before it is actually signed.

Regulation 41 of the Working Time Regulations 1998 provides that a workforce agreement may be embodied in an agreement between the Chief Constable and a Joint Branch Board.

The South Wales case did not reach a hearing because shortly before the hearing South Wales Police accepted that the Standing Order from 1990 could not constitute a “relevant agreement”. It was therefore established that in South Wales the leave year for the purposes of the Working Time Regulations 1998 begins on the “default” dates in Regulation 13 even though the leave year for other purposes begins on 1 April.

Conclusion

In many forces the date of commencement of the leave year for the purposes of the Police Regulations will be well established, but arrangements should be reviewed to identify whether that date has also been effectively established for the purposes of the Working Time Regulations 1998. One of the practical disadvantages of the Working Time Regulations is that the leave year will commence on a different date for each officer who has joined service after 1 October 1998.

If the Joint Branch Board considers it desirable to have a single leave year commencement date for all purposes an agreement to that effect should be concluded in writing with the Chief Constable which must be:

- circulated by the Force to all officers with an explanatory note before it is signed and becomes effective
- in writing
- signed by or on behalf of the Joint Branch Board
- signed by or on behalf of the Chief Constable
- have effect for a specified period not exceeding 5 years

Yours sincerely

Jeff Moseley
General Secretary

21 September, 2000

To: The Chairman and Secretary
All Branch Boards

Dear Colleague

Working Time Regulations 1998 - Payment for Annual Leave whilst Acting Up

The purpose of this Circular is to draw attention to legal advice recently received on this subject. We are advised that officers who perform the duties normally performed by a member of a higher rank should, in certain circumstances, be paid for annual leave at the same rate.

The Legal Framework

The relevant extracts from the Police Regulations 2003, the Working Time Regulations 1998 and the Employment Rights Act 1996 are contained in attached Appendix.

In short, under the Police Regulations where an officer is performing the duties of a member of a higher rank and being paid at the lowest rate of pay for such rank s/he nonetheless reverts to his/her normal rate of pay if annual leave is taken.

The Working Time Regulations provide an entitlement to be paid in respect of any period of annual leave arising under the Working Time Regulations be reference to the rate of "a week's pay". "A week's pay" is defined, by reference to the Employment Rights Act as the amount which is payable "...if the (officer) works throughout his normal working hours in a week".

Advice

The Working Time Regulations apply to the police service. Regulation 13 WTR provides an entitlement to twenty days annual leave per year. Regulation 16 WTR provides that a worker is entitled to be paid in respect of such annual leave at the rate of a week's pay in respect of each week of leave.

Sections 221-224 of the Employment Rights Act 1996 are applied to determine the calculation of "a week's pay".

As police officers work "normal working hours" within the meaning of Section 234 ERA, Section 221 (2) applies. This provides that a week's pay is for these purposes:-

"...the amount which is payable by the employer under the contract of employment in force on the calculation day if the employee worked throughout his normal working hours in a week."

The references to a "contract of employment" are to be read as references to the Police Regulations 2003 and a police officer is to be treated as an employee for these purposes.

If an officer performing the duties of a higher rank takes annual leave during a period of performing such duties, the amount payable is s/he had worked normal working hours would be at the higher rank's rate. Such an officer is therefore entitled to be paid for leave at that higher rate.

(It should be emphasised that the entitlement to take leave at the higher rate is limited to annual leave which arises under the Working Time regulations (i.e. twenty days per annum) and not to any additional leave entitlement under the Police regulations.)

Remedy

Regulation 30 WTR provides that the remedy for a failure to pay at the proper rate is a complaint to an employment tribunal. Such a claim should be brought before the end of the period of three months beginning with the date on which payment should have been made. It is likely that time will run not from the date of any request for payment at the higher rate but the date upon which payment was received for the annual leave in question at the lower rate.

JBBs may wish to attempt to agree the matter on a general basis with the forces. If this does not prove possible then it may be necessary to bring a test case in the employment tribunal. Any refusal to pay for annual leave at the higher rate in appropriate circumstances should be reported.

Yours sincerely,

Jeff Moseley
General Secretary

APPENDIX

The determination for regulation 27 Police Regulations 2003 provides:

"(4) ...a member of a police force below the rank of superintendent who, in any year, has been required to perform the duties normally performed by a member of the force of a higher rank than his own for fourteen complete days shall be paid in respect of each further complete day in that year on which he is required to perform such duties at a rate equal to the lowest rate of pay to which he would be entitled upon promotion to a higher rank".

