Case: 1800412/2015 & others
(see schedule)

EMPLOYMENT TRIBUNALS

Claimants:	**Mr D Mansell & others (see schedule)**
Respondent:	**South Yorkshire Fire and Rescue Service**
Heard at:	**Leeds On: 27th, 28th and 29th October 2015. Reserved Decision on 23rd November 2015**
Before:	**Employment Judge Lancaster**
Members:	**Ms J Lancaster**
	Mr G Eales
Representation	
Claimant:	**Mr O Segal Q.C.**
Respondent:	**Mr C Bourne, counsel**

JUDGMENT

1. All claims with the exception of Mr Antony Allen (1800414/2015) succeed.

2. Remedy is adjourned to a date to be fixed upon the parties notifying the tribunal of a time estimate, availability dates and any proposed further directions not later than 28 days from the sending out of this judgement.

WRITTEN REASONS

Background

1. The Claimants are fire-fighters who were compulsorily transferred from one of two stations in South Yorkshire, Lowedges and Aston Park, when in October 2014 those stations were designated as the first in the Respondent Fire Authority's area to move from the traditional 2-2-4 duty system to Close Proximity Crewing (CPC).

2. Under the 2-2-4 duty system fire-fighters work 2 day shifts in succession followed by 2 night shifts (or vice versa) and then 4 days off. On average shifts are 12 hours in duration so that in any 8 day period 48 hours would be worked, which equates to 42 hours per week.

3. In so far as the traditional duty system, taking also in to account any variations in the average 12 hour shift pattern, would in practice entail a fire-fighter working in excess of the ordinarily permitted hours with respect to night work or minimum daily rest periods these are covered by the "Grey Book". This is a collective or workplace agreement entered into by Fire Authorities with the recognised Fire Brigades Union within the meaning of **regulation 23 of the Working Time Regulations 1998 (WTR)**. This provision permits the modification or

exclusion of the application of **regulations 6(1) to (3) and (7) and 10 (1)** (as well as requirements in regulations 11 and 12). The 2-2-4 duty system is therefore fully compliant with the **WTR.**

4. CPC is a variant on a new duty system ("Day Crewing Plus" - DCP) which has apparently already been implemented by a number of Fire Authorities. Such duty systems are operated in conjunction with Self Rostered Crewing (SRC) whereby fire-fighters themselves have a degree of flexibility in the distribution of their shifts. It is common ground, however, that CPC was always envisaged as operating so that they would now be working 4 consecutive 24 hour shifts, each divided into a 12 hour day shift and 12 hours "on call" at night, followed by 4 days off. The on-call hours would be spent at or near the Station on the Respondent's premises - presumably hence the name "*close proximity* crewing".

5. Although the core hours, the 4 day shifts, remain at 48 (the same as under 2-2-4) it is accepted that the "on-call" night time hours also constitute working time. 96 hours worked in the 8 day period equates, of course, to a weekly average of twice that under 2-2-4, 84 hours per week. This necessarily would require an individual opt-out from the 48 hour maximum under **regulations 4 and 5.**

6. It also necessarily follows that, absent any express variation of the collective agreement to exclude or modify their application, CPC must entail a breach of **regulations 6 and 10**. Under **regulation 6** night workers, which it is accepted the Claimants are as defined by the **WTR,** shall not work on average more than 8 hours out of 24 in an applicable reference period and the employer shall take all reasonable steps to ensure compliance with this maximum. It is also probable – the issue, though alluded to in the course of discussion, has not been clearly addressed before us – that fire-fighters are doing work involving special hazards as defined by **regulations 6 (7) and (8)** so that they must not work more than 8 hours in any 24 hour period and the employer's potential criminal liability for failing to ensure this is not subject to any qualification of reasonableness. Under **regulation 10** a worker is entitled to a daily rest break of not less than 11 hours in any 24 hour period in which he or she works.

7. The advantage to the employer in instituting CPC is that it enables a station to be crewed with significantly fewer fire-fighters. Before its introduction there were 50 people altogether working at the two stations: this was reduced to 28. There would be a significant financial saving, estimated in March 2012, when the introduction of CPC was approved by the Fire and Rescue Authority, at £400,000 per station per year

8. Lowedges and Aston Park were selected for the initial rollout of CPC because the crews from those stations, it is accepted, attend a relatively low number of incidents. In particular the chance of actually being called out at night is minimal. Under the 2-2-4 duty system no regular work would in fact be scheduled for those on the night shift after midnight, the rest of the time they would be on stand-down, and it would be anticipated that there may be only a very few callouts; perhaps as low as one or two a year for any individual fire-fighter.

