THE HIGH COURT

[2023] IEHC 719

[Record No. 2022/328MCA]

BETWEEN

DAVID WALSH

APPELLANT

AND

KERRY COUNTY COUNCIL

RESPONDENT

JUDGMENT of Mr Justice Barr delivered on the 15th day of December 2023.

Introduction.

1. This is an appeal on a point of law from a determination of the Labour Court that the appellant, who is a retained firefighter attached to Ballybunion Fire Station, was not "working" for his employer, during the periods when he was on standby, awaiting a call-in in the event of a fire or other alert.

2. The issue for determination on this appeal is whether the Labour Court erred in its approach to that question and in the conclusion that it reached.

3. Reduced to its essence, the argument submitted by Mr Power SC on behalf of the appellant, was to the effect that, while the Labour Court had looked at some factors, such as the fact that the appellant had to respond to an alert within ten minutes; that he would not be disciplined or sanctioned, as long as he responded to a minimum of 75% of alerts; that he did not have to remain at any specific place during time spent on standby; the Labour Court had erred in law in failing to take into account the overall impact of all the restrictions on the appellant, in determining that the time spent on standby was not working time.

4. In response, Ms McKenna SC, submitted that the court could only interfere with primary findings of fact made by the Labour Court, if it was satisfied that there was no evidence to support them. It was submitted that in this case, nearly all the findings of fact made by the Labour Court, had been agreed, or had not been seriously controverted. Accordingly, it was submitted that there was no basis for this court to set aside any of the primary findings of fact made by the Labour Court, or the inferences drawn by it

therefrom, which, it was submitted, had been reasonably open to the Labour Court to draw.

5. It was submitted that the Labour Court had had regard to all relevant factors and had correctly applied the relevant legal authorities in reaching its conclusion that the constraints on the applicant's activities during the periods spent on standby, did not "objectively and very significantly" affect the possibility of the applicant freely managing his time and pursuing his own interests. It was submitted that there was no basis at law on which the decision of the Labour Court could be set aside.

Background.

6. The appellant is a retained firefighter, based at Ballybunion Fire Station, County Kerry. He has been employed on a part-time basis in that fire station since 11 August 2008. The terms and conditions of his employment with the respondent were set out in a document which accompanied his letter of appointment dated 8 August 2008. That document provides that as well as receiving a retainer fee, which is to cover the fact that he is on standby effectively 24/7; he also receives an additional payment in respect of periods when he is called in to answer an alert. He is paid a certain amount for the first hour when he is called in; thereafter, receives an hourly rate for all subsequent hours spent attending to the fire, or other alert. He also receives an attendance fee when he is undergoing training exercises and when engaged in carrying out maintenance courses in respect of his equipment.

7. Clause 9 of the contract deals with availability. It provides that the appellant is required to be available on a 24-hour daily basis, save for periods when he is on approved leave. It provides that he must be available at all times generally for callouts. He must normally reside and work within "a reasonable distance" of the fire station in which he is employed. A change of residence or place of employment, which would take him an unreasonable distance from the station, will result in automatic termination of his service. The document provides that it is necessary that he should be released from his normal employment on the occasions that attendance at fires, demands such release.

8. Also relevant to his terms of employment, was a composite agreement dated 17 August 1999, concluded between representatives of SIPTU and ATGWU and various local authorities, including a representative of the respondent. That document provided that in relation to attendance at fire drills, the attendance criteria would be 85%. In case of an

alert, there was a duty on firefighters to attend. It was stated that that was the basis on which a retainer would be paid.

9. In relation to "turnout time", the document provided that current local arrangements, whereby the Chief Fire Officer would set a turnout time limit, in light of local circumstances, would continue to apply following normal consultation. It was agreed that all on-call firefighters, who responded within the turnout time limit, would receive full pay for the incident in all circumstances. Any firefighter who failed to respond within the turnout time limit, but responded within the maximum attendance time, set by the Chief Fire Officer, would be paid one-hour flat time and would be at the station unless required at an incident.

10. The appellant's terms and conditions of employment were further supplemented by a letter dated 21 September 2015 from the acting Chief Fire Officer of the Kerry Fire and Rescue Service. In relation to alerts, the letter reiterated that all personnel were obliged to be available on a 24-hour basis daily, excluding periods on which they were on approved leave. It stated that all personnel must be available at all times generally for callouts and must normally reside and work within a reasonable distance of the fire station in which they are employed. It was an essential requirement that personnel contact their station officer in advance, should circumstances arise that may result in their being unavailable to attend at any time. In such instances, the station officer was required to make an assessment as to the availability for turnout at his station and to proceed as appropriate. The document further provided that a minimum requirement of 75% of attendance at alerts would be appropriate, given the requirement to respond. The document further provided that all personnel would be made aware should their level of attendance at drills or alerts be unsatisfactory and they would be given an opportunity to address same.

