Neutral Citation Number: [2018] EWHC 1229 (Admin)

Case No: CO/3084/2017

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Hearing at Leeds Combined Court Centre,
1, Oxford Row, Leeds LS1 3BG

Judgment handed down at
Manchester Civil Justice Centre
1 Bridge Street West,
Manchester M60 9DJ

Date: 25/05/2018

Before:

THE HON MR JUSTICE KERR

- -

Between :

THE QUEEN ON THE APPLICATION OF THE FIRE BRIGADES UNION — **Claimant**

- and -

SOUTH YORKSHIRE FIRE AND RESCUE AUTHORITY — **Defendant**

- and –

SOUTH YORKSHIRE FIRE AND RESCUE SERVICE — **Interested Party**

- -

OLIVER SEGAL QC and BETSAN CRIDDLE (instructed by **Thompsons Solicitors**) for the **Claimant**

DAVID MITCHELL (instructed by **Barnsley Metropolitan Borough Council Legal Services**) for the **Defendant**

The **Interested Party** did not appear and was not represented

Hearing date: 26th April 2018

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Approved Judgment

The Hon Mr Justice Kerr:

Introduction

1. The claimant trade union (the FBU) contends that the defendant Fire and Rescue Authority (the Authority) has committed itself to an unlawful shift pattern at four fire stations in South Yorkshire; unlawful, says the FBU, because it cannot operate without the interested party (the Service) breaching its obligations as the employer of firefighters under the Working Time Regulations 1998, as amended (the Regulations). The Authority submits that the contentious shift system is lawful and that the court should refuse relief.

2. The Authority is the statutory fire and rescue authority for the South Yorkshire area, constituted under section 1 of the Fire and Rescue Services Act 2004 (the 2004 Act). It is made up of 12 local councillors from the councils of Barnsley, Doncaster, Rotherham and Sheffield, and the Police and Crime Commissioner for South Yorkshire. The Service has operational responsibility for discharging the responsibilities of the Authority under the 2004 Act (and under the Civil Contingencies Act 2004 and the Local Government Act 1999).

3. The Authority's core functions in Part 2 of the 2004 Act include responsibility for fire safety and fire fighting in South Yorkshire (section 6 of the 2004 Act). It is responsible for setting terms and conditions of employment of firefighters in its area, though they are employed by the Service rather than the Authority. The FBU is the recognised union representing firefighters in South Yorkshire and elsewhere, for the purposes of collective bargaining.

4. The shift system in issue in this case (explained in more detail below) is called "Close Proximity Crewing" (CPC). It involves periods during a working week of 96 hours of continuous duty, other than during brief respite periods that follow if a firefighter is called out at night between midnight and 7am (or 8am). The FBU argues that this shift system breaches regulations 6 and 10 of the Regulations. The Authority disagrees and says that even if that were correct, the court should refuse relief.

5. It contends that the CPC shift system is not unlawful under the Regulations; that the FBU should not be permitted to interfere, and the court should not interfere, with the exercise by the Authority of its statutory core functions; that the claim is long out of time; that the FBU had or has adequate alternative remedies; and that any relief would undermine public safety, would cause substantial hardship to firefighters wishing to work the CPC shift system and would be detrimental to good administration.

Law

6. A fire and rescue authority is constituted in accordance with section 1 of the 2004 Act. Section 21(1) of that Act requires the Secretary of State to prepare a "Fire and Rescue National Framework". It must set out priorities and objectives for fire and rescue authorities in connection with the discharge of their functions (section 21(2)(a)). The Framework must be kept under review and may be revised from time to time (section 21(3)).

7. Section 21(4) requires the Secretary of State to discharge his functions under (1) and (3) "in the manner and to the extent that appear to him to be best calculated to promote … public safety, … the economy, efficiency and effectiveness of fire and rescue authorities, and … economy, efficiency and effectiveness in connection with the matters in relation to which fire and rescue authorities have functions".

8. Fire and rescue authorities must have regard to the Framework in carrying out their functions: section 21(7). Article 2 of the Fire and Rescue Authorities (National Framework) (England) Order 2012 gave effect to the Framework published on 11 July 2012. The Fire and Rescue Authorities (National Framework) (England) Order 2018 gave effect to a new Framework published on 8 May 2018, after this case was argued before me.

9. Directive 2003/88/EC, known as the Working Time Directive (the Directive) required EU member states to enact national measures concerning working time. The recitals included the observation that workers' safety, hygiene and health at work should not be subordinated to purely economic considerations (recital (4)); and that long periods of night work can be detrimental to the health of workers and can endanger safety at work (recital (7)). The Directive is transposed into domestic law by the Regulations.

10. By article 2(1) of the Directive, working time includes "any period during which the worker is working, at the employer's disposal and carrying out his activity or duties …". It includes time spent on stand-by at home by firefighters who are required to reach their workplace within eight minutes (*Ville de Nivelles v. Matzak*, Case C-518/15, [2018] IRLR 457, at [65]); and time spent by a doctor "on-call" at a hospital where he was required to be present, though allowed to rest when his services were not required (*Landeshautpstadt Kiel v. Jaeger* Case C-151/02, [2004] ICR 1528, at [68]).

11. In *Commission v. United Kingdom*, Case C-484/04, [2007] ICR 592 at [44] the Court of Justice held that guidelines emphasising to employers that they were not obliged to ensure their employees exercised or were able to exercise their right to minimum rest periods, were incompatible with the objective of the Directive that minimum rest periods are considered essential for the protection of workers' health and safety; since the guidelines were liable to render the rights in articles 3 and 5 of the Directive, relating to rest periods, meaningless.

12. During rest breaks, the worker must not be subject to any obligation towards the employer which may prevent him from pursuing freely and without interruption his own interests, to neutralise the effects of work on his safety or health. Such rest breaks must immediately follow on from work periods (*Jaeger*, at [94]).

13. The obligation to provide rest breaks under the relevant provisions in the Directive requires, as a general rule, that a period of work must regularly alternate with a rest period. To ensure effective protection of the safety and health of workers, in order to be able to rest effectively, the worker must be able to remove himself from the work environment for a specific number of hours that must be consecutive, must directly follow a period of work and enable the worker to relax and dispel fatigue from work (*Jaeger*, at [95]).

14. Work periods not punctuated by the necessary rest periods may, therefore, not be sufficient to comply with the Directive. Work periods "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 [to rest periods, under article 17] and from which the worker must benefit before commencing the following period of work" (*ibid.* at [97]).

15. As a general rule, "to accord such periods of rest only at other times not directly linked with the period of work extended owing to the completion of overtime does not adequately take into account the need to observe the general principles of protection of the safety and health of workers …" (*ibid.*, at [97]). The derogation permitted by article 17 is:

> "expressly … subject to the condition that the workers concerned are to be afforded equivalent periods of compensatory rest or that, in exceptional cases in which the granting of such equivalent periods of compensatory rest is not possible for objective reasons, those workers are to be afforded appropriate protection" (*Union Syndicale Solidaires Isère v. Premier Ministre*, Case C-428/09, [2011] IRLR 84, at [49]).

16. The "equivalent periods of compensatory rest" that must be accorded where a derogation permitted by article 17 is implemented:

> "must …. be characterised by the fact that during such periods the worker is not subject to any obligation vis-à-vis his employer which may prevent him from pursuing freely and without interruption his own interests in order to neutralise the effects of work on his safety or health. Such rest periods must therefore follow on immediately from the working time which they are supposed to counteract in order to prevent the worker from experiencing a state of fatigue or overload owing to the accumulation of consecutive periods of work (see *Jaeger*, paragraph 94)" (*Union Syndicale*, at [50]).

17. Turning to domestic law, the Regulations were made under section 2(2) of the European Communities Act 1972 and provide as follows, so far as material. The definition of "working time" in regulation 2(1) mirrors that in article 2(1) of the Directive. In regulation 2(1) there are definitions of "night time", "night work" and "night worker", which, it is agreed, apply here; and of "rest period", which means "a period which is not working time, other than a rest break or leave to which the worker is entitled under these Regulations".

18. Regulation 4(1) provides that unless the worker has agreed in writing to perform such work, a worker's working time, including overtime, in any reference period applicable in his case shall not exceed an average of 48 hours for each seven days. Regulation 4(2) requires the employer to "take all reasonable steps" to ensure that limit is complied with and to keep up to date records in relation to employees who have agreed in writing to perform work in excess of the limit (commonly referred to as an "opt-out").