9. Although this is potentially a national issue, so far as the parties and the tribunal are aware there are no other similar claims pending apart from a further South Yorkshire multiple from Edlington fire station (case number 1802230/2015 and others) which has now been adjourned contingent on the outcome of this case. There is one case from Llanelli on very

similar facts which has already been dealt with before the Employment Appeal Tribunal: that is **Gale and others v Mid & West Wales Fire Service UKEAT/0651/14/JOJ**

The Law

10. The parties have, obviously, referred extensively to **Gale** and the legal framework is identical. It is set out in paragraphs 17 to 21 of the judgement of HHJ Eady QC in the EAT

" 17. The relevant legislative provisions are found in the **Employment Rights Act 1996**. The right relied on is provided by section 45A, which relates to detriments in working time cases and provides (relevantly) as follows:

> **"(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 grounds 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,**
>
> **...**
>
> **(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."**

18. The right to bring a complaint of a breach of section 45A to the ET is then provided by section 48(1ZA) and by section 48(2) it is provided that:

> **"On such a complaint it is for the employer to show the ground on which any act, or deliberate failure to act, was done."**

19. The nature of the protection afforded by section 45A **Employment Rights Act** was considered by the EAT (HHJ Peter Clark) in the case of **Arriva London South Ltd v Nicolaou** (supra) where it was held to be akin to protection against victimisation; the "protected act" being the Claimant's right under the **WTR**, the prohibited conduct arising where the employer subjects the Claimant to a detriment by act or omission on the ground that she has exercised that right. In such cases, the question is why the Claimant received the treatment complained of? The "reason why?" question.

20. In order to answer that question, the protected act need not be the sole cause of the treatment; it is enough that it has a significant influence on the outcome or - post **Fecitt and Others v NHS Manchester** [2012] IRLR 64 CA - whether the protected disclosure was a "material factor" in the employer's decision to subject the Claimant to a detrimental act.

21. In approaching these questions HHJ Peter Clark went on to observe (see paragraph 28 of **Nicolaou**) that the *reason why* question must not be confused with a "but for" test. Whereas a *but for* test might be appropriate in criterion cases (see **James v Eastleigh Borough Council** [1990] 2 AC 751), it is the *reason why* test which prevails where the employer's mental processes (conscious or subconscious) are in issue."

The Hearing

22. The first day was re-designated a reading day to accommodate Mr Bourne who was unable to attend for personal reasons.

23. An issue arose at the start of the second day as to whether or not the 2 lead Claimants (Mr Jason Sherwin and Mr Stephen McGovern) should be permitted to adduce evidence of alleged conversations with their station manager in which they expressly voiced their reasons for not volunteering to work the Close Proximity Crewing (CPC) shift system by reference to its non-compliance with the **WTR**. The earlier preliminary hearings had identified only an "argument from silence": the "protected act" being the not volunteering and the material failure to comply with the Regulations being inferred as the reason for not doing so.

24. The case was then adjourned for additional witness statements to be taken from Sherwin and McGovern, clarifying the evidence they proposed to give. The Respondent was also able to confirm the availability on the third day of Mr Jonathan Dyson, the Station Manager at Lowedges Fire Station at the material time. In the circumstances the additional evidence, and the answering evidence, was all admitted. The alternative, doing justice to both parties, would, had Dyson not been available, would have been to adjourn the case with costs.

25. We also heard for the Claimants from Mr Graham Wilkinson, the former Brigade Chair of the South Yorkshire Fire Brigades Union (FBU) and for the Respondent from Mr James Courtney, the Chief Fire Officer.

26. We were selectively referred to an agreed bundle running to 833 pages. An additional 7 pages of documentary evidence were put in by the Respondent in the course of the hearing.

27. By agreement the afternoon of the second day was used firstly for preparatory legal argument in advance of any evidence being called and the first witness was then Wilkinson. In the event even with the re-scheduling of submission and evidence it was not however possible still to conclude the case within the allocated listing time.