The Decision of the Labour Court.

11. The decision against which an appeal on a point of law was brought, was the decision of the Labour Court dated 8 December 2022. In that decision, the Labour Court noted that the applicant submitted that as a retained firefighter, he was on call 168 hours a week, 52 weeks of the year. Given the response time required under his contract of employment, he was obliged to live and remain in close proximity to the fire station in Ballybunion. He had a ten-minute response time to an alert. Indeed, he was obliged to attend within five minutes, as the practice was that if possible, the fire tender would leave

the station within six minutes of the alert being made. If he arrived at the station within ten minutes of the alert, he would still be paid the full amount, but would have to remain at the station and may be dispatched to the alert, if required.

12. The Labour Court noted that it was submitted on behalf of the appellant, that while the requirement was to attend all alerts and that he would not be disciplined as long as he attended a minimum of 75% of alerts, given the level of manning in the station at the relevant time; the appellant had attended to far more than 75% of alerts in the relevant years. The Labour Court decision noted that the following assertions made by the respondent were not contested by the appellant:

- that the appellant ran a Bed & Breakfast with his partner and was engaged in other professional activities, such as organising golf tours;
- that the appellant was required to be at the fire station within ten minutes of the alert, whilst the appliance would mobilise after five minutes;
- that the average number of calls to the fire station for the past six years was 52 a year;
- that the average duration of a call was 2 hours and 20 minutes and that the appellant on average was obliged to attend 84 hours per annum at fire incidents, averaging 1.7 hours per week;
- that Ballybunion fire station was a one pump station, with a recommended staffing level of nine. While all staff were alerted in the event of an incident, the appliance would mobilise with six personnel on board. If there were not sufficient staff to mobilise the appliance, the nearest fire station would be mobilised.

13. The Labour Court noted that in his oral evidence before it, the appellant stated that he had had to submit a letter confirming that he would have permission to leave his Bed & Breakfast business to attend at fires, as and when required. He stated that given the level of staffing in the station, which was not at full complement, that had an impact on the retained fire fighters such as the appellant, who had to attend at nearly all the callouts. The appellant did not accept that he had a discretion not to turn up to an alert. He stated that if he wanted to leave the geographical area where the station was located, he had to check with the station officer to see what other staff were available, and depending on the numbers available, he might not be granted time off to leave the area. He stated that that

had happened to him on one occasion when he wanted to attend a golf tournament in Adare, but could not go on the day that he wanted to, as the other staff members were on leave. He was obliged to attend the tournament on a different day.

14. In cross-examination it was put to the appellant that he was called out for approximately two hours per week. When asked as to how that constrained him in the carrying on of his Bed & Breakfast business, the appellant did not dispute that on average he worked two hours per week on a callout. When asked how much of the 168 hours that he claimed that he was working for the fire brigade, was spent running his business; the appellant stated that he could not put a figure on that, but he was "actively involved" in running the business.

15. In the course of his evidence, the appellant accepted that he was able to go beyond the Ballybunion area, but he had to get permission from the station officer to do so. He stated that the station officer never refused him this permission, but sometimes he would ask him to delay for maybe thirty minutes, depending on where other people were. He stated that on one occasion he was not able to respond to an alert, even though the station officer had told him he was low in numbers and that he was not sanctioned for not turning out on that occasion.

16. The Labour Court noted that the appellant was obliged to carry an alerter with him, which had an operational range of 10/15km from the fire station. The court noted that it was submitted on behalf of the appellant that in the year 2017, he had attended 60 out of 64 incidents; in 2018, he had attended 61 out of 66 incidents; and in 2019 he had attended 49 out of 54 incidents.