19. Regulation 4(1) creates a contractual right and obligation and is enforceable as such: *Barber v. RJB Mining (UK) Ltd* [1999] ICR 679, per Gage J at [35]. It is separate and distinct from the obligation under regulation 4(2), which is enforceable through the criminal law. Compliance with regulation 4(2) is one of the "relevant requirements" set out in regulation 28(1). By regulation 29(1) failing to comply with a relevant requirement is an offence.

20. There is no right to complain to an employment tribunal of a breach of regulation 4(1) or (2); see regulation 30 and *Barber v. RJB Mining (UK) Ltd* at [38]. However, in an

appropriate case a private law claim may be brought and a declaration or injunction may be granted; in *Barber*, a declaration was granted to the effect that the employer had breached the contractual obligation created by regulation 4(1), though an injunction was refused.

21. Regulation 6 deals with the length of night work. Regulation 6(1) provides that a night worker's normal hours of work in any reference period applicable in his case "shall not exceed an average of eight hours for each 24 hours". Regulation 6(2) requires the employer to "take all reasonable steps … to ensure that the limit … is complied with in the case of each night worker employed by him".

22. There is no right to complain to an employment tribunal of a breach of rule 6(1). It is possible that it may create a contractual as well as a statutory prohibition on the employer and a corresponding contractual right in the employee, by parity of reasoning with that in *Barber* in relation to regulation 4; but there is no authority on the point. Unlike regulation 4, regulation 6 does not include any provision for an individual to opt out.

23. Compliance with regulation 6(2) is a "relevant requirement" within regulation 28(1). It is therefore a crime (see regulation 29(1)) not to comply with regulation 6(2), but this is subject to exceptions. There is an exception where regulation 23 applies. That provides at (a) that a collective agreement or workforce agreement may modify or exclude the application of (among other provisions) regulation 6(1) and (2).

24. There is also an exception where regulation 6 is disapplied by regulation 21. That provides that subject to regulation 24, regulation 6(1) (among other provisions) does not apply in relation to a worker where (among other cases):

> "(c) …. the worker's activities involve the need for continuity of service or production, as may be the case in relation to [various industries and activities]".

The list of those industries and activities is not exhaustive and could in principle, it is agreed, include a fire brigade if its workers' activities involve the need for continuity of service.

25. In considering "the need for continuity of service" test, it is the activities of the worker, not those of the employer, that must involve that need: *Gallagher v. Alpha Catering Services Ltd* [2005] ICR 673, CA, per Peter Gibson LJ at [37]. It is not enough to trigger the exclusion of the time limit on night workers' hours if the *employer's* activities require continuity of the service provided by the employer.

26. Further, the disapplication of regulation 6 by regulation 21, or its exclusion or modification pursuant to regulation 23 (a), cannot occur unless regulation 24 is complied with. That provides, so far as material:

> "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".

27. Regulation 10 deals with daily rest breaks. 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" (regulation 10(1)). A collective agreement may modify or exclude the application of regulation 10(1) (regulation 23(a)).

28. Regulation 10(1) does not apply in the cases covered by regulation 21(c) (cited above: where the workers' activities involve the need for continuity of service or production). Further, regulation 22 deals with shift work. It provides (in material part) that subject to regulation 24, regulation 10(1) does not apply 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 (regulation 22(a)).

29. But the disapplication of regulation 10(1) in the cases covered by regulations 21 and 22 is subject to regulation 24 dealing with compensatory rest (cited above), which must be complied with also where a collective or workforce agreement modifies or excludes (under regulation 23(a)) the application of regulation 10(1).

30. Unlike the obligations to comply with the maximum working week provision (regulation 4(2)) and the limits on the length of night work (regulation 6(2)), the obligation to provide daily rest is not policed by the criminal law. Compliance with regulation 10(1) is not a "relevant requirement" under regulation 28(1). The employee may complain to an employment tribunal, subject to the usual time limits: regulation 30(1)(a)(i) and (ii). The remedies available are a declaration and compensation (regulation 30(3)).

31. Enforcement of the criminal law provisions is a matter for an "enforcement authority". By regulation 28(1), that means the Health and Safety Executive (HSE), a local authority, the Civil Aviation Authority and certain other bodies. A prosecution may only be undertaken by an inspector of an enforcement authority, or by or with the consent of the Director of Public Prosecutions (regulation 29C). It follows that a private prosecution of the Authority or the Service by the FBU would not be possible without the consent of the Director.

32. The position is therefore different from that in *R v. Director of Public Prosecutions ex p. Camelot* (transcript, 14.4.97), which I drew to the parties' attention. The judgment of Simon Brown LJ (as he then was) at page 9 of the transcript, emphasises the wariness of the court when considering whether to accept an invitation in judicial review proceedings to pronounce on whether conduct is criminal or not. One factor relevant to the court's decision is whether a private prosecution is an available alternative remedy.

Facts

33. The FBU is the recognised trade union for firefighters. It negotiates with local government employers. Collective terms and conditions are negotiated through the National Joint Council (NJC) for Local Authorities Fire and Rescue Services and are included within the "Grey Book" containing agreed terms and conditions which are incorporated into the contracts of employment of individual firefighters. Dispute resolution machinery exists, in the usual way, in the event of disagreements.

34. Part 4 deals with hours of duty and duty systems. Local variations are permissible but "should comply with relevant United Kingdom and European law, including the Working Time Regulations 1998, and Health, Safety and Welfare at Work legislation" (section 4, paragraph 3(3)). Duty systems should also "have regard to the special circumstances of individual employees and be family friendly" (paragraph 3(4)).

35. Since around 2006 or 2008, shift systems comprising some sort of CPC type arrangement have been in operation at a minority of fire stations in the United Kingdom. The detail of each such system outside South Yorkshire is not dealt with in the evidence. It is unnecessary to examine the precise terms of CPC type arrangements in other parts of the country.

36. I do not think it is necessary or feasible to examine whether they comply with the Regulations and if they do not, in what way; Mr Mitchell, for the Authority, accepts that they do not but I do not have details of any collective agreement (if there are any relevant collective agreements elsewhere in the country) which might be relevant for the purposes of excluding or modifying provisions of the Regulations.

37. As long ago as August 2010, in South Yorkshire a first draft of a CPC shift system was produced by the Authority. Volunteers to work in accordance with that shift system were sought in 2011. This occurred alongside "a significant reduction in funding from Central Government … [which] resulted in a substantial cut to the Fire Service's budget of approximately £12 million of the last 7 years" (according to Mr Martin Blunden, the Service's Deputy Chief Fire Officer).

38. According to Mr Blunden, CPC offers savings of about £400,000 per station per year at those stations where it operates. It is a way of keeping the service going with less money to spend on it. It is regarded as suitable for fire stations that are quiet at night, i.e. in areas where night time call outs are infrequent. It is not considered suitable at fire stations that are busy at night. Those who volunteer to work the CPC shift system are paid an extra 30 per cent on top of their normal pay. They also agree in writing to opt out (under regulation 4(1) of the Regulations) of the average maximum working week of 48 hours.

39. There has been some dispute about the extent to which CPC type arrangements operate in different parts of the country. The FBU's evidence is that between 1.5 and 2 per cent of firefighters nationally are working under some sort of CPC type arrangement; and that while some firefighters volunteer, no doubt attracted by the extra pay, the FBU has consistently opposed CPC on principle, on the ground that it entails breaches of the Regulations.

40. The Authority's evidence is that variants of the CPC system used in South Yorkshire are used in other parts of the country, with at least the informal, off the record agreement of the FBU; that the latter has not consistently opposed CPC; that some of its officials

recognise the necessity for CPC; and that the FBU's opposition is motivated by pension considerations and not just by concerns about compliance with the Regulations.

41. I find the evidence about use of CPC in other parts of the country of limited assistance. It is not suggested the particular variants of CPC in use elsewhere are the same as the CPC system used at four fire stations in South Yorkshire. Some of them involve firefighters remaining "at home" while subject to emergency call out. The versions of CPC used elsewhere may or may not be covered by any relevant collective agreement.

42. I am not in a position to make findings as to whether any CPC systems outside South Yorkshire breach the Regulations or not. What is clear is that the FBU has been opposed to the use of CPC in South Yorkshire for some years and that it has a consistent history of asserting that the particular CPC system in use at four fire stations operated by the Authority is such that it cannot operate in conformity with the Regulations.