28. The decision was therefore reserved to another day and written reasons are accordingly provided.

The Facts

29. There is an agreed statement of facts in this case. This can be summarised. The Respondent was considering the introduction of CPC from 2010. Initial expressions of interest indicated that there would be sufficient number to make this viable. Originally a trial of CPC was to be undertaken only at Lowedges. This was extended to Aston Park. 28 volunteers were selected for the trial. The final scheme was for the permanent introduction of CPC at both stations. Although there was a priority list of 28 already in place the recruitment exercise was therefore re-opened with a view to permanent deployment. The decision to commence CPC on 21st October 2014 and therefore, by implication, to displace existing crews at Lowedges or Aston who were not to transfer onto the new system was confirmed on 29th August 2014. In the intervening period there were discussions between the Respondent and the FBU but the union never agreed any variation of the "Grey Book" terms and conditions which would have modified the application of the **WTR** so as to prevent the occurrence of what was otherwise acknowledged by the Respondent to be a breach. Individual claimants did not submit any written objections to their being displaced until October 2014.

30. Further relevant findings of fact are as follows. All claimants were members of the FBU. None of them with the exception of Mr Antony Allen ever applied to work CPC, either on a trial or permanent basis. Throughout the relevant period there were discussions between staff and Station Managers, the precise content of which is not material, to the effect that a significant majority of existing crews were dissatisfied with the proposed changes entailed by CPC and that these discussions included reference to the possible impact of the **WTR** upon the new working arrangements. At Lowedges 5 of the existing 26 crew transferred to CPC and the remaining 21 were displaced – 2 of whom had unsuccessfully applied for CPC. At Aston Park the numbers were 6 and 18 respectively. There was no alternative provision for working at either fire station other than on CPC. It necessarily follows on these figures that had all existing crew applied to work CPC after 21st October 2014 they could not have been accommodated. It is also the case that no priority was given to existing crew: Allen applied unsuccessfully to transfer and was compulsorily displaced. It was always understood that any fire-fighter not volunteering for CPC would automatically be liable to displacement under their contract of employment if and when it was implemented. The final and material deadline for applying was 11th August 2104. Those who were successful in their application to transfer to CPC were informed on or about 18th August 2014. At the same time as confirming acceptance of the offer, and as a precondition, they were required to sign an opt-out from the 48 hour maximum working week. Those who were to be displaced were not expressly told, and nor were the Station Managers informed, of the imposed moves until shortly before they were actually effected, that is no earlier than October 2014.

Conclusion

31. The questions in the agreed list of issues (which are reproduced in **bold** below) are to be answered as follows.

1. Did the CPC system breach the WTR and if so, how? The Claimants contend that the system contravened the following provisions

1.1 the 48 hour maximum working week (Regulation 4) – the basic working week being 96 hours and all staff having to sign an opt-out.

32. None of the Claimants were in fact ever required to sign an opt-out. That would, as established in **Gale** be a complete answer to any claim under **section 45A (1) (c)** were it made. It does not, however, dispose of the claim under **section 45A (1) (a).**

33. It is common ground, following **Gale** that **section 45A (1) (a)** is concerned with contraventions of the **WTR** which potentially give rise to a criminal offence under **regulation 29** whereas **section 45A (1) (b)** is concerned with those rights conferred by the **WTR** and which are enforceable by the individual worker under **regulation 30.**

34. **Regulation 4** is not absolute. There will be no contravention where there is an opt-out. Also an employer will not be in breach where it has taken "all reasonable steps, in keeping with the need to protect the health and safety of workers to ensure that the limit is complied with":

35. The average working week under CPC (in fact 84 and not 96 hours) does however exceed the 48 hour maximum whereas 2-2-4 did not. It is not material that individual fire-fighters may in fact choose to work additional hours in another occupation, whether employed or self-employed, which may result in their working more than the maximum. Unless the additional employment was also with the Fire Service, for instance as a retained fire-fighter, and for more than 6 hours per week an opt-out entered into between them and the Respondent would not be necessary. Under CPC such an opt-out is necessary. The terms of the opt-out required of those volunteering for CPC is somewhat disingenuous in that it appears to suggest that it is only necessary in the event that the worker does have additional employment: *"If you hold employment in circumstances in which you will actually work an average of more than 48 hours"*. There is no "if" about it: anyone agreeing to CPC will exceed the maximum hours unless they opt-out.

