

POLICE FEDERATION OF ENGLAND & WALES

WORKING TIME REGULATIONS

a Guide for Joint Branch Boards

August 2001

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1. INTRODUCTION

1.1 The Working Time Regulations 1998 came into force on 1 October 1998, and implemented the European Directive on the Organisation of Working Time (EWTD). The WTR were amended by the Working Time Regulations 1999 which came into force on 17 December 1999. Throughout this Guide, the Working Time Regulations 1998, as amended by the Working Time Regulations 1999, will be referred to as the 'WTR'.

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

- ∃ a limit on average weekly working hours of 48
- ∃ a limit on night workers= average normal daily hours of 8
- ∃ health assessments for night workers
- ∃ a minimum daily rest period of 11 consecutive hours
- ∃ a minimum weekly uninterrupted rest period of 24 hours
- ∃ rest breaks at work (where the working day is more than 6 hours, an uninterrupted period of not less than 20 minutes)
- ∃ 4 weeks paid annual leave

The WTR are primarily a health and safety provision.

1.3 The above provisions represent minimum standards of protection for the health and safety of workers. Employers are required to take all reasonable steps to provide this protection. Failure to do so could be a criminal offence.

1.4 The WTR apply to all federated ranks, though the very limited derogations applicable to the police service mean that the nature of application may differ depending on the duties assigned to the member.

General impact on members

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

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

Entitlements under other provisions (*Regulation 17*)

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

The WTR cannot be used to reduce existing provisions contained in Police Regulations which are more favourable than those in the WTR. A worker is entitled to take advantage of whichever right is, *in any particular respect*, the more favourable.

Derogations

- 1.8 The EWTD allows certain derogations from some of these provisions in certain circumstances, or in relation to particular workers or groups of workers. The Government has adopted some derogations on a national level by including them in the WTR, whilst others remain to be agreed (or not) by either collective or workforce agreements (see Sections 14 and 16 below).
- 1.9 The Police Regulations can be amended to provide for the framework for working time in the police service to accommodate derogations available within the police service (where they do not already do so). In addition, within the Police Regulation framework, the WTR expressly authorise Aworkforce agreements≡ between chief officers and JBBs (WTR Regulation 41).
- 1.10 This briefing document therefore seeks to provide appropriate guidance to JBBs in dealing with this complex legislation, and to provide a common framework of broad principles within which the maximum consistency can be achieved across all forces. It covers only those points and provisions of prime relevance to the police service. It is not intended to be exhaustive and JBBs will need also to refer to the WTR itself.
- 1.11 Copies of the WTR are annexed hereto (Annex III).

2. COVERAGE AND SCOPE

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

- 2.1 This Regulation does *not* apply to the federated ranks. Amongst others, this Regulation covers workers like managing executives or those with >autonomous decision-taking powers=. The test is that Aon account of the specific characteristics of the activity in which he is engaged, the duration of his working time is not measured or predetermined or can be determined by the worker himself≡. Earlier fears that some forces may seek to exclude inspecting ranks from scope of the WTR have so far proved largely unfounded.
- 2.2 However, our advice remains that we do not believe the test in this Regulation applies to the inspecting ranks. In the vast majority of cases, inspectors= and chief inspectors= time (tours of duty) will be predetermined to a large extent and their hours recorded in some way (and thus measured). Further, and importantly, the characteristics of the activities of inspecting ranks do not require the working time not to be measured, etc.

Partly measured working time (*Regulation 20(2)*)

- 2.3 The WTR 1999 introduced a new Regulation 20(2) as under:

Where part of the working time of a worker is measured or predetermined or cannot be determined by the worker himself but the specific characteristics of the activity are such that, without being required to do so by the employer, the worker may also do work the duration of which is not measured or predetermined or can be determined by the worker himself, regulations 4(1) and (2) and 6(1), (2) and (7) shall apply only to so much of his work as is measured or predetermined or cannot be determined by the worker himself.

The effect of this new Regulation is to restrict the provisions relating to maximum weekly working time and night work only to that part of a worker's time which is measured, predetermined or cannot be determined by the worker himself.

- 2.4 According to Government advice, WTR Regulation 20(2) would only apply to workers who "choose to work longer of their own volition". It would not apply to periods of paid overtime, which is measured and determined by the employer; nor would it apply to extra hours if a worker is explicitly instructed to work at specific times, eg being required to attend a meeting.
- 2.5 This Regulation weakens the protection previously enjoyed by a significant number of members under the WTR. Some of our members are provided with a workload by higher ranks and are normally expected to complete that work within a defined timescale. Whereas a member may not be told expressly that they must undertake the work between specific hours, the volume of work may be such that they have no choice but to work longer than their rostered hours, and

without being expressly required by a senior officer to work overtime. In other words, they are compelled to do so because of the volume of work with which they have been provided. In such circumstances, it cannot be said that additional hours worked are truly voluntary.

- 2.6 Our lawyers have advised that this Regulation is likely to be given a very restricted interpretation by tribunals and courts, not least because the WTR have to be interpreted as compliant with the EWTD.

JBBs are advised to contact the JCC through the General Secretary's office if they encounter problems in respect of this Regulation.

- 2.7 Section 14 deals with coverage and scope of the WTR as they affect the police service in the wider context.

3. WORKING TIME (*Regulation 2*)

- 3.1 >Working time= is defined in Regulation 2 as any period during which a worker is working, at his employer=s disposal and carrying out his activity or duties. It is understood that all three elements must be satisfied for time to be >working time=, and this has been confirmed in a European Court of Justice (ECJ) decision in relation to Spanish doctors (see para 3.5).
- 3.2 Working time includes all time comprising duty time within the meaning of the Police Regulations and also includes periods of training provided, directly or indirectly, by the employer. JBBs and chief officers can by local agreement determine that other time may also comprise working time.

PNB agreement

- 3.3 The PNB has agreed (PNB Circular 01/2, see Annex IV) that the following periods should also be included in the national definition of police officers' working time:
- (i) travel, outside of normal rostered duty hours and not currently covered by Police Regulation 32, to and from duty at a place other than the normal place of duty, eg travel to and from court;
 - (ii) travel to and from training courses other than at the normal place of duty.

Note: PNB Circular 01/2 is an advisory circular, which requires amendment to Police Regulations or specific authorisation by Home Office Circular.

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

On call/standby

- 3.4 The WTR are not explicit on whether the time workers are on call or standby is working time. Government policy in this area is that a worker who is >on call= but otherwise free to pursue their time as their own would not be working until >called= to work.
- 3.5 In 2000, the ECJ made a decision which has clarified the position to an extent. The case related to Spanish doctors, and the ECJ decided (for the purposes of the EWTD) that doctors required to be on call in the sense of being present at the workplace with a view to providing their services were carrying out their duties and that such on-call time is therefore classified as 'working time'. Such doctors satisfied the first two conditions of the definition of 'working time', ie any period

during which the worker is working, and at the employer's disposal. With regard to the third condition, ie carrying out his activity or duties, the ECJ held that the fact that the doctors were required to be present *at the health centre* with a view to providing their services meant that they were carrying out their duties.

- 3.6 So when an officer is required to be at a given workplace location, it is strongly arguable that this should count as working time, even though the officer is described as being "on call".
- 3.7 As stated in para 3.2, it is open to JBBs to reach agreement that additional periods comprise working time and it is recommended that existing local agreements determining what is or is not duty time be relied upon wherever possible. It may, however, be possible for JBBs to agree with chief officers that some other time, though not duty time for the purposes of the Police Regulations, comprises working time for WTR purposes, eg a period on call when the officer need not be at a given location but cannot move more than a given distance from home.
- 3.8 Although Staff Side attempted to reach agreement at PNB that 'on call' time should be treated as working time for the purposes of the WTR, it was not successful. However, the Official Side has agreed to issue guidance to forces reminding them of their duty of care as employers and in exercising that duty of care to have regard to the nature and extent of on call or standby requirements. A copy of that guidance is attached at Annex X.

4. NIGHT TIME (*Regulation 2*)

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

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

5. NIGHT WORKERS (*Regulation 2*)

5.1 Who is a night worker? The WTR specify a night worker as anyone who works at least 3 hours of their daily working time during night hours (see para 4.1), either:

- i) as a normal course (which will include a member working nights for the majority of the days they work, but will probably include others also - see below); or
- ii) any other proportion determined under Police Regulations or (where regulations are silent) agreed by the JBB and the chief officer.

5.2 It was at first suggested that only members working 50% or more of their shifts on nights would be night workers. However, Government advised that Aas a normal course≡ means working during night time on a regular basis, including for example, on a rotating shift system that results in regular night working (as opposed to occasional or ad hoc night working). According to Government advice, therefore, those members working 3-shift systems and VSAs that incorporate >night time= as explained in para 4.1) should thus be classified as night workers under the WTR.