43. On 26 March 2012, the Authority approved the introduction of CPC at four fire stations identified as having a low level of night time activity: Aston Park, Lowedges, Tankersley and Edlington. In May 2012, the FBU in South Yorkshire registered a trade dispute with the Joint Secretaries of the NJC. It covered several issues including an objection to CPC.

44. On 11 July 2012, the Secretary of State published the statutory *Fire and rescue national framework for England* (the Framework). It was published pursuant to section 21(1) of the 2004 Act. By section 21(7), fire and rescue authorities are required to "have regard" to it "in carrying out their functions. Statutory effect was bestowed on the Framework by article 2 of the Fire and Rescue Authorities (National Framework) (England) Order 2012.

45. Paragraph 1.3 of the Framework stated that each fire and rescue authority must produce an "integrated risk management plan" (IRMP) which "identifies and assesses all foreseeable fire and rescue related risks that could affect its community…". The IRMP was required by paragraph 2.3 to "reflect effective consultation throughout its development and at all review stages with the community, its workforce and representative bodies, and partners".

46. By paragraph 2.3, the IRMP had to have at least a three year span and was subject to review "as often as necessary to ensure that fire and rescue authorities are able to deliver the requirements set out in this Framework". The IRMP also had to "reflect up to date risk analyses and the evaluation of service delivery outcomes".

47. On 25 January 2013, the Yorkshire & Humberside FBU sent a circular to members saying it had received leading counsel's advice that CPC and similar duty systems could be unlawful. The circular pointed to pension issues arising from CPC and also pointed out that even those opting out of the maximum working week remained entitled to other rights under the Regulations, i.e. rest periods, compensatory rest and the night work provisions, unless these were amended by collective agreement. The circular explained that the FBU nationally was taking up the issue with the HSE.

48. In about late 2013, the Authority published its (undated) *Strategic Plan 2013-2017*. It appears that this was the IRMP required to be produced pursuant to the Framework and that it was approved by the Authority on 25 November 2013. At the time it was

published, CPC remained unimplemented at the fire stations considered suitable for its introduction. It was noted in the *Strategic Plan* that implementing CPC would save approximately £400,000 per station where it operates – presumably, an annual figure.

49. However, the trade dispute lodged by South Yorkshire FBU in May 2012 was settled in November 2013 on terms recorded by the Joint Secretaries which included the agreement that "[t]he proposals on CPC will no longer be progressed". According to the witness statement of Mr Neil Carbutt, the Brigade Secretary of South Yorkshire FBU, the Service then, on 2 December 2013, announced that CPC would be introduced at two stations, Lowedges and Aston Park.

50. On 13 February 2014, claims in the Leeds employment tribunal were commenced against the Service by a number of firefighters (*Mansell* and others), supported by the FBU, who had been transferred from those two stations after not volunteering to work the CPC shift system. Their case was that they had been subjected to a detriment under section 45A of the Employment Rights Act 1996 (the 1996 Act) on the ground that they had refused to comply with a requirement in contravention of the Regulations; and/or by refusing to forego a right conferred on them by the Regulations.

51. On 27 February 2014, Mr Carbutt wrote at length to Mr James Courtney, the Chief Fire Officer and Chief Executive of the Service, asking for the implementation date for CPC at the two stations to be cancelled. Mr Courtney replied to concerns about the impact of CPC on pensions, that leading counsel had advised that "CPC is fully pensionable". He declined to defer the implementation date, 1 April 2014.

52. At a meeting with the Authority on 19 March 2014, the FBU repeated its request that implementation be deferred, though it did not rule out reaching agreement on the issue. On 21 March, the FBU registered an official trade dispute with the Service over the issue. The Service responded by suspending what it called the trial of CPC. Mr Courtney informed various persons concerned in a circular letter of 26 March 2014. Discussions then ensued on possible alternative proposals but no agreement between the Authority (or the Service) and the FBU was reached.

53. In the course of the correspondence, on 8 May 2014 Mr Courtney wrote to the Brigade Chair of South Yorkshire FBU, Mr Graham Wilkinson, acknowledging that "any CPC type system is non-compliant with … [relevant provisions in] the Grey Book; and that … [t]he system does not comply with the Working Time Regulations". That candid admission is not as startling as it sounds, because the non-compliance could be cured by a collective agreement under regulation 23 of the Regulations, if one could be reached.

54. On 20 June 2014, an employment tribunal in Cardiff rejected claims from firefighters in Llanelli founded on section 45A of the 1996 Act. It appears from a later decision on the Employment Appeal Tribunal (on appeal) that the claims failed because (to quote from the Appeal Tribunal's summary), the tribunal:

> "had clearly found that there had been no requirement that the Claimants sign a workforce agreement/other opt-out and could [sic] be no challenge to the dismissal of the claims under section 45A(1)(c).
>
> …

> The Employment Tribunal had found that what the Respondent proposed did not give rise to a contravention of the [Regulations] … [and] had found that the Claimants had not proposed to forego a right (to rest breaks) under the [Regulations] before the Respondent had decided to impose the detriments complained of."

55. During the week of 26-27 June 2014, a blog prepared by the Chief Fire Officer reported that the Authority had directed the Service to proceed with the introduction of CPC at Lowedges and Aston Park, the two stations which featured in the pending employment tribunal proceedings. The Chief Fire Officer emphasised that CPC working would remain voluntary and that suitable financial incentives would be considered.

56. On 24 July 2014, the South Yorkshire FBU wrote to the HSE complaining that the CPC system that was being introduced was in clear breach of the Regulations, and explaining in detail why. The letter stated that "the clearest breach … relates to night work (Regulation 6)" and gave a detailed explanation. The letter explained that the Service agreed that CPC was in breach of the Regulations and quoted Mr Courtney's written admission (in his letter of 24 May 2014) to that effect.

57. In September 2014, the Service launched an updated *Operational Plan* announcing that "[w]e now intend to introduce [CPC] by the end of 2014". The South Yorkshire FBU wrote informing Mr Courtney on 29 September that the FBU would be referring (among other things) the issue of CPC to the NJC Joint Secretaries for conciliation. In early October 2014 the Service carried out a risk assessment of CPC at the two stations in question, Lowedges and Aston Park, and found the risks acceptable. The FBU then made a unilateral referral of the issue to the NJC Joint Secretaries on 13 October 2014.

58. With the employment tribunal proceedings pending in Leeds, CPC was implemented at the two stations in October 2014. In the light of the failure to agree on the introduction of CPC, a body called the Technical Advisory Panel (TAP) established under the NJC collective bargaining arrangements, met on 18 February 2015 to discuss the issue in the presence of the Joint Secretaries, the Service and the FBU.

59. At the meeting, according to the minutes, the chair of the TAP stated that, while he was not qualified to give a legal opinion, he was concerned that the CPC might not survive a legal challenge because "time worked on day shifts and time spent on stand down could be taken together and construed as working time". Accordingly, he warned that "these shift arrangements, as currently proposed, may not be fully in keeping with the requirements of [the Regulations]".

60. On 10 April 2015, the Employment Appeal Tribunal dismissed the claimants' appeal against the decision of the tribunal in Cardiff (*Gale v. Mid and West Wales Fire Service*, UKEAT/0365/14/JOJ, HHJ Eady QC) on the basis that, although the tribunal's reasoning was not altogether clear, its findings of fact (noted above, as quoted from the judge's summary) were unassailable and not susceptible to challenge on appeal.

61. On 22 April 2015, the FBU raised the issue of the legality of CPC in yet another forum, this time the Service Health and Safety Meeting. Mr Carbutt complained that while regulation 4 had been addressed (presumably, a reference to volunteers having signed an opt-out from the average 48 hour maximum working week), regulations 6 and 10

had not been addressed. It was noted that no collective agreement on the issue had been entered into by any fire and rescue service in the country.

62. The Service then extended the reach of CPC, introducing it at a third fire station, Edlington, in June 2015. The HSE responded to the FBU's complaint in September 2015, writing to Mr Courtney informing him that it did not intend to take action. The HSE expressed the view that the Service "are in breach of Regulation 6 of [the Regulations]". This is, of course, a criminal offence if regulation 6(2) is referred to. As to regulation 10, the HSE said it was not responsible for enforcement and would not comment on compliance.

63. The HSE reasoned that the non-compliant shift patterns replaced other shift patterns – "the traditional 2-2-4 system" – that "themselves are also non-compliant". That unsustainable contention has not commanded support from anyone else interested in this issue, including the Authority and the Service at the hearing before me. The unchallenged evidence of the FBU, supported by the Leeds employment tribunal in the *Mansell* litigation, is that the 2-2-4 shift system does comply with the Regulations.