Regulation 16 WTR provides:

(1) a worker is entitled to be paid in respect of any period of annual leave to which he is entitled under regulation 13, at the rate of a week's pay in respect of each week of leave.

(2) Sections 221-224 of the 1996 Act shall apply for the purpose of determining the amount of a week's pay for the purpose of this regulation, subject to the modifications set out in paragraph (3)."

The modifications include a provision that the calculation date is to be treated as the first day of the period of leave in question.

The reference to the 1996 Act is a reference to the Employment Rights Act 1996. Section 221 provides:

"(1) This Section and Sections 222 and 223 apply where there are normal working hours of the employee when employed under the contract of employment in force on the calculation date.

(2) Subject to Section 222, if the employee's remuneration for employment in normal working hours (whether by the hour or week or other period) does not vary with the amount of work done in the period, the amount of a week's pay is the amount which is payable by the employer under the contract of employment in force on the calculation date if the employee works throughout his normal working hours in a week..."

Section 234 provides:

"Normal working hours -

(1) Where an employee is entitled to overtime pay when employed for more than a fixed number of hours in a week or other period, there are for the purposes of this Act normal working hours in this case.

(2) Subject to sub-section (3) [which is not relevant] the normal working hours in such a case are the fixed number of hours."

Regulation 13 WTR provides an entitlement to four weeks leave. Under Regulation 41, for the purposes of the WTR the holding of the office of constable is treated as employment under a worker's contract.

HOME OFFICE CIRCULAR**HOC 54/1999**

Date: 11 November 1999

This circular is about: Guidance on how Special Constables are affected
by the Working Time Regulations 1998

From: POLICE PERSONNEL AND TRAINING UNIT

Date for implementation: 1 October 1998 This cancels HOC: 54/1998

For more information contact: Robin Ford

PPTU Home Office
50 Queen Anne's Gate
London SW1H 9AT
Tel: 0171 273 2591
E-mail: robinleslie.ford@homeoffice.gsi.gov.uk

or

Mike Box

Tel: 0171 273 3305

(Fax: 0171 273 2501)

This circular is addressed to: Chief Officers of Police

Copies are being sent to: Chief to Police Authorities, Special Liaison
Officers and Force Commandants

Dear Chief Officer

WORKING TIME REGULATIONS: SPECIAL CONSTABLES**Introduction**

1. This circular, which replaces Home Office circular 54/1998, gives general guidance on how special constables are affected by the Working Time Regulations 1998 (SI 1998 No 1833) which came into force on 1 October 1998. It does not seek to comment on all the ramifications of the legislation.

2. The principal amendments/additions to the guidance contained in HOC 54/1998 are:

- that a police force is not required under the Regulations to make any contact with a special constable's employer;

- that a police force is required to keep records of the duty hours performed for a minimum of two years but it is recommended that records are kept six years;

- that a special is entitled to certain daily or weekly rest periods or rest breaks but may choose not to take them; and

- that in specific circumstances, where police duty inevitably conflicts with the Regulations, the Regulations in respect of the average 48 hours a week limit and rest periods and breaks do not apply.

3. The Regulations (WTR) implement the Working Time Directive and the Young Workers Directive (in respect of adolescent workers) which are EC Directive forming part of measures aimed at improving health and safety at work. Regulation 41 states that for the purposes of the Regulations the holding of the office of constable shall be treated as employment. Therefore, the WTR apply to special constables unless any particular circumstances of a police operation inevitably conflict with the provisions of the Regulations, in which case those Regulations in respect of the average 48 hours a week limit and rest periods and breaks do not apply - Regulation 18(c) refers.

Principal requirements of the Regulations

4. The provisions of the WTR which may affect special constables:

- set a maximum average working week of 48 hours, excluding daily rest periods (Regulation 4);

- provide a rest period of not less than 11 consecutive hours in a 24-hour period (Regulation 10);
 - provide an uninterrupted rest period of not less than 24 hours in a 7-day period (Regulation 11);
 - set a limit of 8 hours night work in a 24-hour period (Regulation 6(7));
 - entitle a worker, whose normal working time exceeds 6 hours, to a rest break (Regulation 12);
- and
- require an employer to keep adequate records for two years to show whether the limit on the hours of the working week is being complied with (Regulation 9).