5.3 This Government advice was confirmed and strengthened by a Northern Ireland High Court decision (*R v Attorney General for Northern Ireland ex parte Burns*). The decision in this case was that a worker on a 'standard' rotating shift system (working nights one week in three) is a 'night worker', even though the night shifts did not occur on the majority of days worked. The Court held that working at least three hours during night time "as a normal course" involved no more than that it should be a regular feature of a worker's employment.

PNB agreement

5.4 In the light of the Northern Ireland High Court decision, the PNB has agreed (PNB Circular 01/2, see Annex IV) the following definition of a 'night worker' for the purposes of the police service:

"A police officer who regularly works shifts which include nights, irrespective of the shift pattern actually worked, shall be a 'night worker' for the purposes of the Working Time Regulations".

Note: PNB Circular 01/2 is an advisory circular, which requires amendment to Police Regulations or specific authorisation by Home Office Circular.

Pending amendment to Police Regulations or a Home Office Circular, it is

advised that, unless agreement can be reached locally that the term Night worker should include those members working regular nights, under a 3-shift system or VSA etc, then no agreement should be made. It may be necessary to progress proceedings to establish that such members are night workers because they work nights as a normal course.

6. HEALTH ASSESSMENTS (*Regulation 7*)

- 6.1 All workers classified as night workers are entitled to free (to the worker) health assessments at regular intervals. Forces should, if health assessments have not already taken place, be making arrangements for those assessments to be undertaken as soon as practicable on members who are night workers, as the WTR require such assessments to be undertaken *before* members are assigned to night working.

PNB agreement

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

7. LIMITS ON NIGHT WORK (*Regulation 6*)

- 7.1 An employer must take all reasonable steps to ensure that a night worker=s normal hours of work (not just hours of night work) do not exceed an average of 8 hours in each 24 hours over the reference period of 17 weeks. Under WTRRegulation 6(3)(a), successive reference periods of 17 weeks may be set by the Police Regulations or agreements between JBBs and chief officers. Where no agreement is reached, the reference period will be any period of 17 weeks in the course of a worker=s employment (a rolling reference period). This means that, provided a worker has not worked more than the average in the 17 weeks preceding, including today, then the WTR are not breached in respect of that 17 week period.
- 7.2 It may be to our members= advantage that there is a rolling reference period (that rolling period will include a period of 17 weeks which might otherwise have been fixed as a 17 week reference period). Hence, if chief officers want to agree otherwise, JBBs should ensure that they obtain something material in return.

This may have particular impact for inspecting rank members who are night workers and for whom the Police Regulations provide no limitations on working time.

Special hazards (*Regulation 6(7)*)

- 7.3 Where a night worker=s work involves special hazards or heavy physical or mental strain, there is a limit of 8 hours *on the actual daily working time* allowed in any 24 hour period during which night work is performed. It may be argued that special hazards apply to much of the work of police officers and that, therefore, all officers classified as night workers should be restricted to a limit of 8 hours (per 24 hours) whilst working nights.
- 7.4 WTRRegulation 6(8) provides that the work of a night worker involves special hazards or heavy physical or mental strain if it has been identified as involving a significant risk to the health and safety of workers in a risk assessment made under regulation 3 of the Management of Health and Safety at Work Regulations 1999.
- 7.5 WTRRegulation 6(8) also allows JBBs to make agreements with chief officers identifying that the work of night workers involves special hazards, or heavy physical or mental strain. In the interests of the health and safety of members, serious consideration should be given by JBBs to reaching agreements that this is the case (and if appropriate that where this is breached, additional compensatory rest is permitted - see Section 15).

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

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

Overtime claim forms or rosters may not necessarily be relied upon to accurately record the number of weekly hours worked. Any periods of working time must be included (including any periods agreed by JBBs in a workforce agreement, and periods agreed at PNB, see Section 3). Periods of unpaid overtime under Police Regulation 28(3) should be included in the calculation, as should any travelling time treated as duty; whereas any periods paid for but not worked under Police Regulations 29(9)(f) and 28(7)(c) should not be included.

Agreement to exclude the maximum (*Regulation 5*)

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

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

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

- 8.6 The so-called "individual opt-out" from the maximum 48 hour working week in the WTR derives from a provision of the EWTD (Article 18(1)(b)(i)). This Article is due to be re-examined by the Council of the European Union before 23 November 2003. It is possible, therefore, that the "individual opt-out" in WTR Regulation 5 will be revoked at some point in the future.

9. DAILY REST (*Regulation 10*)

- 9.1 Workers are entitled to a rest period of not less than 11 consecutive hours in each 24 hour period (but see Sections 14 and 16).
- 9.2 Police Regulation 27(4)(a) currently provides for a period of not less than 8 hours between the ending of each daily period of duty and the beginning of the next (although this can be varied by agreement with JBBs).

Many shift systems currently in operation in forces may not accommodate the new entitlement to 11 consecutive hours daily rest - see Section 11.

PNB agreement

- 9.3 The PNB has agreed (PNB Circular 01/2, see Annex IV) that, in order to take account of WTR Regulation 10, Police Regulations should be amended as follows:

In Regulation 27(4)(a) substitute '11 hours' for '8 hours'

In Regulation 27 (4), after "unless the joint branch board agrees otherwise", insert "subject to an equivalent period of compensatory rest" (see also Section 15).

10. WEEKLY REST (*Regulation 11*)

- 10.1 Workers are entitled to an uninterrupted rest period of not less than 24 hours per week. This may be averaged at the sole discretion of the chief officer over a 2 week period, where workers would be entitled to 2 days' rest per fortnight: either by 2 uninterrupted periods of not less than 24 hours per fortnight or one such period of not less than 48 hours per fortnight. However, Government policy is that it would be good practice for employers and workers to agree beforehand which of these is to apply.
- 10.2 Police Regulations already allow for 2 rest days per week and this more favourable condition must prevail. In addition, many, if not most forces currently roster rest days as 2 consecutive days per week.

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

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

- 10.3 This Regulation provides that periods of daily and weekly rest should not overlap, *except where this is justified by objective or technical reasons or reasons concerning the organisation of work*. The Government has said that any case of dispute in this respect would be for the courts to decide.
- 10.4 Given that Police Regulations already provide for 2 rest days per week, it is not anticipated that such a dispute will arise.

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

11. SHIFT WORKERS (*Regulation 22*)

- 11.1 ***Subject to compensatory rest*** (see Section 15), the provisions for daily and weekly rest do not apply to shift workers when changing shift and they *cannot* take a daily or weekly rest period between the end of one shift and the start of the next one.

This should be borne in mind when agreeing shift systems and rosters in your force which should, in keeping with the protection of the health and safety of workers, wherever possible allow periods of daily and weekly rest.

If they have not already done so, JBBs may need to agree with chief officers that shift patterns accommodate appropriate compensatory rest for members where there is such a breach (such as for instance ensuring that a quick changeover is followed by a break well in excess of 11 hours).

- 11.2 Similarly, subject to compensatory rest, the daily and weekly rest provisions do not apply to >split-shift= workers. Police Regulation 24(3)(a) states that, as far as the exigencies of duty permit, the normal daily period of duty shall be performed in one tour of duty. It is understood that few, if any, split shifts are now worked in the police service.

12. REST BREAKS AT WORK (*Regulation 12*)

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

Albeit subject to the exigencies of duty, both Police Regulation 24(3)(b), which provides for a 45 minute break, and Schedule 3, which provides for a minimum 30 minute break on a sliding scale, are more favourable than this WTR regulation and, in most circumstances, should therefore prevail.

- 12.2 Advice about when rest breaks should be taken, and how a failure on the part of management to allow them can be challenged, can be found in Annex V, at the answer to question 4.

13. ANNUAL LEAVE (*Regulation 13*)

- 13.1 A worker is entitled to at least four weeks paid leave in each leave year. WTR Regulation 13(7) places a condition on this entitlement, namely, that a worker has to have been continuously employed for 13 weeks. However, a recent decision in the ECJ has ruled that this 13-week qualifying period is contrary to the provisions of the EWTD. Consequently, amending Regulations are expected shortly. Whereas this decision is not likely to impact widely on Federation members, it could nonetheless affect, say, a probationer who leaves the police service prior to completing 13 weeks' service, who would now be entitled to compensation related to entitlement to annual leave (see paras 13.11 – 13.13).
- 13.2 The minimum annual leave entitlement of four weeks can, according to Government advice, include public holidays.
- 13.3 A week's leave is equivalent to the time a worker normally works in a week. Typically, for police officers this is 5 days each week.

Police Regulations currently provide for a minimum of 21 days annual leave (equivalent to 4 weeks and 1 day), depending on length of service, in addition to 8 days public holiday. These provisions are more favourable and must prevail.