64. More to the point, the HSE reasoned that the breach of regulation 6 was not likely to increase significantly the risk to firefighters because of the arrangements the Service had put in place to manage the risks of fatigue. The HSE was sanguine about the safety aspect and its "enforcement decisions also take strategic considerations and the wider public interest into account." It reasoned that here "taking enforcement action when there is no readily available compliant alternative arrangement could cause considerable public disruption to the emergency services, and would not be in the public interest".

65. The *Mansell* claims then came on for hearing before the Leeds employment tribunal. Among those giving evidence was Mr Courtney. He repeated his admission that the Service (in the words of the tribunal in its subsequent decision, at [59]) "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" – a clear reference to regulation 10.

66. The use of CPC was then extended in November 2015, between the hearing in the *Mansell* litigation and the giving of judgment, to another station considered suitable, Tankersley. CPC, Mr Blunden explains, achieves several policy objectives of the Authority: avoiding the need to close any fire station; avoiding any reduction in the number of firefighters employed; and maintaining immediate response capacity at fire stations where CPC is in use.

67. However, the tribunal's judgment of 16 December 2015 told a different story. All but one of the claims under section 45A of the 1996 Act succeeded. For that to happen, it was necessary to find (and the tribunal did find) that the Service imposed a "detriment" on the claimants for having refused to comply with a requirement which the employer imposed, or proposed to impose, in "contravention" of the Regulations (section 45A(1)(a)); or for having refused to forego a right conferred by the Regulations (section 45A(1)(b)).

68. The result could not have surprised anyone much in view of Mr Courtney's admission that the Service knew full well CPC entailed a breach of the requirement in the

Regulations for 11 hour rest periods. The tribunal described the breaches as "blatantly obvious" [60]. Subject to requirements being "imposed" for the purpose of section 45A(1)(a), there were specific findings of a "contravention" of the Regulations, under regulation 4 (subject to any opt out) [34] and [37]; regulation 6 [43]; and regulation 10 [44].

69. The Authority "does not agree" with the decision in *Mansell*, as Mr Blunden explains in his witness statement, but did not appeal against the decision. A remedies hearing was fixed for the purpose of assessing compensation. The Authority was undaunted by the decision. In May 2016, its human resources department published a written definition of CPC, which was also addressed in witness statements, among them that of Mr Blunden.

70. As he explains, those who work CPC shifts do so voluntarily, in the sense that they choose first to sign an "opt-out" of regulation 4 (the maximum working week). They then work the CPC shifts. They are "on station" for an 11 hour day shift from 8am to 7pm, immediately followed by 13 hours '"on call" from the station', from 7pm to 8am the next morning.

71. The work is not constant, however. After 7pm when "on call" at the station, staff are only required to respond to operational incidents and undertake "operationally essential work". If they are called to an incident between midnight and 7am (per Mr Blunden) (or 8am, per the written policy document), they are entitled to a period of "compensatory recovery time", starting at 7am and calculated as the amount of time spent responding to the incident, plus 15 minutes; subject to a minimum of one hour.

72. This shift pattern is then repeated a further three times, making four shifts worked consecutively, each of 24 hours, making a total of 96 hours; followed by four days off. Staff are required to work from 13 to 17 such shifts per month. While working CPC shifts, staff are paid an additional 30 per cent on top of their basic salary; plus a further annual payment of £2,275 per annum for accommodation that is being modernised.

73. On 13 February 2017, the Authority began a consultation process over a six week period until 27 March 2017, for the purpose of considering its new draft IRMP which was intended to operate during the years 2017 to 2020. The FBU warned in a letter of 30 March 2017 that the draft IRMP contained no risk analysis in respect of the CPC shift system in the light of the decision in the *Mansell* litigation.

74. In the same letter, the FBU called on the Authority formally to commit to the abolition of CPC and its replacement with a lawful system compliant with the Regulations and the Grey Book. However, the Authority, in the final version of the IRMP published on 3 April 2017 – the decision challenged in this case – referred to the continuing need to reduce costs and explained that among the measures to achieve this was (with bold in the original):

> "[i]ntroducing **Close Proximity Crewing** at four fire stations, reducing staff costs with no impact on our immediate 999 response from those stations".

75. On 11 April 2017, the Authority's Vice Chairman, Councillor A. Atkin, wrote to Mr Carbutt of the South Yorkshire FBU reiterating the Authority's commitment to CPC, dismissing the *Mansell* tribunal decision as confined to its facts and the issue of "detriment"; and pointing out that "the Chief Fire Officer provided evidence during the hearing that the Service were never in doubt that CPC entailed a breach of the 48 hour working week".

76. In defence of the IRMP, the Authority's Vice-Chairman said this:

> "The fire and rescue national framework for England says that 'Fire and rescue authorities need to assess all foreseeable fire and rescue related risks that could affect their communities… However this must be within the budget that is available to, and set, by the Fire Authority taking into account Government Grants, Business Rate retention and Council Tax contributions. In order to mitigate the risks that our IRMP identifies, within the financial envelope that we describe at the start of this letter, CPC will continue to be one of the duty systems that are employed so as to continue to provide the most equitable emergency response to the people of South Yorkshire."

77. Thus, from Councillor Atkin's perspective, far from being a threat to the health and safety of firefighters, CPC was itself part of the strategy for mitigating fire risk to the South Yorkshire public, without exceeding the considerably reduced available budget.

78. After that, the issue became litigious, with an exchange of pre-action protocol correspondence. A pre-action protocol letter of 24 April 2017 was sent. After some agreed delay, a response was eventually provided on 9 June 2017 by the Authority's solicitors, Barnsley Metropolitan Borough Council. The response stated that the "private law claims" in *Mansell* were "irrelevant to any question of whether or not CPC *per se*, is unlawful (which clearly, it is not)."

79. In the response, the solicitor explained further that in the face of budget cuts, the Authority had "chosen to retain CPC in order to best meet its overriding legal duty to safeguard the people of South Yorkshire". While it was understood that the FBU did not agree with that choice, "the mere fact of this disagreement creates no liability on the part of … [the] Authority, whether in accordance with general principles of public law, or at all".

80. The present claim was then brought on 28 June 2017, 19 days after the date of that letter and five days short of the three month period referred to in CPR Part 54. I do not accept that the challenge to that decision was out of time, if it was the correct decision to challenge. Permission was initially refused on the papers but, after an oral hearing, was granted by His Honour Judge Gosnell in an order made on 16 November 2017, in respect only of the decision to publish the IRMP on 3 April 2017.

<u>The Issues: Submissions</u>

81. The parties were in agreement that the issues are:

(1) whether the CPC system is unlawful, or has already been held unlawful in a decision binding on the parties;

(2) whether the FBU is precluded from challenging the IRMP for one or more of six reasons advanced by the Authority; and

(3) if the CPC system is unlawful and the FBU is not so precluded from challenging it, whether any and if so what relief should ensue.

82. The six (overlapping) bars to relief asserted by the Authority under the second issue are (i) interference with statutory core functions (ii) that officials of the FBU have accepted the necessity of the CPC system (iii) that the FBU has not complained further to the HSE, or made any further complaint to the ET, in light of the decision in *Mansell* (iv) that granting relief would unacceptably disrupt the finances and family arrangements of firefighters working the CPC shifts (v) that the FBU has accepted the CPC system in other areas and (vi) delay, substantial hardship and detriment to good administration.

83. The FBU's main submissions were as follows:

(1) The unappealed decision of the tribunal in *Mansell* is binding and its findings create an issue estoppel on the issue of contravention of regulations 6 and 10 of the Regulations, since breach of those regulations was a necessary ingredient of the claimants' cause of action in *Mansell*. Issue estoppel also extends to cases where a party to previous proceedings raises a point it should have raised, but did not raise, in the earlier proceedings. Therefore, the Authority should not be permitted to rely on regulations 21 and 22, not having done so in the *Mansell* litigation.

(2) In any event, the CPC system is unlawful. A public body must exercise its statutory functions in a lawful manner, not for an unlawful purpose; further, it cannot rely on scarcity of funds to justify unlawful conduct (*R (Tandy) v. East Sussex County Council* [1998] AC 714, per Staughton LJ at 719G-720B, approved by Lord Browne-Wilkinson at 746C and 747B). It was *Wednesbury* unreasonable to approve an IRMP which committed the Authority to a course of unlawful conduct.