17. In its decision, the Labour Court referred to the definition of working time as set out in Article 2 of the Working Time Directive 2003/99 and in s.2(1) of the Organisation of Working Time Act 1997. It also referred extensively to the decisions of the CJEU in *Vielle de Nivelles v. Matzak* (Case C-518/15); *RJ v. Stadt Offenbach* (Case C-580/19); and *MG v. Dublin City Council* (Case C-214/20). Having referred to the tests set down in those cases in relation to when time may be regarded as "working time", and having regard to the facts as found by it, the Labour Court came to the following conclusion:

> *"Applying those considerations to the facts of the case before the court, the court finds that the complainant is not obliged to participate in the entirety of the interventions and that there is a 75% minimum requirement attendance in place.*

The constraints that are placed on the complainant do not 'place him under major constraints and have a very significant impact on the management of his time' and that he is able to pursue other activities for a significant portion of his standby periods, including running his own business. This finding was supported by the complainant's evidence that his [sic] is actively involved in his own business and the respondent's uncontested submission that on average the complainant is obliged to attend 84 hours per annum, averaging 1.7 hours per week.

Taking all of the above into consideration, the court determines that the time spent on standby by the complainant is not working time for the purpose of the Directive and/or the Organisation of Working Time Act 1997 and that no breach of the Act occurred during the cognisable period.

Having heard the case in full and concluding that in this case, time spent on call did not qualify as working time, the issue of exemptions from the maximum working week and weekly and daily breaks did not arise. Therefore, there was no requirement for the court to address these issues.

The complainant's appeal fails. The decision of the adjudication officer is upheld."

Submissions of the Parties.

18. On behalf of the applicant, Mr Power SC accepted that in the *Matzak* case, the CJEU had had regard to the requirement that the fire fighter in that case had to remain at his home during his period on standby. The court had also had regard to the other constraints which had cumulatively meant that he had to be regarded as being engaged in "working time" during the period that he was on standby. Those constraints arose from the fact that he had to be able to respond to a call within eight minutes, which in turn meant that he had to live close to his fire station. It was submitted that the decision in that case was not solely predicated on the fact that the fire fighter had to remain at his home during his period on standby. It was submitted that the Labour Court had been in error in holding that that was the determinative factor in that decision and on that basis, had erred in holding that that case was not determinative of the appellant's appeal herein.

19. Counsel referred to the decision in *RJ v. Stadt Offenbach*, where it was held that it was necessary for the court in assessing the case to carry out an overall assessment of all the circumstances of the case, in particular the consequences of the response time requirement and, where appropriate, the average frequency of interventions during that

period, and consider whether the constraints imposed on the worker during that period were of such a nature as to constrain objectively and very significantly the ability that he or she had to freely manage, the time during which his or her professional services are not required and to devote that time to his or her own interests: see para. 61.

20. Counsel submitted that a similar obligation had been placed on the decisionmaker by virtue of the test set down in *MG v. Dublin City Council*, where it had been held that the decisionmaker must have regard to all the constraints and to consider whether they were such as to objectively and very significantly constrain the worker's ability to freely manage his time and his other activities, during his periods on standby: see para. 42.

21. It was submitted that in the present case, the Labour Court had rigidly followed the decision in the *MG* case, to hold that in similar circumstances, the appellant was not engaged in "working time" when on standby. It was submitted that in so doing, the Labour Court had failed to have proper regard to all the circumstances in the case and in particular to all of the constraints that existed in relation to his obligation to remain within a ten minute response time with his fire station and the fact that he was effectively on call 24/7; coupled with the fact that his attendance rate was far in excess of the 75% minimum required under his terms of employment.

22. It was submitted that the Labour Court had failed to fully take into account the overall impact on all of the restrictions on the appellant in determining that the time spent on standby was not working time. It was submitted that the court had placed undue and unwarranted emphasis on the 75% attendance threshold, in reaching its determination and had ignored that it was a minimum requirement that, if not met, triggered a disciplinary response. The court had failed to take into account the actual attendance record of the appellant, which was above 90%, in estimating the constraints that operated on the appellant. It was submitted that the appellant satisfied the statutory definition of working time when on call, because he (a) was at his employer's disposal; and (b) was carrying on or performing the activities or duties of his work, given that that activity or duty, was a remunerated contractual obligation to be on standby.

23. On behalf of the respondent, Ms McKenna SC, submitted that it was well settled that there was limited scope to challenge findings of fact in statutory appeals that were restricted to a point of law: see *Deely v. Information Commissioner* [2001] 3 IR 439;

Fitzgibbon v. Law Society [2015] 1 IR 516; and *Web Summit Services Limited v. Residential Tenancies Board* [2023] IEHC 634.

24. It was submitted that in the present case, all the facts had either been agreed, or had not been seriously contradicted by the appellant. Insofar as there was a contested finding in relation to the 75% threshold for attendance at alerts, it was submitted that the Labour Court had acted on evidence that was before it in reaching its finding that the appellant knew that he would not be disciplined as long as his attendance record stayed above that minimum threshold. Accordingly, it was submitted that the findings of fact and the inferences drawn therefrom, could not be challenged on this appeal.