- 13.4 The WTR stipulate that the minimum entitlements to annual leave may not be replaced by a payment in lieu, except where the worker's employment is terminated (see paras 13.11 – 13.14).
- 13.5 WTR Regulation 13(9) states that the minimum entitlements to annual leave should only be taken in the leave year in which it is due. There can be no derogation from WTR Regulation 13(9). Police Regulations currently allow for up to 5 days to be carried over to the following leave year. On the face of it, therefore, WTR would appear to restrict carry over of holiday entitlement to a member's entitlement over and above 20 days. In the case of a member on the minimum entitlement of 21 days, for instance, this may mean he or she could carry over only 1 day's leave, not 5 as laid down in Police Regulations.
- 13.6 However, since WTR annual leave entitlement can include public holidays, and because members enjoy an *additional* entitlement to public holidays, it is advised that provided 8 days' public holidays are counted in the 20 days WTR entitlement, members could nonetheless continue to carry over up to 5 days' leave. In general terms, this means that a member can use their non-public holiday leave entitlement above and beyond 2 weeks and 2 days to carry over up to 5 days.

Whereas it may be disputed which specific leave days have been taken under WTR entitlement and which under Police Regulations entitlement, an Employment Tribunal has held (*Barton & ors v SCC Ltd*) that it was for the worker to choose which weeks he or she took as statutory leave [WTR] and

which as contractual.

Dates on which leave is taken (*Regulation 15*)

- 13.7 This Regulation sets out the procedures for both employers and workers in giving notice to take annual leave. These procedures are weighted heavily in the employer=s favour. For instance, whereas a worker may give notice to take 2 weeks' leave, say, ten months in advance of taking it, as long as the employer gives the equivalent amount of notice as the notified leave (ie 2 weeks in this case), the employer could cancel the worker=s leave only 2 weeks before the leave is due to be taken.

WTRegulation 15(5) allows JBBs to reach agreement with chief officers to vary or exclude such restrictive procedures, so unless the local arrangements are less favourable, JBBs may want seriously to consider retaining their existing arrangements. In any event, WTRegulation 15(3) will only apply to the four weeks' minimum period of annual leave and not to the remaining holiday entitlement under Police Regulations.

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

- 13.8 This Regulation sets out the date on which the leave year is taken to commence for the purposes of payment under the WTR only. In essence, there are three possible dates:
- (i) where service in the police commenced on or before 1 October 1998, the leave year begins on 1 October each year;
 - (ii) where service in the police commenced after 1 October 1998, the leave year begins on the date on which service began and on the anniversary of that date in each subsequent year; or
 - (iii) if there has been a "relevant agreement", the leave year can begin on whichever date is specified in that agreement.
- 13.9 In many forces the date of commencement of the leave year for the purposes of Police Regulations will be well established, but arrangements should be reviewed to identify whether that date has also been effectively established for the purposes of the WTR. One of the practical disadvantages of the WTR is that the leave year will commence on a different date for each officer who has joined the service after 1 October 1998.
- 13.10 The date of commencement of the leave year can be important. It could impact, for instance, where an individual wishes to pursue an entitlement arising under the WTR on termination of service (see paras 13.11 – 13.13). Just such a case arose in South Wales police early in 2001, details of which were circulated in JBB Circular No. 20/2001 (included at Annex VII).

If the Joint Branch Board considers it desirable to have a single leave year commencement date for all purposes, an agreement to that effect should be concluded in writing with the chief officer, which must comply with the conditions for workforce agreements laid down in WTR (see Section 16).

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

- 13.11 This Regulation confers an entitlement to a payment in lieu of leave which has accrued but not been taken on termination of employment. Such sum may either be provided for in a relevant agreement, eg a workforce agreement, or in the absence of such agreement, in accordance with the formula contained in WTR Regulation 14(3)(b).
- 13.12 Regulation 14(3)(b) says that the payment due shall be "a sum equal to the amount that would be due to the worker under WTR Regulation 16 in respect of a period of leave determined according to the formula $(A \times B) - C$ ", and it goes on to define that formula. Regulation 16 in turn lays down the method of determining the amount of a week's pay for holiday purposes, to be used in conjunction with the formula in Regulation 14.

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

- 13.13 It has not been the practice in the Police Service to pay for annual leave accrued but not taken on termination of employment, so this is a new entitlement for members. It should be noted that this entitlement applies only to the four weeks annual leave entitlement conferred by the WTR. However, the PNB has reached an agreement in this respect.

PNB agreement

- 13.14 The PNB has agreed (PNB Circular 01/2, see Annex IV) an improvement to the entitlement outlined in paras 13.11 – 13.13. If an officer on termination of service has not been able to take his/her leave then pay in lieu of leave should apply to **all** the officer's remaining annual leave entitlement, and is not limited to the annual leave entitlement under the WTR.

Note: PNB Circular 01/2 is an advisory circular, which requires amendment to Police Regulations or specific authorisation by Home Office Circular.

It should be noted that until Police Regulations have been amended, there is no legally enforceable right to payment for *all* remaining annual leave entitlement on termination, only annual leave entitlement under the WTR.

Payment for annual leave whilst acting up

13.15 We are advised that officers who perform the duties normally performed by a member of a higher rank should, in certain circumstances, be paid for annual leave at the higher rank's rate. For full details please refer to JBB Circular No. 50/2000 (included at Annex VIII). It should be emphasised that the entitlement to be paid at the higher rate during leave is limited to annual leave which arises under the WTR.

Note, however (see para 13.14) that PNB has agreed, for the purposes of WTR Regulation 14, to apply payment in lieu of remaining annual leave entitlement on termination of employment to *all* holiday leave entitlement. In the interests of consistent treatment in the calculation of holiday pay, it would be logical, therefore, for JBBs to seek an agreement to extend that principle in the case of payment for annual leave taken whilst acting-up.

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

Excluded sectors (*Regulation 18*)

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

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

Reference to the Acivil protection services≅ also applies to the police (see WTRregulation 2).

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

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

14.3 These exclusions can apply to the police, therefore, either on the basis of characteristics peculiar to the police service or to certain specific activities within the service, which inevitably conflict with the provisions of the WTR.

14.4 There is no definition of >inevitable conflict= and the Government has said that ultimately, any disputed case would be a matter for the courts to determine. Whilst this is not helpful, these exclusions must not be treated as blanket exclusions. That is to say, they apply *only* where such characteristics or specific activities which inevitably conflict with the WTR actually occur. We are advised that these exclusions should only apply in *exceptional* circumstances, such as might arise, for example, during widespread public disorder.

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

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

Other special cases (*Regulation 21*)

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

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

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

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

- ∃ where the worker=s activities involve the need for continuity of service or production
- ∃ where the worker=s activities are such that his place of work and place of residence are distant from one another or his different places of work are distant from one another
- ∃ where the worker is engaged in security and surveillance activities requiring a permanent presence in order to protect property and persons
- ∃ where the worker=s activities are affected by –
 - (i) an occurrence due to unusual and unforeseeable circumstances, beyond the control of the worker=s employer;
 - (ii) exceptional events, the consequences of which could not have been avoided despite the exercise of all due care by the employer; and
 - (iii) an accident or the imminent risk of an accident

Only activities involving the need for continuity of service are expressly stated to cover the police service, though the others listed above may also have some application.

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

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

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

15. COMPENSATORY REST (*Regulation 24*)

- 15.1 This Regulation provides that where any provision of the WTR is excluded by Regulation 21 then wherever possible workers should be allowed to take equivalent periods of compensatory rest. The Regulation does not expressly stipulate that these should be equivalent *uninterrupted* periods of rest, but in keeping with the protection of the health and safety of workers, uninterrupted periods would constitute best practice. For instance, if an officer had enjoyed only 6 hours of daily rest and was then, under circumstances existing in Regulation 21, recalled to duty, the equivalent period of compensatory rest should be 11 hours, not the 5 hours representing the balance of 11 hours after the 6 hours already enjoyed.
- 15.2 The Regulation further provides that in exceptional cases in which it is not possible >for objective reasons= to grant compensatory periods of rest, then workers shall be afforded >such protection as may be appropriate in order to safeguard the worker=s health and safety=. Neither >exceptional cases=, >objective reasons=, nor the alternative protection to be provided is defined in the WTR. However, it is suggested that exceptional circumstances would be very rare, such as a worker terminating his/her employment before compensatory rest could be taken.
- 15.3 Compensatory rest, in accordance with the provisions of this Regulation, must also apply in the case of shift workers (see Section 11).
- 15.4 The provisions of this Regulation must also apply where modifications or exclusions have been made by agreements under Regulation 23 (workforce agreements, see Section 16).