(3) The Authority cannot rely on the exceptions in regulations 21 and 22 of the Regulations; those provisions only apply to an exceptional need to work over a particular rest period, not to a systematic removal of consecutive rest periods, without providing "an equivalent period of compensatory rest" (regulation 24(a)); see *Landeshauptstadt Kiel v. Jaeger*, at [95-97]; *Union Syndicale Solidaires Isère*, at [39-40], [49-54].

(4) The Authority can easily, albeit at greater cost, operate a shift system that complies with the Regulations; this is demonstrated by the fact that it does so at all its fire stations except the four where CPC is operated. At all its other fire stations, the lawful 2-2-4 shift system is operated without difficulty. The saving of cost is achieved by requiring fewer firefighters to work harder, in breach of their rights under the Regulations.

(5) The contention that to grant relief would unjustifiably interfere with the exercise of the Authority's core functions under Part 2 of the 2004 Act is not cogent, in view of the Authority's acceptance that it must act lawfully in the exercise of those functions. Further, the requirement to publish the IRMP arises under Part 3, not Part 2, of the 2004 Act.

(6) The suggestion that officials of the FBU have accepted the necessity of the CPC system is irrelevant and also misplaced, as is the suggestion that the FBU has acquiesced in use of the CPC system in areas other than South Yorkshire. The

FBU has stated only that it can understand why the Authority finds the CPC system attractive; but its opposition in principle to the use of CPC has been consistent locally and nationally.

(7) There was and is no adequate alternative remedy. The FBU complained to the HSE in 2014 and has spoken to it since, but the latter's response in 2015 was unhelpful and founded on a misconception that the 2-2-4 shift system was also unlawful. The FBU has supported complaints to the employment tribunal, but the latter has no power to stop the illegality; it can only compensate individual workers who bring claims.

(8) The challenge is not brought out of time; it was brought within three months of the Authority's decision to publish the IRMP on 3 April 2017. As Stanley Burnton J (as he then was) said in *R (Lambeth MBC) v. Secretary of State for Work and Pensions* [2005] EWHC 637 (Admin) at paragraph 38:

> "Whether a decision not to change an earlier administrative decision is itself a reviewable decision does not admit of a formulaic or straightforward answer. It must depend on the facts of each case. The Court must determine whether in substance a fresh decision has been made or ought to have been made. A claimant cannot circumvent or avoid the requirements of CPR Part 54.5 or of section 31(6) of the Supreme [now Senior] Court[s] Act simply by requesting reconsideration of an earlier decision. On the other hand, new facts may arise that require fresh consideration …".

(9) Prior to April 2017, the FBU properly concentrated on opposing the CPC by industrial means, through the collective negotiating machinery and by supporting individual employment tribunal claims. The FBU was reasonably entitled to expect that the Authority would either appeal the *Mansell* decision or comply with it. It did neither. When in April 2017 it refused to exclude use of the CPC system from its published IRMP, the FBU was entitled to challenge that decision and did so promptly.

(10) The FBU could not (through one of its members) bring a private law claim as in *Barber v. RJB Mining (UK) Ltd* because here there was no viable claim under regulation 4 of the Regulations, the relevant shift workers having opted out of the 48 hour average maximum working week. Aside from regulation 4 claims and enforcement through the criminal law, the Regulations provide that the exclusive remedy is an employment tribunal claim. The ineffectiveness of that remedy to stop the illegality complained of is demonstrated by the *Mansell* litigation.

(11) The court should not withhold relief in the exercise of its discretion, either under section 31(6) of the Senior Courts Act 1981 or otherwise: cf. *R. v. Secretary of State for the Environment* (1998) 30 HLR 328, CA, per Judge LJ (judgment of the court) at 380-3. The court's intervention is needed to secure observance of the law by the Authority and to avoid a continuing breach of the law. The court should quash the IRMP and require the Authority to publish a fresh IRMP omitting use of the CPC system.

84. For the Authority, the main submissions advanced were the following:

(1) The application is "misconceived" and the court "does not have jurisdiction to grant the relief sought" (as Mr Mitchell put it in his skeleton argument). The FBU's claim is made in furtherance of an industrial dispute and there is no support for the suggestion that the CPC system is unsafe. The claim is out of time and ignores "the rights of those workers voluntarily working the CPC shift system".

(2) The decision in *Mansell* is not binding. The FBU was not a party to those claims. *Mansell* does not establish that the CPC system is unlawful. It concerned the private employment rights of workers; the observations on compliance with the Regulations were *obiter dicta* and wrong. The Authority did not seek to appeal the decision but does not agree with it. Mr Mitchell mounted (as he accepted) a collateral attack on the decision in *Mansell*. Further, the *Mansell* claims were brought under section 45A of the Employment Rights Act 1996, not under the Regulations.

(3) It was not an abuse of process to rely on exceptions to the application of regulations 6 and 10 of the Regulations, contained in regulations 21 and 22; even though the exceptions had not been relied on before the employment tribunal, when the employer was represented by different counsel; cf. *Johnson v. Gore-Wood & Co (No 1)* [2002] 2 AC 1, per Lord Bingham at 31C-D.

(4) There was no breach of regulation 6 in relation to night work. The exception in regulation 21 applies because the activities of the firefighters working CPC shifts involve the need for "continuity of service". The same is true in the case of regulation 10, relating to rest periods; the exception in both regulations 21 and 22 apply.

(5) The obligation in regulation 24 to provide an "equivalent period of compensatory rest" is complied with by the measures attested to by Mr Blunden in his witness statement: "recovery time provided for in the CPC policy …, self-rostering, training, stress risk assessments, welfare meetings and by requiring CPC stations to only attend emergency calls during night shift hours where life is endangered".

(6) The tribunal in *Mansell* was therefore wrong to find that the only exception that might avail the Authority would be under regulation 23, if there were a suitable collective agreement excluding the application of regulations 6 and 10 of the Regulations. The illegality is the CPC is not established by the FBU refusing to enter into such a collective agreement; its refusal to do so is not a "trump card".

(7) While the Authority accepts that it must act lawfully in exercising its statutory functions, it is for the Authority to decide how to spend its budget. The motivation for the CPC system is not just financial; it is to enable the Authority to maintain emergency response times. The system of work is safe; there have been no accidents or increased sick leave. Any suggestion that the CPC system increases fatigue should be rejected.

(8) The FBU has tolerated and acquiesced in variants of CPC at other locations outside South Yorkshire. The court should not accept the suggestion that only just over 1.5 per cent of firefighters nationally are working under CPC type arrangements. Certain (unnamed) officials of the FBU have acknowledged privately the need to retain the CPC, while publicly opposing it.

(9) The alternative remedy of complaint to the employment tribunal is adequate and is available if any worker wishes to complain of a breach of regulation 10(1) of the Regulations. Regulation 6(1) and (2) are enforceable by the HSE, but that body has declined to act and the FBU did not apply for judicial review of that decision when it was made in 2015. The court should therefore not grant relief now.

(10) To discontinue the CPC system at the four fire stations would place those voluntarily working that shift system under severe financial pressure and would disrupt family arrangements and child care arrangements; for example, to Mr Wayne Dunn, one of the Authority's witnesses who has worked under CPC arrangements for three years and wishes to continue.

(11) Relief should be refused under section 31(6) of the Senior Courts Act 1981 on the ground of undue hardship to those working CPC arrangements and on the ground that to grant relief would be detrimental to good administration: *Caswell v. Diary Produce Quota Tribunal for England and Wales* [1990] 2 AC 738, per Lord Goff at 741D-H and 748G-749F; and *R. v. Aston University Senate, ex p. Roffey* [1969] 2 QB 538, per Donaldson J at 555:

> "the prerogative remedies are exceptional in their nature and should not be made available to those who sleep upon their rights".

(12) In the present case, to prevent the use of CPC shifts would prejudice the population of South Yorkshire because a fresh consultation exercise would have to be held, leading to a fresh IRMP; budget cuts would have to be achieved by other means than by the saving permitted by use of CPC; and emergency response times would be placed at risk.

The Issues: Reasoning and Conclusions

85. I will begin by considering the standing of the employment tribunal's decision in the *Mansell* claims. I was treated to much erudition and learning on the subject of issue estoppel in the strict sense, the related and broader *Henderson v. Henderson* principle and the modern articulation of the principles, found in Lord Bingham's speech in *Johnson v. Gore-Wood & Co (No 1)* (cited above).