36. Although in the event no Claimant exceeded the 48 hour limit, because they remained on the 2-2-4 duty system, we accept Mr Segal's argument that it cannot be a reasonable step to ensure compliance to subject the worker to the very detriment that is complained of. If therefore the compulsory displacement to another station is a detriment the Respondent cannot argue that it has not unreasonably required a contravention of the regulation. That is the position even though reasonableness in respect of detriment is viewed from the point of view of the worker (whether they reasonably consider that they have been subjected to a disadvantage in the work place) whereas the objective reasonableness of the steps taken under **regulation 4 (2)** must be from the perspective of the employer. Nor does it matter that the Respondent could not, of course, ever have been actually subject to prosecution in respect of the displaced fire-fighters who did not ever exceed the maximum. **Section 45A (1) (a)** is not dependant upon the Respondent having committed a criminal offence in contravention of the **WTR,** only upon the proposed imposition of a requirement which if it were to be put in place would amount to an infringement.

37. If the requirement was imposed it will therefore amount to a contravention of **regulation 4** for the purposes of **Section 45A (1) (a)**

1. Did the CPC system breach the WTR and if so, how? The Claimants contend that the system contravened the following provisions

1.2 average night work (Regulation 6) – the relevant staff being "night workers" within Reg 2 (1), their average hours must not exceed 8 hours during the material reference period; the actual average is between 13-14 hours

38. The average normal hours of work in a 24 hour period calculated under **regulation 6(5)**, on the basis of 1428 hours worked in the 17 week reference period, under CPC is in fact 12.75.

39. It is the position of the HSE who declined to investigate this matter when it was referred to them by the FBU that the 2-2-4 duty system as endorsed by the "Grey Book" also exceeded the 8 hour average. That is the stance also taken by the Respondent. It is however not explained why this should be the case. On the basis of the "Grey Book" maximum 42 hours working week, the total hours in the reference period are 714 and the average accordingly is 6.375 hours.

40. Whilst it may well be a sensible pragmatic decision on the part of HSE not to take action in this case, given the existing modifications of the **WTR** that certainly are contained in the "Grey Book" the precise rationale of the decision is not clear.

41. We are, however satisfied that there is no discernible risk inherent in CPC, as opposed to the 2-2-4 system that would justify a prosecution on the basis that the Respondent had failed to take "all reasonable steps, in keeping with the need to protect the health and safety of workers to ensure that the limit is complied with". Under CPC the whole of the night time working hours are ordinarily spent on "stand-down" and not just the second half of the shift. It is working time but no actual duties are performed, except in the rare event of a call-out.

42. It is conceded by Mr Segal that the materiality of the objections to CPC as voiced by the FBU in respect of **regulation 6** is "borderline". This however is a point that is more relevant to causation.

43. On the face of it there is an inherent breach and, as in the case of **regulation 4,** If the requirement was imposed it will amount to a contravention of **regulation 6** for the purposes of **Section 45A (1) (a)**

1. Did the CPC system breach the WTR and if so, how? The Claimants contend that the system contravened the following provisions

1.3 daily rest (Regulation 10) – there was no 11 hour break within each 24 hours, the basic shift pattern being for multiples of 24hour shifts.

44. Under CPC 96 consecutive hours constitute working time. That necessarily does not allow for the required rest period.

45. As this is a right which will come under **Section 45A (1) (b)** there is no requirement that those provisions of CPC which give rise to an infringement must be imposed, or be proposed to be imposed, by the Respondent

1. Did the CPC system breach the WTR and if so, how? The Claimants contend that the system contravened the following provisions

1.4 rest breaks (Regulation12) – there appears to be no provision within CPC for any rest break compliant with Gallagher v Alpha Catering Services [2005] ICR 673

46. This allegation is not pursued. Under 2-2-4 the minimum 20 minute break in a shift lasting more than 6 hours is catered for within the duty allocation. It is accepted that there is no basis to suppose that an identical position would not be adopted under CPC. There is nothing within CPC as opposed to 2-2-4 which precludes the taking of rest breaks and there is no breach of **regulation 10.**