16. WORKFORCE AGREEMENTS (Regulation 23)

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

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

- 16.5 Where workers are affected by the Regulation 21 exclusions (see para 14.8), the reference period for calculating average weekly hours worked will, for the duration of the worker undertaking the relevant activities, be 26 weeks instead of 17 (by virtue of WTR Regulation 4(5)).
- 16.6 Regulation 23(a) allows workforce agreements to modify or exclude the application of certain provisions (specified in brackets below) of the Regulations relating to:

| | |
|----------------------|----------------------------------|
| length of night work | (Regulation 6(1) to (3) and (7)) |
| daily rest | (Regulation 10(1)) |
| weekly rest | (Regulation 11(1) and (2)) |
| rest breaks at work | (Regulation 12(1)) |

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

17. ENFORCEMENT / OFFENCES / REMEDIES *(Regulations 28, 29 and 30)*

Enforcement *(Regulation 28)*

17.1 The weekly limit on working time and certain limits on the activities of night workers are matters for the Health and Safety Executive and will be enforced in the same way as other health and safety obligations. In some circumstances, local authorities will be responsible for enforcement.

Offences *(Regulation 29)*

17.2 A breach by an employer of any of their key duties under the WTR will be an offence that may carry with it a fine and possibly imprisonment.

Remedies *(Regulation 30)*

17.3 Where workers are given an entitlement under the WTR, the remedy for an employer's failure to grant that entitlement will be by way of a complaint to an Employment Tribunal.

Right not to suffer detriment *(Regulation 31)*

17.4 This Regulation makes it unlawful to subject any worker to any detriment for refusing to exceed any limit on working time, or to work when entitled to rest breaks, or to agree to opt out of the weekly working time limit. Remedy will be by way of Employment Tribunals. We are advised that our members are most probably protected by this right.

Unfair dismissal *(Regulation 32)*

17.5 This Regulation introduces, by way of amendment to the Employment Rights Act 1996 on grounds similar to those outlined in para 17.4 above, a right to make any dismissal automatically unfair. However, this protection will only be available to employees, rather than the wider group of workers covered by the WTR, as currently legislation only provides remedies against unfair dismissal for employees.

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

18. MISCELLANEOUS

Records (*Regulation 9*)

- 18.1 This Regulation places a duty on employers to keep records showing that the limits on weekly working hours and night work are being complied with. These records must be retained for two years. Whereas in the WTR there is no express right of access to records, JBBs may consider it appropriate to seek to negotiate access on behalf of safety representatives (who may have an entitlement to inspect them in any event under health and safety legislation).

Pattern of work (*Regulation 8*)

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

Existing agreements

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

Workers with more than one employer

- 18.5 Except in the case of young workers, the WTR do not expressly provide that hours worked for more than one employer should be cumulative for the purposes of the Regulations. If they were not, however, then clearly the whole purpose of the WTR would be defeated. Overwork by workers can impact not only on their health and safety but also the safety of others (in the case of the police, meaning not only their work colleagues but also, potentially, members of the public). Overwork can also lead to accidents outside of the work context, for instance, road traffic accidents.

- 18.6 Furthermore, employers are required to take all reasonable steps, in keeping with

the need to protect the health and safety of workers, to ensure that working time limits are not exceeded (WTR regulation 4(2)). Government advice is that such steps should include enquiring whether the worker was employed elsewhere, and taking appropriate steps accordingly.

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

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

Further advice

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

WORKING TIME REGULATIONS – SUMMARY CHART

Annex I

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

| RIGHT | DEROGATIONS | RECORDS REQUIRED |
|---|---|------------------|
| <p>Daily rest (Reg 10) - 11 consecutive hours in each 24 hour period</p> <p>Weekly rest (Reg 11) - 24 hours per week, or 48 hours per fortnight</p> | <p>Workforce agreements - Reg 23(a)</p> <p>Special circumstances derogation - Reg 21 (subject to Reg 24 compensatory rest)</p> <p>Exceptional circumstances derogation - Reg 18(c)</p> <p>Shiftworkers - Reg 22 (subject to Reg 24 compensatory rest)</p> | No |
| <p>Rest breaks at work (Reg 12) - minimum of 20 minutes uninterrupted rest if the working day is longer than 6 hours</p> | <p>Workforce agreements - Reg 23(a)</p> <p>Special circumstances derogation - Reg 21 (subject to Reg 24 compensatory rest)</p> <p>Exceptional circumstances derogation - Reg 18(c)</p> | No |
| <p>Paid annual leave (Reg 13) - 4 weeks</p> | <p>None from entitlement</p> <p>- but workforce agreements can vary procedures for giving notice (Reg 15(5))</p> | No |

WORKING TIME REGULATIONS – SAMPLE WORKFORCE AGREEMENT

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

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

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

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

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

In addition, please refer to the hard copy handbook in your Joint Branch Board office of this document.

It should be reproduced electronically in future issues.

This Act of Parliament is available from the Government Acts of Parliament Website

<http://www.hmso.gov.uk/acts.htm>

PNB Circular 01/ 2 (Advisory)

POLICE NEGOTIATING BOARD

Independent Secretary
Mrs E J Santry
Office of Manpower Economics
Oxford House
76 Oxford Street
London W1N 9FD

AGREEMENT REACHED IN THE POLICE NEGOTIATING BOARD

1. A PNB agreement has been reached on *application of the Working Time Regulations 1998, as amended by the Working Time Amendment Regulations 1999*, to the police service. This agreement is effective from 19 October 2000. Details are set out in the attached memorandum.
2. This agreement requires amendment to police regulations or specific authorisation by home department circular and any approved changes will be promulgated in due course in Home Office, Scottish Executive Justice Department and Northern Ireland Office circulars. This PNB circular is purely advisory and does not confer authority* to implement the agreement.
3. Any inquiries should be addressed to the Independent Secretariat at the Office of Manpower Economics ☎ 020 7467 7218 or to the Official Side Secretary ☎ 020 7296 6722 or to the Staff Side Secretary ☎ 020 8399 2224. Enquiries to the Independent Secretariat relating to the interpretation of this circular should, where possible, be sent in writing.

26 February 2001

* PNB Circulars form a single numerical series. Those which in themselves provide authority to implement an agreement carry the serial number alone, while those which are purely advisory are designated as such after the serial number.

MEMORANDUM

The following agreement reached in the Police Negotiating Board is submitted for the approval of the Secretaries of State

APPLICATION OF THE WORKING TIME REGULATIONS 1998, as amended by the WORKING TIME AMENDMENT REGULATIONS 1999

The PNB has considered the implications of the Working Time Regulations and to facilitate the consistent application of this legislation throughout the Police Service has reached agreement on the following. This agreement requires amendment to police regulations.

1. Definition of 'working time'

The Working Time Regulations include in the interpretation of 'working time' under Regulation 2(1) provision for "any additional period which is to be treated as working time for the purpose of these Regulations under a relevant agreement". It has been agreed that the following periods should be included in the national definition of police officers' working time:

- (i) travel, outside of normal rostered duty hours and not currently covered by Police Regulation 32 (England and Wales) (and equivalent regulations for Scotland and Northern Ireland), to and from duty at a place other than the normal place of duty, e.g. travel to and from court;
- (ii) travel to and from training courses other than at the normal place of duty.

2. Definition of 'night worker'

The Working Time Regulations define a night worker as a worker "who, as a normal course, works at least three hours of his daily working time during night time".

This was clarified in the Regulations as a person who "works as a normal course (without prejudice to the generality of that expression) if he works such hours on the majority of days on which he works." DTI guidance on this definition was confirmed and strengthened by a Northern Ireland High Court decision (*R. v. Attorney General for Northern Ireland ex parte Burns*).

The decision in the Burns case was that a worker on a 'standard' rotating shift system (where one in three shifts is at night) is a 'night worker' for the purposes of the Regulations (even though the night shifts do not occur on the majority of days worked). In the light of this decision the PNB has adopted the following definition of a 'night worker' for the purposes of the police service:

that a police officer who regularly works shifts which include nights, irrespective of the shift pattern actually worked, should be a 'night worker' for the purposes of the Working Time Regulations.

Any worker classified as a night worker must, under the terms of Regulation 7, be given the opportunity of a free health assessment before undertaking night work and be moved from night work where a doctor has advised that his or her health may be suffering. However, the PNB has also agreed that it would be good practice for all police officers, regardless of whether they are 'night workers', to be given the opportunity of a free health assessment.

3. Entitlement to Daily Rest

Regulation 10 provides for an entitlement to "a rest period of not less than eleven consecutive hours in each 24-hour period", which is at variance with the eight hours currently conferred by Police Regulations. The PNB has therefore agreed that regulations should be amended as follows to take account of this entitlement:

Regulation 27(4)(a) (England and Wales) (and equivalent regulations for Scotland and Northern Ireland) - 11 hours to be substituted for the current 8 hours; and consequent amendments to Schedule 1 (Modification for part-time service);

Regulation 27(4) (England and Wales) (and equivalent regulations for Scotland and Northern Ireland) - after "unless the joint branch board agrees otherwise": insert "subject to an equivalent period of compensatory rest".