5. It should be noted that Regulation 5 permits a worker to agree with their employer in writing that the 48 hour per week limit should not apply to that worker. Workers with more than one employment would need to have agreements with each employers.

Workers with more than one employment

6. The WTR apply to special constables who are in private employment as if they are workers with more than one employment.

7. The Department of Trade and Industry (DTI) and Health and Safety Executive guidance says that Regulation 4(2) requires employers to take all reasonable steps to ensure that workers do not exceed an average of 48 hours of weekly working time. Such steps would include enquiring of the worker whether he was working elsewhere (or requesting that they be notified on the worker getting other work) and, if so, adjusting working arrangements accordingly. If a worker were working more than an average of 48 hours per week in total, ie the aggregate of the hours worked for both employers, each employer may wish to agree with the worker that he is willing to work that number of hours per week. It should be noted that an employer has no right to try to restrict the number of hours a worker works for another employer (or performs duty for the police in the case of a special constable) in order to restrict the aggregated hours to an average of 48 per week.

Entitlements

8. In addition to the maximum of 48 hours per week, the WTR provide entitlements to certain rest periods and breaks. These must be made available to special constables, subject to the circumstances described in paragraph 3 above, but a special constable may choose to waive those entitlements. Furthermore, the WTR do not restrict the activities of a worker during those breaks. For example, during a rest period from employment of not less than 11 consecutive hours in a 24-hour period, a special constable may perform police duty and vice versa.

Guidance for forces

9. The following guidance not only ensures that forces comply with the Working Time Regulations but also recommends that further steps are put in place to ensure the health and safety of special constables.

The Agreement

10. Where special constables wish to exceed the average of 48 hours per week when their hours of employment are aggregated to the hours of police duty, the force should ask the specials to sign written agreements with the force to that effect. Copies of the agreements should be kept by the force and the specials. An example of such an agreement is annexed to this circular. Specials should be advised to consider drawing up similar agreements with their employers.

11. It would also be advisable to ask specials to confirm the average number of hours per week they work for their employers and record this data.

The Employer

12. The force is not required to consult or contact a special's employer. But it is recommended that specials be advised to notify their employers of their voluntary work for the police service and the number of hours performed per week. This will assist an employer to discharge its duty of care towards its employees.

Recording hours of duty

Layden House, 76-86 Turnmill Street,
London, EC1M 5LG
Telephone 020 7296 6600 Fax 020 7296 6751
Official Side Secretary, Charles Nolda

Direct Dial
020 7296 6712

e-mail: graham.baird@lg-employers.gov.uk

JCC SECRETARY

- 9 AUG 2001 POLICE NEGOTIATING BOARD

Official Side

RECEIVED

To: Clerks to Police Authorities
Chief Constables

3rd August 2001

CIRCULAR PNB/OS/1/01

Dear Sir/Madam

WORKING TIME REGULATIONS

1. Police authorities received in February PNB Circular 01/2 (Advisory) on the application to the police service of the Working Time Regulations.
2. The PNB agreement was reached following detailed discussions on a claim submitted by the Staff Side. In its claim, the Staff Side asked that the definition of working time should cover three specific instances. The Official Side was content to agree to two of these and they are now contained in paragraph 1 of the agreement, namely: (i) travel, outside of normal rostered duty hours and not currently covered by Police Regulation 32, to and from duty at a place other than the normal place of duty and (ii) travel to and from training courses other than at the normal place of duty.
3. The Staff Side also requested that time when an officer is on call or on standby should count as working time for the purpose of the Working Time Regulations. The Official Side was not prepared to agree to this part of the claim but, in rejecting it, did agree to remind police authorities of their obligations under the Working Time Regulations.
4. The Regulations are a health and safety measure designed to ensure that workers receive minimum periods of daily and weekly rest. Police authorities have a statutory duty of care to police officers and, in exercising that duty of care, will need to have regard to the length and nature of periods of standby undertaken by a police officer (including an assessment of the impositions placed on the officer during such standby time, which would include the impact on the officer's private life) and decide the extent to which standby time should be taken into account in assessing the rest periods that officers receive. Any duty actually undertaken during standby time would of course count as working time for the purpose of the Regulations.

Yours faithfully



Phil White
Assistant Official Side Secretary