2. Did the Respondent impose the CPC system at Lowedges Road and Aston Park Fire Stations?

47. This question is only relevant to **section 45A (1) (a).**

48. The Respondent decided, without the consent of the FBU or of a majority of the workforce at the stations in question that CPC would be introduced there. No more than around 25 per cent of the existing staff at either station were prepared to change duty systems. There was no alternative. Anyone not prepared to, not applying to work or not selected to work CPC would be displaced. Unlike the factual situation in **Gale** there was no possibility of any fire-fighter remaining at either station but still working 2-2-4, or indeed any duty system except CPC.

49. The fact that in the event both stations were crewed by volunteers is not determinative. In the ordinary meaning of the word CPC was "imposed" by the Respondent.

3. Did the Claimants as a matter of fact, whether by not applying to work under CPC or otherwise, refuse or propose to refuse to work under the CPC system at Lowegdes Road and Aston Park Fire Stations within the meaning of section 45A ERA? The Respondent's position is that the Claimants are not entitled to rely on any refusal/proposal to refuse other than the decision not to apply to work under CPC

50. In the context of the history of this case we are satisfied that the Claimants' not applying to work CPC is a positive act and not merely an omission.

51. On 30th July 2014 the Respondent sought formal applications from all Wholetime Staff to work CPC at either Lowedges or Aston Park. This was expressly done in the face of the fact that there was no agreement with the FBU. The Respondent was dependant therefore upon a sufficient number of volunteers coming forward knowing that by so doing the collective negotiating process was in effect being circumvented.

52. That admitted circumvention of the process which might have resulted in a collective agreement under **regulation 23** was in the full knowledge of the Respondent that CPC, absent any such authorised modification or exclusion of their application, breached the requirements of the **WTR**

53. Any fire-fighters at either of the designated stations who did not volunteer did so knowing that this was in anticipation of their being compulsorily displaced. The final invitation to apply by 11th August 2014 was also cumulative. A request for expressions of interest in July 2011 was followed by application to work the trial in January 2014 and then there was

the soliciting of volunteers in July 2014. There has been no suggestion that any Claimant, bar Allen, did not maintain a consistent position of non-participation in this process.

54. The question of what was or was not said by any Claimant to a station manger is more properly relevant to the next issue of whether or not they refused or proposed to refuse to comply with any specific requirement or to forgo any specific right under the **WTR.**

55. The converse to the Respondent actively seeking volunteers to work CPC in breach of the **WTR** and in circumvention of collective agreement with the recognised union is, we are satisfied, that those who did not volunteer were understood to be actively refusing, or proposing to refuse to work under CPC at Lowedges or Aston Park.

56. The motive for refusing is irrelevant to this question.

57. We are, in fact, satisfied on balance that the principal reason for the FBU's objections to CPC during this period was because of the possible implications upon pensions. It may be that objecting to a breach of the **WTR** was therefore perceived at least in part as a means to an end. It also may well be the case that individual fire-fighters decided not to apply in solidarity with the expressed views of their union's leadership.

58. It is, for whatever reason, nonetheless, in context, a clear refusal or proposal to refuse to work under CPC.

4. If so, did the Claimants:-

4.1 in accordance with section 45A (1) (a) ERA, refuse or propose to refuse to comply with a requirement that the employer imposed or proposed to impose in contravention of the Regulations (namely any aspect of the CPC system found to be in contravention of Regulations 4 and 6, being duties in imposed on an employer); and/or

4.2 in accordance with section 45A (1) (b) ERA, refuse or propose to refuse to forgo a right conferred by the Regulations (namely any aspect of the CPC system found to be in contravention of Regulations 10 and 12).

59. Courtney in his evidence accepted that the Respondent was never in doubt that CPC entailed a breach of the 48 hour weekly maximum (subject to opt-out) and of the requirement for 11 hour daily rest periods.

60. In respect of these breaches of **regulations 4 and 10** respectively, the first of which engages issue 4.1 and the second issue 4.2, the breaches are blatantly obvious. CPC required a fire-fighter to work 96 hours continuously without any rest period.