4. Compensation related to entitlement to annual leave

Regulation 14 of the Working Time Regulations provides that, on termination of employment during the course of a leave year, "where the proportion of leave taken by the worker is less than the proportion of the leave year which has expired, his employer shall make him a payment in lieu of leave". Thus, a police officer who, on termination of service has taken less than his/her annual leave entitlement under the Working Time Regulations, is entitled to payment in lieu of the untaken days.

PNB has agreed that, in addition to this right, if an officer on termination of service has not been able to take his/her leave then the provisions of Regulation 14 should apply to all the officer's remaining annual leave entitlement, and is not limited to the annual leave entitlement under the Working Time Regulations.

The formula in Working Time Regulations 14(3) should be used to make the calculation. This states that the payment due shall be a sum equal to the amount that would be due to the worker under regulation 16 (viz. at the rate of a week's pay in respect of each week of leave calculated by reference to sections 221-224 of the Employment Rights Act 1996 as modified) with a day's pay for this purpose comprising, for a full time member, a week's pay divided by 5 and, for a part-time member, comprising a week's pay multiplied by the appropriate factor for that member and divided by 5, in respect of a period of leave determined according to the formula -

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

where-

A is the period of leave to which the worker is entitled

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

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

WORKING TIME REGULATIONS – Frequently asked questions

Set out on the following pages is the advice which has been issued from time to time in response to some frequently asked questions.

1. To what extent can the application of the Working Time Regulations to police service be excluded under Regulation 18?

Material parts of the Working Time Regulations (those parts being referred to as “the relevant Regulations”) are excluded from applying (without any requirement for compensatory rest):

“where characteristics peculiar to certain specific services such as the armed forces or the police, or to certain specific activities in the civil protection services, inevitably conflict with the provisions of these Regulations” (Regulation 18).

This provision does not exclude the relevant regulations in respect of all police activity. There is express provision in the Working Time Regulations governing the application of the Regulations, both to the police service and to the armed forces so that it was anticipated that Regulations will generally apply to both services.

We are advised that it is only where the specific activity of the member(s) in question are such as to mean that there is an inevitable conflict with the Working Time Regulations that the relevant regulations do not apply. Even when excluded, by reason of the European Working Time Directive (Article 2(2)), the “safety and health of workers must be ensured as far as is possible in the light of the objectives of [the Working Time] Directive”.

A very restrictive interpretation of the exclusion under Regulation 18 is likely. The exclusion is therefore only likely to apply in the context of ongoing public disturbances during which members are required to perform duty.

2. How does a “quick changeover” fit within the terms of the Working Time Regulations and how is compensatory rest accounted for?

Regulation 10(1) provides:

“An adult 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 22(1) provides:

“Subject to Regulation 24 ... Regulation 10(1) does not apply in relation to a shift worker when he changes shifts and cannot take a daily rest period between the end of one shift and the start of the next one”.

The term “shift worker” is defined as meaning any worker whose work schedule is part of shift work, where shift work means:

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

It is by no means certain that all members working a shift pattern will be treated as “shift workers” for the purposes of the Working Time Regulations; much depends on whether members in the shift can be said to “succeed each other at the same workstations according to a certain pattern”. Whereas those working a shift pattern in a control room at a particular desk may fall within this definition, it is by no means certain that others working a shift pattern will do so.

If and to the extent that Regulation 22 applies then the “quick changeover” will be permissible, subject, however, to appropriate compensatory rest being made available. Alternatively a “quick changeover” will be permissible if pursuant to agreement between the Joint Branch Board and the Chief Officer, or the requirement for it falls within one of the special cases within the terms of Regulation 21 (e.g. the need for continuity of service). It is unlikely however that, unless a member is a shift worker for the purposes of the Working Time Regulations, a quick changeover can be rostered without Joint Branch Board consent.

In all these cases, however, Regulation 24 (Compensatory Rest) applies which requires that where:

“... 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."*

We are advised that the length of compensatory rest should be equivalent to the period of uninterrupted rest to which the member was entitled (unless, perhaps, the interruption is de minimis). In other words, if the member was enjoying an 11 hour uninterrupted rest period and this was interrupted by, say, a 2 hour work requirement after 5 hours this should give rise to a period of compensatory rest of 11 hours and not merely either an additional 5, 6 or 2 hours.

To illustrate how compensatory rest may well not involve an increase in the actual time off for the member in most circumstances, consider the following example:

Assume the following roster:-

| | |
|----|----------|
| M | R |
| T | R |
| W | 6am-2pm |
| Th | 6am-2pm |
| F | 10pm-6am |
| Sa | 10pm-6am |
| Su | 10pm-6am |
| M | 2pm-10pm |
| T | 2pm-10pm |
| W | R |
| Th | R |

The member will have enjoyed less than 11 hours rest between shifts on Sunday and Monday (being rostered to rest for only 8 hours). The Working Time Regulations entitlement will have been breached so compensatory rest of some 11 hours is required. It is necessary first to consider the extent of the rest period available on Wednesday and Thursday at the end of the pattern. Commencing at 10pm Tuesday and finishing at 6am Friday, this gives a total of 56 hours rest. Of that 56 hours, 24 will comprise the uninterrupted weekly rest period. This leaves a balance of some 32 hours of which 11 could comprise the compensatory rest period arising from the failure to provide 11 hours uninterrupted rest on Sunday/Monday.

In an example of a member rostered to work weekdays only, assume the member is required to work three of the four rostered rest days in two weeks. His entitlement to enjoy 48 hours rest every 14 days is breached and an entitlement to compensatory rest equivalent to 24 hours uninterrupted is required. In the next following fortnight, there will be available in the next 2 day break, potential for a further 24 hour break in addition to the entitlement due under the Working Time Regulations for that period, so compensatory rest can be granted.

The Working Time Regulations provide minimum standards. An employer can provide better than minimum rest periods. The Police Regulations anticipate, at least for constables and sergeants, better than the Working Time Regulations minimum.

3. What is a “special hazard” and how can a refusal on the part of the Force to accept that particular duties raise a “special hazard” or involve heavy “mental strain” be challenged?

As material, the Working Time Regulations provide:

"6(7) An employer shall ensure that no night worker employed by him whose work involves special hazards or heavy physical or mental strain works for more than 8 hours in any 24 hour period during which the night worker performs night work.

6(8) For the purposes of paragraph (7), the work of a night worker shall be regarded as involving special hazards or heavy physical or mental strain if:-

(a) it is identified as such in:-

(i) a collective agreement; or

(ii) a workforce agreement,

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

(b) it is recognised in a risk assessment made by the employer under Regulation 3 of the Management of Health and Safety at Work Regulations 1992 as involving a significant risk to the health or safety of workers employed by him."

The relevant part of the European Working Time Directive (on which members can rely) provides that:

"Member states shall take measures necessary to ensure that ... night workers whose work involves special hazards or heavy physical or mental strain do not work more than 8 hours in any period of 24 hours during which they perform night work."

It further provides:

"For the purposes of the aforementioned, work involving special hazards or heavy physical or mental strain shall be defined by national legislation and/or practice or by collective agreements or agreements concluded between the two sides of industry, taking account of the special effects and hazards of night work."

It is therefore open for the kind of work of members which involves special hazards or heavy physical or mental strain, to be identified by agreement between the Joint Branch Board and the Chief Officer. In the absence of such agreement, the Working Time Regulations provide that such work will be identified if recognised in a risk assessment made by the Chief Officer "as involving a significant risk to the health or safety of workers employed by him".

The question is therefore raised as to what, if any, remedy there may be if the Chief Officer refuses to accept that a particular activity involves special hazards or heavy physical or mental strain under an agreement with the Joint Branch Board and does not identify, in a risk assessment, that such activity involves a "significant risk".

We are advised that the position under the Working Time Regulations is unsatisfactory and that the issue may ultimately have to be resolved by the European Court as it may be that the Working Time Directive has not been adequately implemented in the United Kingdom, providing no obvious remedy in the event that there is no agreement and an inadequate risk assessment is conducted.

However, the Management of Health and Safety at Work Regulations 1992 require every employer to make a suitable and sufficient assessment of

- (a) the risks to the health and safety of his employees to which they are exposed whilst they are at work; and
- (b) the risks to the health and safety of persons not in his employment arising out of or in connection with the conduct by him of his undertaking

for the purpose of identifying the measures he needs to take to comply with the requirements and prohibitions imposed upon him by or under the relevant statutory provisions.

The HSE's Approved Codes of Practice on risk assessment and specific topics provide additional guidance. The HSE also produces Guidance Notes on specific hazards.

What to do if you consider a manager or the force is failing to comply with obligations

Everyone has or should have an interest in the promotion and development of an effective health and safety culture. It is to be hoped that senior managers will recognise the importance of the issue. There will however inevitably be occasions where a disagreement arises or where a force appears not to be meeting its obligations. It is important that such matters are dealt with in a structured fashion. Generally, the first step will be for any issue to be raised by safety representatives at safety committee meetings or with the appropriate manager. If this does not resolve the matter the JBB should consider raising the matter with the chief constable. JBBs may wish to put in place their own structure for dealing with such issues. If the issue is still not resolved it may well be appropriate to contact the local HSE and/or forward papers for legal advice.