86. However, the debate turned out to be academic because it concentrated on private law and was not focussed on the special position occupied by judicial review claims. It turned out that both parties were content to accept the judicially endorsed formulation of Professor Wade in the 5th edition of his book, *Administrative Law*, published in 1982. In *R. v. Secretary of State for the Environment* [1983] 1 WLR 524, May LJ (giving the judgment of the court of which McNeill J was the other member), said of judicial review proceedings, at 538-9:

> "In such proceedings, there are no formal pleadings and it will frequently be difficult if not impossible to identify a particular issue which the 'first' application will have decided. Moreover, we do not think that there is in proceedings brought under Order 53 any true lis between the Crown, in whose name the proceedings are brought (and we venture a reservation about whether or not issue estoppel could operate against the Crown), and the respondent or between the ex parte applicant and the respondent. Further, we doubt whether a decision in such proceedings, in the sense necessary for issue estoppel to operate,

is a final decision: the nature of the relief, in many cases, leaves open reconsideration by the statutory or other tribunal of the matter in dispute.

We respectfully adopt a passage from Professor Wade's treatise on *Administrative Law*, 5th ed. (1982), p. 246 where he writes:

> 'in these procedures the court 'is not finally determining the validity of the tribunal's order as between the parties themselves' but 'is merely deciding whether there has been a plain excess of jurisdiction or not.' They are a special class of remedies designed to maintain due [process] in the legal system, nominally at the suit of the Crown, and they may well fall outside the ambit of the ordinary doctrine of *res judicata*. But the court may refuse to entertain questions which were or could have been litigated in earlier proceedings, when this would be an abuse of legal process; and in the case of habeas corpus there is a statutory bar against repeated applications made on the same grounds.'"

87. And in the same case in the Court of Appeal, [1984] 1 WLR 592, Dunn LJ said this at 602:

> "Although not necessary for my decision I also incline to the view that the Divisional Court was right to hold that the doctrine of issue estoppel cannot be relied on in applications for judicial review, although the court has an inherent jurisdiction as a matter of discretion in the interests of finality not to allow a particular issue which has already been litigated to be re-opened. This depends upon the special nature of judicial review under R.S.C., Ord. 53 which makes it different both from ordinary civil litigation inter partes and from criminal proceedings. Like the Divisional Court, I adopt the passage from Professor Wade's *Administrative Law*, 5th ed. (1982), p. 246, set out in the judgment of the Divisional Court at p. 539."

88. In the light of that authority, I approach the decision in the *Mansell* litigation in the following way. First, I do not treat it as binding either on the parties or the court. It is, though, entitled to the high respect due to a specialist tribunal experienced in dealing with claims of this kind. The proceedings were private law claims by individuals. They were brought under section 45A of the 1996 Act, which was added to the 1996 Act by regulation 31(1) of the Regulations. Neither party appearing before me was a party to the tribunal claims.

89. Second, however, I reject Mr David Mitchell's submission that the tribunal's findings on "contravention" of the Regulations were *obiter*. The findings relating to "contravention" were necessary to complete the successful cause of action for the claims under section 45A(1)(a) of the 1996 Act. That does not mean, however, that I am bound to accept the unappealed findings of the tribunal as correct if, on analysis, they turn out to be wrong.

90. Mr Mitchell wished to rely on regulations 21 and 22. His predecessor appearing before the tribunal had not done so. I will not refuse to listen to his arguments on those two regulations, whose effect I have set out above. The question before me relates to the continued future operation of the CPC system in South Yorkshire. I think it would be

wrong to shut out, on procedural grounds, submissions of potential relevance to that issue.

91. Next, is the CPC system lawful? I bear in mind that the objective of the Directive, transposed into domestic law by the Regulations, is to protect the health and safety of workers by placing limits on their working time, subject to permitted derogations and exceptions; hence, in *Commission v. United Kingdom* case, the UK was found not justified in issuing guidelines suggesting that the effect of the Regulations was essentially permissive and voluntary.

92. The CPC system does not prevent compliance with regulation 4 of the Regulations, as Mr Oliver Segal QC, for the FBU, accepted. Compliance with regulation 4(2) is ensured by obtaining a voluntary written opt-out from each firefighter who volunteers to work CPC shifts. It would be another matter if the signing of the opt-out was not voluntary, but that is not suggested here.

93. Regulation 6 is more difficult. There is no individual opt-out provision. The regulation applies unless modified or disapplied by a collective or workforce agreement, or unless the exception in regulation 21 applies, in which case regulation 24 must be complied with. There is no collective agreement relating to CPC in South Yorkshire which could affect the applicability of regulation 6.

94. It seems to me clear that those who work CPC shifts are "night workers" doing "night work" for the purposes of regulation 6. The parties do not disagree with this proposition. Their normal hours of work in any reference period applicable in their case therefore should not exceed an average of eight hours for each 24 hours, unless regulation 21 applies.

95. It is clear that where CPC shifts are worked, the limit of eight hours is exceeded. A CPC shift requires up to 96 hours of continuous duty, made up of an 11 hour "on station" day shift (from 8am until 7pm) followed by a 13 hour night "on call" night shift (from 7pm to 8am). The fact that on the night shift the firefighters may be asleep or relaxing at the fire station does not mean they are not on "working time"; see the reasoning in *Matzak* and *Jaeger*.

96. The firefighters on CPC shift are entitled to rest time if called out between midnight and 7am (or 8am). The rest time will be at least one hour; longer if the time spent working during the call out exceeds 45 minutes. The earned rest break must be taken at the fire station; the firefighters entitled to it cannot, in practice, go home to rest; but they are not at the disposal of the employer while the rest break lasts, i.e. they cannot be called out again during it.

97. I would accept that during those rest breaks the firefighters may not be on "working time", even though they are not, in practice, able to go home to rest and must do so at the fire station. They are not, during those rest breaks, at the employer's disposal, unlike the firefighters in *Matzak* who had to be at the station within eight minutes, and unlike the "on call" hospital doctor in *Jaeger*, who could be woken at any time to perform duties.

98. But the availability of the rest break is contingent on a post-midnight call out occurring. The four CPC fire stations have been chosen deliberately because this is relatively

infrequent at those stations. If there is no post-midnight call out, the period of continuous working time is 96 hours. If, say, there are six half hour post-midnight call outs during those 96 hours, there will be six one hour breaks during the 96 hours and the other 90 hours will be working time.

99. While under CPC the actual duration of continuous duty depends on the number and duration of post-midnight call outs during each 96 hour period, it is plain that the CPC system is designed, calculated and intended to require those taking part in it to spend many 24 hour periods during which more than eight hours will be spent on working time. It is therefore clear that their normal hours of work in a reference period applicable in their case exceed eight hours for each 24 hour period.

100. Mr Mitchell submitted that regulation 21 disapplies regulation 6 in relation to CPC shift firefighters because their activities "involve the need for continuity of service". I do not agree and am not surprised that his predecessor did not trouble the employment tribunal with the argument. There is no reason why continuity of service by individual workers is required at fire stations where CPC shifts are worked. It is evidently not required at fire stations where those shifts are not worked. Yet, the service is the same.

101. Even if that were wrong, the Authority could only rely on regulation 21 if it, or the Service, complies with regulation 24. This requires that where a worker is required to work during a period that would otherwise be a rest period or a rest break, the employer must wherever possible allow the worker to take an equivalent period of compensatory rest, and in exceptional cases where that is not possible for objective reasons, afford him such protection as may be appropriate in order to safeguard his health and safety.

102. I do not think that the Service or the Authority is providing CPC shift workers with "an equivalent period of compensatory rest" where CPC shifts are worked. The brief respite afforded to firefighters following post-midnight call outs at CPC fire stations do not come near to satisfying the requirement to provide "compensatory rest" periods, as explained in *Jaeger*, at [94]-[97] and in *Union Syndicale* at [50].

103. This is because the respite periods of one hour or more available after post-midnight call outs are not a complete break from the work environment; the employee is not able to stop work, go home, relax, forget about work and pursue his own interests. Nor do the work periods regularly alternate with rest periods during the overall 96 hour duty period. They arise randomly as and when there is a post-midnight call out.

104. Nor does the period of respite correspond to any reduction applied to rest periods under a permitted derogation authorised by article 17 of the Directive; it corresponds to the duration of a post-midnight call out and is not available at all unless there is one. They are not directly linked to the duration of work "extended owing to the completion of overtime" (*Jaeger*, at [97]).