61. However the concerns were expressed on any particular occasion by individual fire-fighters in respect of this working pattern, those concerns, which we are satisfied were raised over the 3 year period that CPC was in contemplation, will necessarily have encompassed that which was so blatantly obvious to everyone concerned.

62. In this context the repeated refusal to apply to work CPC can only properly be understood as an express unwillingness to work a pattern which required a fire-fighter to be at the Station for 96 hours continuously without any rest period. As that shift system

necessarily breaches **regulations 4 and 10** in the clearest fashion the refusal to work CPC and the refusal to comply with the requirement in the one or to forgo the right conferred by the other cannot be separated.

63. We do not accept Mr Bourne's submission that it is necessary for the Respondent to know why any Claimant was refusing to work CPC before and further more that that reason would have to amount, expressly or impliedly to a specific refusal, or proposal to refuse to acceded to a relevant contravention of the **WTR.** The ways in which such an onerous work pattern might impact on an individual are many and various. It may be that it is seen as unduly intrusive upon family life, it may be a cause of marital tension, it may interrupt established patterns, either of leisure activity or of alternative work. For whatever reason an individual is motivated to refuse to comply or to forgo their rights it is still a refusal, particularly when the breached obligations and the infringed rights in question are, as here, self-evident.

65. Furthermore the individual refusals did not take place in a vacuum. The membership was not, of course, unanimous in its opposition to the implementation of CPC but the FBU nevertheless necessarily spoke for all its members when it identified the breaches of the **WTR.** It is also the case that the position of the FBU in respect to any collective agreement is decisive. Individual employees, and only they, may opt-out of the maximum working hours requirement but they may not modify or exclude any other applications of the **WTR**: only the recognised union in this case may do that.

66. In a letter to all the Fire Authority members dated 25th January 2013 the FBU expressly advised them that it had legal opinion that CPC could be unlawful and that modification or exclusion of the provisions as to rest breaks, rest periods, compensatory rest and the night work provisions could only be effected by collective agreement. The FBU's position at this stage remained formally as it had been at January 2012 when it had expressly declined to enter into any such collective negotiation on CPC. The principles and parameters of collective consultation are set out within the "Grey Book" and expressly include the fact that any agreement should be compliant with the **WTR.**

67. In a letter to Courtney from the Brigade Secretary, Mr Neil Carbutt, dated 27th February 2014 the principal concern is in respect of pensions and the only express reference to the **WTR** is in relation to individual opt-outs. However there is specific mention of the disquiet at Lowedges and at Aston Park over the proposals which would "not be suitable" for some. This reinforces the fact that objection was being taken to a proposal which blatantly breached **regulations 4 and 10**

68. On 21st March 2014 the FBU registered an official dispute in respect of the proposed introduction of CPC, including the fact that it was said to go against the principles in the "Grey Book".

69. The Respondent's stated reason for not considering a referral for determination of the dispute to be necessary was that it conceded that CPC was non-compliant with the principles in the "Grey Book" or with the **WTR.**

70. In a letter from the national Assistant General Secretary to FBU members, dated 16th July 2014, and which Courtney accepts he will have seen at or about that time, the breaches of **regulations 6 and 10** absent any collective agreement are made explicit.

71. As we have already stated the invitation letters of 30th July 2104 expressly acknowledged that CPC was to be implemented in the face of the fact that there was no agreement with the FBU.

72. On 14th September 2014 Carbutt wrote again to Courtney asked for an assurance that employees actually working the CPC system would continue to get their 11 hours daily rest and not be required to opt-out of the 48 hour maximum. This insistence on compliance with **regulations 4 and 10** was repeated in the union–drafted letters sent by individual Claimants in October 2014 where they purported to be not volunteering for CPC on these express grounds.

73. Although Carbutt's letter and these individual letters were all sent after the decision had effectively been taken on 29th August 2014, they were before it had been communicated to any but the successful applicants. Whilst it cannot therefore be a material factor influencing the decision this correspondence does provide corroboration for the view that a refusal to comply or to forgo in respect of these particular blatant breaches was indeed the reason for not having volunteered.

74. Although in **Ajayi v Aitch Care Homes UKEAT/0464/11** it was held that a refusal must be explicit and not implicit that is not a black and white distinction. In this case we conclude that the refusals, certainly with regard to **regulations 4 and 10** are to be treated as explicit.