4. Refreshment breaks; when should they be taken and how can a failure on the part of management to allow them be challenged?

By reason of Regulation 12(1):

“Where an adult worker’s daily working time is more than 6 hours, he is entitled to a rest break”.

There is provision that this rest break should be an uninterrupted period of not less than 20 minutes and be away from the worker’s “workstation” if he has one (Regulation 12(3)). Importantly Regulation 12(2) provides:

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

We are advised that the Working Time Regulations right to a rest break for our members is likely to be 20 minutes.

The question has been raised as to when the rest break should be taken. Whereas the Regulations are silent on this, we are advised it is to be anticipated that it should be taken in circumstances where the member works no more than 6 hours without enjoying a rest break. If, therefore, there is a rostered tour of duty of 8 hours, then it will be inappropriate for the WTR rest break of 20 minutes to occur earlier than after 1 hour 40 minutes of the tour (though, of course, members remain entitled, subject to the exigencies of duty, to 45 minutes rest break). If the rest break is, for instance, taken at the beginning of the 8th hour of the tour then the member will have been required to work 7 hours without a rest break and we advise that this is likely to be viewed as contrary to the spirit (if not the letter) of the Working Time Regulations.

It has been reported that in some Forces there are regular breaches of the provisions of Regulation 12 of the Working Time Regulations. The question was raised as to how this entitlement can be enforced. A member may present a complaint to an Employment Tribunal that the Chief Officer has refused to permit him to exercise any right he has under Regulation 12 (a rest break provision). Such a complaint must be filed within 3 months less one day of the date it is alleged the exercise of the right should have been permitted. This is not a complaint that there is a breach of Regulation 12 but rather a complaint that there has been a refusal on the part of the employer “to permit” the member to exercise that right.

We are therefore advised that where there are concerns that these rights are being breached, members should notify in writing their supervising officer that they wish to insist on their entitlement to a rest break in accordance with the terms of the Working Time Regulations and seek their proposals to ensure that these provisions can be complied with. There is of course scope for the entitlement to be disapplied either by way of agreement between the Joint Branch Board and the Chief Officer (or by reference to one of the special cases under Regulation 21) but in both instances, there is a requirement for compensatory rest (or protection as may be appropriate in order to safeguard the worker’s health and safety).

5. What is the extent of the impact of Regulation 21(b)?

Under Regulation 21 of the Working Time Regulations (which applies to the disapplication of certain regulations provided compensatory rest is available) one of a number of specific cases is where a worker:

“is engaged in security and surveillance activities requiring a permanent presence in order to protect property and persons, as may be the case for security guards and caretakers or security firms”.

This provision may well apply to members on protection duties. It is less likely to apply on all types of surveillance activity but rather likely to be limited only to those who are on surveillance activities “for the purposes of protecting property or persons” rather than for the purposes of pursuing enquiries. If there is a requirement however for the continuity of service for surveillance activities undertaken for the purpose of conducting enquiries, then this may fall under Regulation 21(c) as a different type of “special case”.

6. What are the formalities required for the establishment of a workforce agreement?

Some of the Regulations may be modified/disapplied by way of a workforce agreement. Where a workforce agreement can be entered into then, by reason of Regulation 41(2) there can be modification/disapplication by way of an agreement between the Chief Officer and the Joint Branch Board. We are advised that in the event that such an agreement is reached then the provisions of Schedule 1 governing workforce agreements do not apply.

As an alternative, this can however be a workforce agreement (absent the Joint Branch Board) which will need to comply with each of the conditions set out at paragraph 1 of Schedule 1. This includes the requirement that the Chief Officer provide all members to whom it was intended to apply on the date on which it comes into effect “with copies of the text of the agreement such guidance as those [members] may reasonably require in order to understand it fully”.

7. How might remedies under the Working Time Regulations be used (for example in challenging a failure to provide sufficient compensatory rest when a member, on call, is interrupted for duty purposes?)

Assume that a member is on call and is, for work purposes, interrupted at various times throughout that period of on-call such that he/she is unable to enjoy either a period of uninterrupted rest of 11 hours (the daily rest entitlement and/or 24 hour rest period for weekly entitlement).

The remedy under the Working Time Regulations is by way of a complaint to an Employment Tribunal that the Chief Officer “has refused to permit [the member] to exercise any right” to the daily or weekly rest period (or compensatory rest). Such a complaint should be filed before the end of the period of 3 months beginning with the date on which it is alleged that the exercise of the right should have been permitted.

It is unlikely that proceedings would be appropriate for a one-off breach. However, the Working Time Regulations should assist in negotiating a resolution or a basis for proceedings when there is an extensive requirement for on-call duties and work interruptions of what would otherwise be uninterrupted rest periods. Legal advice should be sought when appropriate.

JBB Circular No. 53/00

10th October 2000

**To: The Secretary
All Branch Boards**

Dear Colleague

Exigencies of Duty - Rostering and Related Issues

1. This circular summarises the legal advice, which the Federation has received on the meaning of "exigencies of duty" and the implications of that advice, together with advice received about the Working Time Regulations on members' rights in relation to the annual roster and related issues.

Police Regulations 1995

2. A number of rights, particularly related to duty, overtime and leave issues, are expressed in the Regulations to be subject to "*the exigencies of duty*". These rights include:-
 - (i) The rights under regulation 24 to perform the normal period of duty in one tour and to have an interval of 45 minutes for refreshment "*so far as the exigencies of duty permit*":
 - (ii) Regulation 27 provides for an annual duty roster. Such a roster can be altered "*owing to the exigencies of duty*".
 - (iii) Regulation 29(2) provides that a member below the rank of inspector shall, "*so far as the exigencies of duty permit*", be allowed a day's leave on each public holiday and be granted rest days at the rate of two rest days in respect of each week.
 - (iv) Regulation 30 provides that an inspector or chief inspector shall, "*so far as the exigencies of duty permit*", be allowed a day's leave on each public holiday and be granted rest days at the rate of two rest days in each week and where the exigencies of duty preclude such allowance or grant to such a member he shall, "*so far as the exigencies of duty permit*", be allowed a day's leave in lieu.

Working Time Regulations 1998

3. These Regulations ("WTR") apply to police service. They provide, amongst other things, for:-
 - (i) a right to a rest break of an uninterrupted period of not less than 20 minutes where daily working time is more than 6 hours;
 - (ii) a right to a daily rest period of not less than 11 consecutive hours in each 24 hour period;
 - (iii) a right (in addition to daily rest) to weekly rest of not less than 24 hours in each 7 day period (or at the chief officer's discretion two uninterrupted rest periods each of not

less than 24 hours in each 14 day period or one uninterrupted rest period of not less than 48 hours in each such 14 day period); and

- (iv) a night worker whose work involves special hazards or heavy physical or mental strain shall work no more than 8 hours in any 24-hour period during which s/he performs night work.
4. All these rights can be modified or excluded by a workforce agreement, subject to an obligation to provide wherever possible equivalent compensatory rest.
 5. There are a number of exceptions to such rights under the WTR including:-
 - (i) under regulation 18, where characteristics peculiar to the police inevitably conflict with the provisions of the WTR; and
 - (ii) under regulation 21, where the worker's activities are affected by factors such as an occurrence due to unusual and unforeseeable circumstances or exceptional events, the consequences of which could not have been avoided despite the exercise of all due care by the employer.

PNB Circular 86/9

6. The PNB Agreement states that "*because rosters are produced annually, a number of unforeseen reasons for changes may subsequently arise*". The Agreement then provides examples of unforeseen reasons such as "public order situations, court attendance and essential training."
7. The PNB Agreement does not expressly exclude foreseen circumstances. It states that the word "*pressing*" relates to "*the expected situation at the time when the duty is to be performed rather than the time when the duty roster is changed i.e. the reasons for a change may be known many months in advance and still be pressing*".
8. The Federation is advised that it would be difficult to argue that only unforeseen circumstances may constitute exigencies of duty. Accordingly, foreseen circumstances are capable of falling within the definition.
9. The Circular sets out the PNB's agreement on the meaning of "exigencies of duty" for the purposes of regulation 27 and alterations to an annual duty roster after its publication. It states that the term "exigencies of duty" should be interpreted as relating to situations where:-

"a pressing demand, need or requirement is perceived but is not reasonably avoidable and necessitates a change of roster".
10. While the PNB Agreement only applies to regulation 27, the interpretation of "*exigencies of duty*" in this manner could apply to other regulations where the phrase is used.
11. The Agreement also provides that changes to rosters should only be made after full consideration of welfare, operational and practical circumstances rather than purely on financial grounds.

12. A PNB Agreement does not have the force of law. However, a court may have regard to the definition provided by the representatives of parties who are affected directly by the provision.