105. Nor do I consider that cases where CPC shifts are worked are in any way exceptional cases where, for objective reasons, it is not possible to grant such a period of rest as is otherwise required to be provided under regulation 24(a). The CPC system forms part of the regular routine shift system at the fire stations where it is used. They are not exceptional.

106. Mr Mitchell did not attempt to explain how the provision for rest breaks within the CPC system, during the overall 96 hours of continuous duty, could be said to measure up to the requirements of regulation 24 and the equivalent provisions in the Directive, as interpreted in the case law of the Court of Justice. His submission that they did was muted and undeveloped.

107. The individual employees affected cannot complain to an employment tribunal of the apparent breach of regulation 6(1). They could, possibly, bring a private law claim in contract for declaratory relief and an injunction in the High Court, but such a claim would be far from sure of success (cf. *British Airline Pilots Association v. Hepburn* (Butcher J, 4.5.18, transcript not yet available)).

108. Conceivably, the FBU could itself bring a claim for declaratory relief, though the success of such a claim would be uncertain; cf. *Mullins v. McFarlane* [2006] EWHC 986 (QB), per Stanley Burnton J as he then was at [39]:

> "My provisional view is that there is no jurisdictional (in the narrow sense of the word) boundary to the power of the Court to grant declaratory relief in this context: the jurisdiction of the Court under CPR Part 40.20 to grant declaratory relief in unrestricted. The restrictions on the power are discretionary. …."

109. But the primary method of enforcing regulation 6 is through regulation 6(2) and the criminal law. The Authority must be aware that its position under the criminal law is not comfortable, but it is currently afforded a measure of *de facto* protection by the refusal of the HSE to take any action and the statutory bar on any private prosecution except with the consent of the Director of Public Prosecutions (see regulation 29C of the Regulations).

110. I have come to the conclusion that I should not grant any relief, the effect of which would be to declare the Authority's conduct (or the Service's conduct) criminal. Indeed, Mr Segal recognised at the hearing that it would not be appropriate to do so and did not press for the grant of such relief. I take into account the factors mentioned by Simon Brown LJ in the *Camelot* case, mentioned above.

111. In particular, if there were a criminal charge against the Authority, it would be entitled to benefit from important safeguards notably absent in these proceedings: formulation of a specific charge, the presumption of innocence, the burden of proof and the criminal standard of proof. I do not think it would be right to declare the Authority in breach of regulation 6 without those safeguards being available to it.

112. I come next to regulation 10 of the Regulations. It deals with daily rest breaks, as distinct from rest periods for night workers. Regulation 10(1) requires that 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. It may be modified or excluded by collective agreement, but has not been in this case.

113. The requirement may be disapplied in cases where regulation 21(c) applies; i.e. where the worker's activities "involve the need for continuity of service". As I have already explained, that is not the position here; it is not sufficient if the employer's activities involve the need for continuity of the service provided by the employer, as explained in Peter Gibson LJ's judgment in *Gallagher* at [37].

114. Unlike regulation 6, regulation 10 is disapplied – subject to regulation 24 - by regulation 22 in the case of shift workers when they change shift and cannot take a daily rest period between the end of one shift and the start of the next one (regulation 22(a)). Mr Mitchell argued faintly that this exclusion applied here, but it does not fit the facts: the 96 hours of duty are occasionally interrupted but there is no change of shift during the 96 hour period.

115. Thus, the four shifts of 24 hours each, within the overall 96 hour period, are each a single shift. Regulation 22(a) is aimed at a worker who changes from one shift pattern to another; say, from the day shift to the night shift or vice versa. The worker may need to work a day shift immediately following on from a night shift at the point of changing from the night to the day shift, or vice versa. That is a world away from the CPC shift system.

116. And even if that were wrong, once again the requirements of regulation 24 are not met here, for the reasons already explained. I conclude that the Authority is not assisted by regulation 22; that counsel for the Service at the employment tribunal was right not to rely on it; and that Mr Courtney was right to admit that the CPC system operated in clear breach of regulation 10.

117. Unlike in the case of regulation 6, the criminal law plays no part in the enforcement of an employer's obligation under regulation 10. An affected employee may, under regulation 30, complain to an employment tribunal and there, if successful, obtain a declaration and compensation. It is therefore unlikely that a private law action in the High Court would be entertained; less likely than in the case of regulation 4 or 6, which do not carry with them the remedy of complaint to a tribunal.

118. I conclude that the position under regulation 10 is not defensible. It does not, unlike regulation 6, engage the criminal law. I do not see how the CPC system as it exists at the four fire stations in South Yorkshire, can operate lawfully in compliance with regulation 10. I agree with the employment judge that the breach is blatant and obvious and I note that Mr Courtney also agrees.

119. Councillor Atkin drew attention to Mr Courtney's agreement on the point in his letter of 11 April 2017. Nonetheless, he added that the IRMP this must be prepared "within the budget that is available" and that "to mitigate the risks that our IRMP identifies, within the financial envelope that we describe …., CPC will continue to be one of the duty systems that are employed so as to continue to provide the most equitable emergency response to the people of South Yorkshire."

120. The response to the FBU's letter before claim repeated, in similar vein, that in the face of budget cuts, the Authority had "chosen to retain CPC in order to best meet its overriding legal duty to safeguard the people of South Yorkshire". The FBU points to these statements as demonstrating a conscious commitment by the Authority to a course of conduct necessarily entailing a deliberate breach of the law, seeking to excuse itself by pleading poverty.

121. Mr Mitchell correctly conceded at paragraph 89 of his skeleton argument that the Authority was required to exercise its statutory functions in a lawful manner. He did not concede that the Authority was acting unlawfully, but in my judgment it was and is. On that footing, he submitted that the court should nevertheless refuse relief in the

exercise of its broad discretion to do so, or applying section 31(6) of the Senior Courts Act 1981.

122. I now have to consider his arguments in support of that proposition. First, the Authority submits that the FBU has acquiesced in the use of CPC at other locations and has accepted it as a financial necessity, while refusing to enter into a collective agreement in South Yorkshire that would validate its use. I do not accept the force of this argument, for the following reasons.

123. First, the officials who are said to have privately endorsed its use are not named. Second, the FBU's evidence is that its officials have not done so; they have acknowledged that the FBU understands the attraction of CPC to the Authority. Third, a union may bestow its agreement to modification of the working time regime by a collective agreement under regulation 23(a), but that is a voluntary act. None has been concluded.

124. Fourth, the use of CPC elsewhere is not the same version of CPC in use in South Yorkshire and appears to relate to day shifts rather than night work. Fifth, the FBU has taken industrial measures to oppose CPC in South Yorkshire. Sixth, it has opposed CPC in South Yorkshire by supporting the *Mansell* claimants and in Wales (unsuccessfully) by supporting the *Gale* claimants.

125. Next, the Authority argues that the Administrative Court should not interfere where the HSE, charged with enforcing the criminal law, has declined to do so. I do not think the refusal of the HSE to bring criminal proceedings, despite recognising that there was a breach of regulation 6, should be decisive for the following reasons.

126. I recognise that the FBU could have brought a challenge by judicial review to the decision of the HSE in 2015 to refuse to take action. If it had done so, the Authority and the Service would no doubt have become interested parties. But such an application for judicial review would have been fraught with difficulty.

127. The first problem would have been that of alternative remedy. The Authority and the Service, and probably the HSE also, would surely have argued strongly that the appropriate remedy was to support a claim in the employment tribunal asserting a breach of regulation 10 (it could not have asserted a breach of rule 6, which is not justiciable in an employment tribunal).

128. This is, as history has shown, the very remedy which, though successfully invoked, has failed to check the continued use of CPC. The employment tribunal is not always the appropriate forum. The tribunal cannot vindicate the rule of law by granting declarations of unlawfulness. It can only secure observance of the law in individual cases. And it cannot entertain claims outside its statutory remit, such as claims alleging a breach of regulation 6.

129. The second problem would have been establishing the unlawfulness of the HSE's decision not to proceed with any enforcement action. True, its first reason for not proceeding was patently bad: that the usual "2-2-4" shift system which the CPC was replacing, was itself unlawful. Mr Carbutt's written evidence demonstrates conclusively that the 2-2-4 shift system complies with the Regulations. The tribunal in *Mansell* rightly agreed, at [39] and [40]. But it would have been very difficult to

persuade the Administrative Court that this first reason predominated in the deliberations of the HSE.