75. It cannot be said in this case that the Respondent had no means of knowing in advance that the not volunteering by the stated deadline of 11th August was because of the Claimants objection to breaches of the **WTR.** Its awareness was not dependant upon receipt of the objection-letters in October, as it was on the facts in **Gale** . Nor was there no prior intimation that the protected act, when performed, was to be so regarded, as in **Ajayi.**

76. In the light of all that had happened previously the act of not volunteering is not only a refusal to work CPC but also, in context, an explicit refusal under **sections 45A (1) (a) (b) ERA,** certainly in respect of **regulations 4 and 10**

77. The position is less clear in respect of **regulation 6.** On Mr Segal's own admission this is borderline. Although referenced on several occasions in the FBU correspondence and although the express subject of the referral by Wilkinson to the HSE on 24th July 2014 this is not mentioned in Carbutt's letter of 14th September nor in the individual objection-letters that followed. Nor in reality is the position in respect of what is actually done at night substantially different under CPC and 2-2-4.

78. However because the breach of **regulation 6** necessarily follows from the breaches of **regulations 4 and 10** and is co-extensive with those blatant failures in compliance, we consider, on balance, that it too is covered by the refusal to comply with its imposition.

5. Did any refusal, or proposal to refuse within the meaning of section 45A, materially influence the Respondent's decision to transfer the Claimants to other stations?

79. The Respondent had determined that CPC would be introduced at Lowedges and at Aston Park notwithstanding the opposition of the FBU and the absence, therefore, of any

collective agreement and knowing full well that it would breach the **WTR**. In order to effect this it needed and actively sought volunteers who were prepared to opt–out and to purport to waive their other rights under the **WTR**

80. In order to accommodate such volunteers it was necessary that any existing crew members at either station who did not volunteer be displaced. Only those who purported to waive their **WTR** rights would be considered to work at the stations in question. Those who refused to do so would be compulsorily transferred to another station.

81. In those circumstances the refusals to volunteer materially influenced the decision. When the pool of volunteers had been identified after 11th August 2014 a decision was taken as to which 28 people should be assigned to CPC. Of course not all were chosen. Those existing staff such as Allen who were unsuccessful were then displaced, but not of course because they had refused to acquiesce in the breaches of the **WTR.** Those who had not volunteered were also designated for transfer. That decision may have been a very straightforward one in the light of the Respondent's previously expressed intention but it was still its decision: the non-volunteers did not merely self-select. Nor were they displaced merely because they were now surplus to requirements at Lowedges or at Ashton Park. They were only superfluous because the Respondent had deliberately sought to replace with them with transferees from other stations who, unlike them, were prepared to waive their **WTR** rights.

82. The Claimants have established a prima facie case for asserting that the reason why they were transferred was their respective refusals under **Sections 45A (1) (a) and (b)**. Under **section 48 (2)** the Respondent has not shown that is displaced the Claimants for some reason unconnected with their refusals. Those refusals are intrinsic to the entire selection, or non-selection process for CPC.

6. Did each of the Claimant's suffer a detriment by reason of such transfer, whether by being forced to transfer to other stations per se and/or by reason of any additional adverse consequence caused by such transfer.

83. Although transfer is lawful under the contract of employment, and not withstanding that a compensatory payment of £500 is also provided for we find that compulsory displacement per se is a detriment.

84. It is reasonably perceived as a disadvantage for a fire-fighter to be transferred because it is no longer possible to work at the previously allocated station because the employer has determined that only those who waive their **WTR** rights may do so. The impact on individuals will vary but it is, without more a detriment. To hold otherwise would we find, accepting Mr Segal's submission be to deny any effective sanction for what is a breach of the **Working Time Directive** and not one which is catered for in these circumstances by the derogation effected under national law by **regulation 23** or by an opt-out under **regulations 4 and 5**

85. A forced transfer was held to be a sufficient detriment in **Fuß v Staadt Halle [2010] IRLR 1080.** We find that it is here also.

Case: 1800412/2015 & others
(see schedule)

EMPLOYMENT JU DGE Lancaster

DATE 16th December 2015

JUDGMENT SENT TO THE PARTIES ON

16 December 2016

AND ENTERED IN THE REGISTER

FOR SECRETARY OF THE TRIBUNALS