The meaning of "exigencies of duty"

13. The Federation is advised that there is no use of the word "exigency" in any statute or statutory instrument other than the Police Regulations. Further, there is no reported case which considers the meaning of "exigency". The Oxford English Dictionary identifies two definitions of the words "exigency":-
- (i) "pressing state (of circumstances, etc), stringency (of requirements), urgent want, pressing necessity...pressing needs, straits; and
 - (ii) that which is needed or required; demands, needs, requirements."
14. While in the absence of a case on the point, there is scope for argument as to the correct interpretation of the expression, the Federation is advised that a court may interpret the phrase as meaning simply "need" rather than "pressing need" particularly as interpreting the phrase as "pressing need" would be likely to restrict the operational management of police forces, which the courts are reluctant to do.

Specific issues

Refreshment Breaks

15. A member is entitled to a refreshment break "*subject to the exigencies of duty*". As indicated above, it is likely that this phrase will be given a wide interpretation as meaning "*needs*" of duty, rather than "*pressing needs*". However, the existence of the right to a rest break under the Working Time Regulations is potentially of considerable assistance.
16. First, the exceptional circumstances in which the WTR obligation does not apply, as summarised above, are limited. It is likely that a force would have to show a real emergency. Second, although the entitlement to a rest break under the WTR is only to 20 minutes, in most circumstances if it is possible to allow an officer a rest break of 20 minutes it is likely to be difficult for a force to establish that the exigencies of duty, even if narrowly defined, did not allow a 45 minute rest break in accordance with regulation 24.

Alterations to the Duty Roster

17. A legal challenge to an individual alteration to a roster on the basis that the reason for the alteration does not amount to an "exigency of duty" is likely to be extremely difficult indeed. First, the court is likely to interpret "exigencies of duty" in a manner favourable to the force. Second, the court is most unlikely to be willing to interfere with the operational needs of a particular situation.
18. If an annual roster fails to take into account scheduled or regular events which will necessarily make extra demands on police manpower, it may be possible to challenge the roster by way of judicial review on the basis that the relevant chief officer has failed to take into account a relevant consideration and as a result has reached a

decision that no reasonable decision maker would have made taking into account all relevant considerations. It should however be emphasised that such challenges are also unlikely to be straightforward. Insofar as they may be possible it will be necessary to move quickly before or shortly after the publication of the relevant roster.

19. Once again the WTR may assist. There may be circumstances in which alterations to the roster conflict with the right to daily or weekly rest or with the limitation upon work to be performed by night workers under the WTR. A failure to allow daily or weekly rest is challengeable in an employment tribunal. A breach of the night working restriction is a criminal offence. A court or tribunal considering such a claim would be likely to scrutinise carefully any attempt by a force to rely upon the limited exceptions under regulations 18 and 21 to which reference is made above.
20. Thus, Branch Boards may wish to examine any alterations to rosters for evidence of the following:-
 - (i) the result that a night worker performs more than 8 work during any 24 hour period during which s/he performs night work. It is emphasised that it is only necessary for some night work to be performed for this obligation to arise. It is not necessary for all the relevant hours to be night work for the provision to be breached; or
 - (ii) the failure to give a member 11 hours uninterrupted rest in each 24 hour period; or
 - (iii) the failure to give the member appropriate weekly rest of at least 24 hours in each 7 day period (in addition to the 11 consecutive hours daily rest entitlement) or, where the Chief Constable has so determined, to either two uninterrupted rest periods each of not less than 24 hours in each 14 day period or one uninterrupted rest period of not less than 48 hours in each such 14 day period.
21. Where members' rights to daily or weekly rest have not been complied with then claims to an employment tribunal may be brought. Such claims would need to be commenced within three months of the date on which it is alleged that the relevant right should have been permitted. An employment tribunal may make a declaration that a complaint is well founded and award compensation. Successful claims may well assist Branch Boards in protecting members against further abuses of the rostering arrangements.
22. Any breach of the night work restrictions is a criminal offence enforceable by the Health and Safety Executive. The risk of such a breach may provide a useful negotiating tool.

Yours sincerely,

Jeff Moseley
General Secretary

JBB Circular No. 20/2001

11 April 2001

**To: The Chairman and Secretaries
All Branch Boards**

Dear Colleague

Annual Leave Under the Working Time Regulations 1998

A recent employment tribunal case arising in South Wales has highlighted an issue in relation to the calculation of annual leave.

Annual leave for a police officer is primarily dealt with by the Police Regulations 1995. Schedule 4 to those Regulations sets out the annual leave to which an officer is entitled and by paragraph 6 of that Schedule it is for the Police Authority to determine the date on which the leave year commences. The Police Regulations 1995 do not contain any provision for payment in respect of untaken annual leave to an officer who is retiring from the force. The Police Negotiating Board has indicated in Circular 01/2 (Advisory) dated 26 February 2001 that agreement has been reached that the Police Regulations should be amended to provide for payment for all untaken leave on termination of service, but there is no legally enforceable right to payment under Police Regulations until such time as they are amended.

However, a right to payment for untaken annual leave does arise under the provisions of the Working Time Regulations 1998 which came into force on 1 October 1998. Regulation 13 provides for a minimum period of paid annual leave (generally 4 weeks) and Regulation 14 provides that where employment is terminated in the course of a leave year, payment must be made in respect of annual leave which has accrued in that leave year but which has not yet been taken.

There are detailed rules for calculating the amount due, but the issue which arose in the recent case was the date on which the leave year commences.

Date of Commencement of Leave Year

Regulation 13 of the Working Time Regulations 1998 sets out the date on which the leave year is taken to commence for the purposes of payment under those Regulations only.

In essence there are three possible dates:

- (i) Where police service commences on or before 1 October 1998, the leave year begins on 1 October each year.
- (ii) Where police service began after 1 October 1998, the leave year begins on the date on which employment began and on the anniversary of that date in each subsequent year.
- (iii) If there has been a "relevant agreement", the leave year can begin on whichever date is specified in that agreement.

In South Wales Police there was a Force Standing Order from 1990 providing that the leave year began 1 April each year. This was plainly effective for the purpose of the leave year under the Police Regulations, but the issue was whether it constituted a "relevant agreement" under the Working Time Regulations 1998. This was important because the officer concerned retired on medical grounds in July 1999 and therefore it was in his interests to establish that the leave year began on the "default" date of 1 October 1998 because he would have served for a much greater proportion of his final year and therefore his entitlement to payment would be greater.

Relevant Agreement

A "relevant agreement" is defined in Regulation 2 of the Working Time Regulations as one of three documents:

- (i) Any provision of a collective agreement which forms parts of a contract between worker and his employer. This is extremely unlikely to apply in the police service because the definition of collective agreement incorporates the involvement of an independent trade union. The Police Federation is not a trade union.
- (ii) Any other agreement in writing which is legally enforceable between the worker and his employer. In general this would require a written document signed by the individual which was in the form of a legally binding contract. There was no such document in the South Wales case.
- (iii) A "workforce agreement"

A workforce agreement is an agreement between the employer and properly elected representatives of the workforce. There are certain conditions which must be satisfied before the agreement is effective, including the fact that the agreement must be in writing, must be for a specified period not exceeding 5 years and must be signed by the Chief Constable. The agreement must also be circulated to all workers before it is actually signed.

Regulation 41 of the Working Time Regulations 1998 provides that a workforce agreement may be embodied in an agreement between the Chief Constable and a Joint Branch Board.

The South Wales case did not reach a hearing because shortly before the hearing South Wales Police accepted that the Standing Order from 1990 could not constitute a "relevant agreement". It was therefore established that in South Wales the leave year for the purposes of the Working Time Regulations 1998 begins on the "default" dates in Regulation 13 even though the leave year for other purposes begins on 1 April.

Conclusion

In many forces the date of commencement of the leave year for the purposes of the Police Regulations will be well established, but arrangements should be reviewed to identify whether that date has also been effectively established for the purposes of the Working Time Regulations 1998. One of the practical disadvantages of the Working Time Regulations is

that the leave year will commence on a different date for each officer who has joined service after 1 October 1998.

3

If the Joint Branch Board considers it desirable to have a single leave year commencement date for all purposes an agreement to that effect should be concluded in writing with the Chief Constable which must be:

- circulated by the Force to all officers with an explanatory note before it is signed and becomes effective
- in writing
- signed by or on behalf of the Joint Branch Board
- signed by or on behalf of the Chief Constable
- have effect for a specified period not exceeding 5 years

Yours sincerely

Jeff Moseley
General Secretary

21 September 2000

**To: The Chairman and Secretary
All Branch Boards**

Dear Colleague

Working Time Regulations 1998 - Payment for annual leave whilst acting up

The purpose of this circular is to draw attention to legal advice recently received on this subject. We are advised that officers who perform the duties normally performed by a member of a higher rank should, in certain circumstances, be paid for annual leave at the same rate.