130. The HSE's second and probably predominant reason was that it would not be in the public interest to proceed against the Authority because it would disrupt the provision of fire services and could endanger the safety of the public. In my judgment, that reason would have seen off the threat of its decision being quashed. A body charged with enhancing public safety would not lightly be found to have acted unlawfully by deciding against expending scarce resources on action it thought would make the public less safe, not more.

131. It is important that the judicial review jurisdiction should is not stultified by over-enthusiastic reliance on the proposition that it should be a remedy of last resort. Judicial review applicants are often told they have selected the wrong target, or invoked the wrong remedy. As Stanley Burnton J pointed out in the *Lambeth* case, the appropriateness of granting or withholding relief depends on all the circumstances and each case turns on its own facts. Here, I am unpersuaded that the two alternative remedies proposed are or were adequate.

132. Mr Mitchell submits, next, that the court should not grant relief, because to do so would interfere with the exercise of the Authority's core functions under Part 2 of the 2004 Act; namely, providing firefighting services and keeping the public as safe as possible from fire. He also says that to grant relief to stop the use of CPC would wrongly interfere with the employment rights of workers voluntarily working the CPC shift system.

133. These are the workers at the four fire stations at which CPC operates, who are paid a premium of 30 per cent and have signed an opt-out in respect of regulation 4. One of them, Mr Wayne Dunn, attests that his structured child care arrangements would be disrupted, as well as his financial position worsened, were he required to give up working CPC shifts at Edlington and the premium they attract.

134. Mr Mitchell relies on section 31(6) of the Senior Courts Act 1981 in this regard. He says there has been much delay before the proceedings were issued; they should have been issued in 2015. He argues that substantial hardship would be caused to the firefighters choosing to work CPC shifts and that it would be detrimental to good administration to condemn a shift system that enables the Authority to make much needed savings and which enhances public safety without endangering that of any of the workers concerned.

135. Mr Michell relies on *Caswell v. Dairy Produce Quota Tribunal for England and Wales* (cited above). The applicants challenged, long out of time, a decision adverse to them arising under the then delegated legislation relating to milk quotas. The House of Lords upheld the decision of Popplewell J (upheld by the Court of Appeal) that although the relevant tribunal had erred in its construction of the regulations, relief should not be granted.

136. The House upheld the judge's finding that to grant relief would cause difficulty with other decisions being reopened, since the amount of quota available was finite; and that the grant of relief would therefore be detrimental to good administration. Lord Goff, giving the leading speech, observed that it not be wise to attempt a formulation of any

precise definition or description of what constitutes detriment to good administration (page 749F). But he was clear that effects on the rights and interests of third parties were relevant, as well as prejudice to the applicant if relief is refused.

137. Mr Mitchell says that if relief is granted in this case, the settled practice of CPC will be disturbed and that this would cause substantial hardship to the firefighters working the CPC shifts and detriment to good administration by undermining public safety. He emphasised that the CPC shifts were safe for the workers concerned; none of them had been hurt and protestations of fatigue by a witness for the FBU working the shifts should be dismissed.

138. I was also referred to *R. v. Brent LBC ex p. Walters* (1998) 30 HLR 328. A council tenant applied for judicial review of a local authority's decision to proceed with the disposal of council housing to a private sector organisation. The council tenant was among those required under the statutory scheme to be consulted, as he stood to lose his secure tenancy. He successfully argued that the consultation was flawed.

139. However, the Court of Appeal upheld the decision of Schiemann LJ to dismiss the claim in the exercise of the court's discretion. The Court of Appeal held that section 31(6) of the 1981 Act did not limit the circumstances in which relief could be withheld in judicial review proceedings in the exercise of the court's discretion. Judge LJ, giving the lead judgment, rejected the argument that once illegality was established, an applicant was entitled to relief *ex debito justitiae*, save in very limited circumstances.

140. Judge LJ noted at 380-2 that in considering whether to withhold relief, it was necessary to have close regard to the nature of the illegality and its consequences. He pointed to overwhelming evidence that if the consultation process were restarted, the whole scheme would be placed at risk and this would endanger the interests of numerous other tenants. The court (he said, at 381):

> "should not, automatically, ignore the adverse consequence of an order for judicial review on a large number of council tenants who did not themselves cause or contribute to the non-compliance. It is in this context that the fact that Mr Walters' application is not supported by any, or any significant group of other tenants, becomes relevant. We have no difficulty in agreeing that the exercise of the court's discretion does not depend on whether it will attract popular support. If Mr Walters' rights have been breached the unpopularity of granting relief to him will not deter the court from granting it. However when there are other genuine interests which will be adversely affected, the court is not prevented from analysing precisely the rights of which a single or a few individuals have been deprived, and their consequent loss (in whatever form it takes) and the consequences of upholding their rights contrary to the interests of many others. As the grant of judicial review may have substantial adverse consequences for a large number of blameless individuals beyond the applicant himself, in an appropriate case, of which this is one, the exercise of discretion permits account to be taken of these conflicting interests."

141. He went on to hold (at 382) that the judge hearing the matter below had considered all factors relevant to the exercise of his discretion. His decision that the effect on legal rights of withholding relief would be minimal or non-existent, and that the applicant's position was adequately protected by an undertaking to ensure that his "right to buy" was preserved, was sound and not one with which the Court of Appeal was prepared to interfere.

142. The present case is very different from both *Caswell* and *Walters*. In both those cases, the legal error that had occurred lay in the past. In the present case, the illegality is continuing and there is a concerted plan to continue the unlawful conduct. The consequences of granting relief, for the parties and others affected, must still be considered. But the case for relief is stronger where there is no plan to put an end to the unlawful conduct and every intention of continuing with it.

143. I am troubled that the stance of the Authority and the Service offers an affront to the rule of law. The letter of Councillor Atkins, and the letter from Barnsley Metropolitan Borough Council (in response to the letter before claim), in my judgment clearly indicated that compliance with the law would be too expensive and that it would lead to a risk to the public. If that is so, the remedy lies with the legislature, but the Authority does not recognise this.

144. Mr Blunden says in his witness statement that to stop CPC would compromise public safety and insists that firefighters working CPC shifts are safe. With respect, that is not a judgment for him or one the Authority is empowered to make. It is a judgment made in the applicable legislation, which determines what is acceptable for the health and safety of the workers concerned. Mr Blunden and the Authority cannot be heard to say that the workers need not worry as they are quite safe without the standards set by the law being met.

145. If the law is defective, it should be changed, not disobeyed. The court is asked for pragmatic reasons to turn a blind eye to the breach of law. The pragmatic reasons are quite strong: CPC is popular with some firefighters; it is economic; it is voluntary, in a sense; it has not led to accidents; it is subject to mitigation measures to protect against fatigue; it may promote public safety; it is confined to low incidence fire stations; and it could be validated by a collective agreement.

146. These points go some way to explaining why the FBU's position may not always have been fully consistent and why the Authority, the Service and some firefighters find CPC a sound and sensible system. Those points mitigate the harm done to the public interest by breach of the law but they do not provide an escape from the proposition that CPC in the form used in South Yorkshire does not and cannot operate in accordance with the Regulations.

147. This is an unusual case where the real complaint of the defendant is that the law is getting in the way of the public interest. The Authority cannot choose, even with the best of intentions, to strike the balance between the safety of its workers and that of the public in a manner different from the balance struck by the law. It is no answer that the workers concerned are paid handsomely to connive at the breach; nor that they are in fact safe and not in need of the law's protection.

148. It is true that the rights the Authority and the Service propose to continue breaching are private law rights conferred (by regulation 10) on individuals and enforceable in the employment tribunal only, unlike the right conferred by regulation 4. But, as I have said, the invocation of those private law rights did not stop the continuing breach of regulation 10. For reasons already discussed, I do not think I should withhold relief on the ground that the FBU has chosen the wrong remedy or waited too long.

149. I appreciate that the Authority is doing its best to promote public safety and cope with severe budget cuts. I also regret the disruption to individuals that may be caused by the grant of relief. It may perhaps increase the likelihood that the FBU and the Authority will enter into a collective agreement to modify the regime via regulation 23. But I do not feel able to refuse relief where there is a conscious decision to commit a continuing and systematic breach of the law. You cannot perform one legal duty by breaching another.

150. For those reasons, I will allow the application and I propose to grant a declaration to the effect that the Authority's CPC shift system is contrary to the rights of firefighters under regulation 10 of the Regulations who are employed by the Service and work that shift system. I do not think any further relief beyond that is necessary. It is not necessary and in my judgment would not be appropriate to quash the IRMP since it is in all other respects lawful.