The Legal Framework

The relevant extracts from the Police Regulations 1995, the Working Time Regulations 1998 and the Employment Rights Act 1996 are contained in the attached Appendix.

In short, under the Police Regulations where an officer is performing the duties of a member of a higher rank and being paid at the lowest rate of pay for such rank s/he nonetheless reverts to his/her normal rate of pay if annual leave is taken.

The Working Time Regulations provide an entitlement to be paid in respect of any period of annual leave arising under the Working Time Regulations by reference to the rate of "a week's pay". "A week's pay" is defined, by reference to the Employment Rights Act 1996 as the amount which is payable "...if the [officer] works throughout his normal working hours in a week".

Advice

The Working Time Regulations apply to the police service. Regulation 13 WTR provides an entitlement to twenty days annual leave per year. Regulation 16 WTR provides that a worker is entitled to be paid in respect of such annual leave at the rate of a week's pay in respect of each week of leave.

Sections 221-224 of the Employment Rights Act 1996 are applied to determine the calculation of "a week's pay".

As police officers work "normal working hours" within the meaning of Section 234 ERA, Section 221 (2) applies. This provides that a week's pay is for these purposes:-

"...the amount which is payable by the employer under the contract of employment in force on the calculation day if the employee worked throughout his normal working hours in a week."

The references to a "contract of employment" are to be read as references to the Police Regulations 1995 and a police officer is to be treated as an employee for these purposes.

If an officer performing the duties of a higher rank takes annual leave during a period of performing such duties, the amount payable if s/he had worked normal working hours would be at the higher rank's rate. Such an officer is therefore entitled to be paid for leave at that higher rate.

(It should be emphasised that the entitlement to take leave at the higher rate is limited to annual leave which arises under the Working Time Regulations (i.e. twenty days per annum) and not to any additional leave entitlement under the Police Regulations.)

Remedy

Regulation 30 WTR provides that the remedy for a failure to pay at the proper rate is a complaint to an employment tribunal. Such a claim should be brought before the end of the period of three months beginning with the date on which payment should have been made. It is likely that time will run not from the date of any request for payment at the higher rate but the date upon which payment was received for the annual leave in question at the lower rate.

JBBs may wish to attempt to agree the matter on a general basis with the forces. If this does not prove possible then it may be necessary to bring a test case in the employment tribunal. Any refusal to pay for annual leave at the higher rate in appropriate circumstances should be reported.

Yours sincerely,

Jeff Moseley
General Secretary

APPENDIX

Regulation 40 police Regulations 1995 provides:

"(3) ...a member of a police force below the rank of superintendent who, in any year, has been required to perform the duties normally performed by a member of the force of a higher rank than his own for fourteen complete days shall be paid in respect of each further complete day in that year on which he is required to perform such duties at a rate equal to the lowest rate of pay to which he would be entitled upon promotion to a higher rank".

Regulation 16 WTR provides:

(1) a worker is entitled to be paid in respect of any period of annual leave to which he is entitled under regulation 13, at the rate of a week's pay in respect of each week of leave.

(2) Sections 221-224 of the 1996 Act shall apply for the purpose of determining the amount of a week's pay for the purpose of this regulation, subject to the modifications set out in paragraph (3)."

The modifications include a provision that the calculation date is to be treated as the first day of the period of leave in question.

The reference to the 1996 Act is a reference to the Employment Rights Act 1996. Section 221 provides:

"(1) This Section and Sections 222 and 223 apply where there are normal working hours of the employee when employed under the contract of employment in force on the calculation date.

(2) Subject to Section 222, if the employee's remuneration for employment in normal working hours (whether by the hour or week or other period) does not vary with the amount of work done in the period, the amount of a week's pay is the amount which is payable by the employer under the contract of employment in force on the calculation date if the employee works throughout his normal working hours in a week..."

Section 234 provides:

"Normal working hours -

(1) Where an employee is entitled to overtime pay when employed for more than a fixed number of hours in a week or other period, there are for the purposes of this Act normal working hours in this case.

(2) Subject to sub-section (3) [which is not relevant] the normal working hours in such a case are the fixed number of hours."

Regulation 13 WTR provides an entitlement to four weeks leave. Under Regulation 41, for the purposes of the WTR the holding of the office of constable is treated as employment under a worker's contract.

HOME OFFICE CIRCULAR

HOC 54/1999

Date: 11 November 1999

This circular is about: Guidance on how Special Constables are affected by the Working Time Regulations 1998

From: POLICE PERSONNEL AND TRAINING UNIT

Date for implementation: 1 October 1998 This cancels HOC: 54/1998

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This circular is addressed to: Chief Officers of Police

Copies are being sent to: Chief to Police Authorities, Special Liaison Officers and Force Commandants

Dear Chief Officer

WORKING TIME REGULATIONS: SPECIAL CONSTABLES

Introduction

1. This circular, which replaces Home Office circular 54/1998, gives general guidance on how special constables are affected by the Working Time Regulations 1998 (SI 1998 No 1833) which came into force on 1 October 1998. It does not seek to comment on all the ramifications of the legislation.
2. The principal amendments/additions to the guidance contained in HOC 54/1998 are:
 - that a police force is not required under the Regulations to make any contact with a special constable's employer;
 - that a police force is required to keep records of the duty hours performed for a minimum of two years but it is recommended that records are kept six years;
 - that a special is entitled to certain daily or weekly rest periods or rest breaks but may choose not to take them; and
 - that in specific circumstances, where police duty inevitably conflicts with the Regulations, the Regulations in respect of the average 48 hours a week limit and rest periods and breaks do not apply.
3. The Regulations (WTR) implement the Working Time Directive and the Young Workers Directive (in respect of adolescent workers) which are EC Directive forming part of measures aimed at improving health and safety at work. Regulation 41 states that for the purposes of the Regulations the holding of the office of constable shall be treated as employment. Therefore, the WTR apply to special constables unless any particular circumstances of a police operation inevitably conflict with the provisions of the Regulations, in which case those Regulations in respect of the average 48 hours a week limit and rest periods and breaks do not apply - Regulation 18(c) refers.

Principal requirements of the Regulations

4. The provisions of the WTR which may affect special constables:
 - set a maximum average working week of 48 hours, excluding daily rest periods (Regulation 4);

- provide a rest period of not less than 11 consecutive hours in a 24-hour period (Regulation 10);
- provide an uninterrupted rest period of not less than 24 hours in a 7-day period (Regulation 11);
- set a limit of 8 hours night work in a 24-hour period (Regulation 6(7));
- entitle a worker, whose normal working time exceeds 6 hours, to a rest break (Regulation 12); and
- require an employer to keep adequate records for two years to show whether the limit on the hours of the working week is being complied with (Regulation 9).

5. It should be noted that Regulation 5 permits a worker to agree with their employer in writing that the 48 hour per week limit should not apply to that worker. Workers with more than one employment would need to have agreements with each employers.

Workers with more than one employment

6. The WTR apply to special constables who are in private employment as if they are workers with more than one employment.

7. The Department of Trade and Industry (DTI) and Health and Safety Executive guidance says that Regulation 4(2) requires employers to take all reasonable steps to ensure that workers do not exceed an average of 48 hours of weekly working time. Such steps would include enquiring of the worker whether he was working elsewhere (or requesting that they be notified on the worker getting other work) and, if so, adjusting working arrangements accordingly. If a worker were working more than an average of 48 hours per week in total, ie the aggregate of the hours worked for both employers, each employer may wish to agree with the worker that he is willing to work that number of hours per week. It should be noted that an employer has no right to try to restrict the number of hours a worker works for another employer (or performs duty for the police in the case of a special constable) in order to restrict the aggregated hours to an average of 48 per week.

Entitlements

8. In addition to the maximum of 48 hours per week, the WTR provide entitlements to certain rest periods and breaks. These must be made available to special constables, subject to the circumstances described in paragraph 3 above, but a special constable may choose to waive those entitlements. Furthermore, the WTR do not restrict the activities of a worker during those breaks. For example, during a rest period from employment of not less than 11 consecutive hours in a 24-hour period, a special constable may perform police duty and vice versa.

Guidance for forces

9. The following guidance not only ensures that forces comply with the Working Time Regulations but also recommends that further steps are put in place to ensure the health and safety of special constables.

The Agreement

10. Where special constables wish to exceed the average of 48 hours per week when their hours of employment are aggregated to the hours of police duty, the force should ask the specials to sign written agreements with the force to that effect. Copies of the agreements should be kept by the force and the specials. An example of such an agreement is annexed to this circular. Specials should be advised to consider drawing up similar agreements with their employers.

11. It would also be advisable to ask specials to confirm the average number of hours per week they work for their employers and record this data.

The Employer

12. The force is not required to consult or contact a special's employer. But it is recommended that specials be advised to notify their employers of their voluntary work for