25. It was submitted that the Labour Court had had regard to the definition of "working time" in both the Directive and in the 1997 Act and had correctly applied it, in line with the relevant decisions of the CJEU.

26. It was submitted that insofar as it had been submitted on behalf of the appellant, that the Labour Court had slavishly followed the decision in the *MG* case, without carrying out any proper assessment of the overall circumstances of the appellant's position; that was untenable, when one read the decision of the Labour Court as a whole. It was submitted that from reading the decision as a whole, it was clear that the Labour Court had had regard to all relevant circumstances, including the fact that the appellant accepted that he was "actively involved" in the running of his business activities as a B&B owner and as the organiser of golf tours. The Labour Court had had regard to the constraint imposed by the ten-minute response time, but had also had regard to the fact that the appellant was free to move around the general area, as long as he remained within a ten minute travel time from the fire station.

27. It was submitted that it was clear that the court had had regard to the constraints, such as they were, on his ability to attend other events and functions, as had been outlined in his oral evidence. The Labour Court had also had regard to the frequency and duration of the occasions on which the appellant was called in to deal with an alert. It was submitted that the Labour Court had had regard to all relevant circumstances when carrying out their assessment of whether the cumulative constraints, objectively and significantly interfered with the appellant's capacity to manage his time while on standby and to pursue his business activities. It was submitted that the Labour Court had not erred

in law in applying the relevant test as set down in the legal authorities. It was submitted that its conclusion was not arrived at through error of law, nor was it otherwise infirm.

Conclusions.

28. Article 2 of Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time (hereinafter 'the Working Time Directive') defines working time as: *"any period during which the worker is working, at the employer's disposal and carrying out his activity or duties, in accordance with national laws and/or practice."*

29. Section 2 of the Organisation of Working Time Act 1997 (hereinafter 'the 1997 Act') provides: "'*Working time' means any time that the employee is – (a) at his or her place of work or at his or her employer's disposal, and (b) carrying out on or performing the activities or duties of his or her work, and (work) shall be construed accordingly".*

30. The term "rest period" is defined in the Directive as meaning "*any period which is not working time*". It is defined in identical terms in the 1997 Act. The parties were agreed that the caselaw of the CJEU, establishes that this is effectively a binary choice, in that the worker is either engaged in "working time" as defined in the Directive and in the Act, or is on a "rest period" as defined therein. There is no halfway house, it is either one thing or the other.

31. In the *Matzak* case, the CJEU considered the significance of the constraint, which provided that the employee had to remain at a place designated by his employer, during his period on standby. At paras. 59 and 60, the court contrasted the situation where such a constraint was in place, with the situation which might apply to a standby period where there was no such constraint:

> "*59. Furthermore, it is apparent from the case-law of the Court that the determining factor for the classification of 'working time', within the meaning of Directive 2003/88, is the requirement that the worker be physically present at the place determined by the employer and to be available to the employer in order to be able to provide the appropriate services immediately in case of need. In fact, those obligations, which make it impossible for the workers concerned to choose the place where they stay during stand-by periods, must be regarded as coming within the ambit of the performance of their duties (see, to that effect, judgment*

of 9 September 2003, Jaeger, C-151/02, EU:C:2003:437, paragraph 63, and order of 4 March 2011, Grigore, C-258/10, not published, EU:C:2011:122, paragraph 53 and the case-law cited).

60. Finally, it must be observed that the situation is different where the worker performs a stand-by duty according to a stand-by system which requires that the worker be permanently accessible without being required to be present at the place of work. Even if he is at the disposal of his employer, since it must be possible to contact him, in that situation the worker may manage his time with fewer constraints and pursue his own interests. In those circumstances, only time linked to the actual provision of services must be regarded as 'working time', within the meaning of Directive 2003/88 (see, to that effect, judgment of 9 September 2003, Jaeger, C-151/02, EU:C:2003:437, paragraph 65 and the case-law cited)."

32. In *RJ v. Stadt Offenbach*, the court emphasised that the test which should be applied in determining whether a person was engaged in "working time" while they were on standby, effectively involved constraints of such a level that they "objectively and very significantly", affected the possibility of the worker freely to manage the time during which his or her professional services are not required and to pursue his or her own interests. The court set out the test as follow at paras. 38 and 39:

"*38. It follows from the elements set out in paragraphs 34 to 37 of this judgment and also from the need, recalled in paragraph 28 of this judgment, to interpret Article 2(1) of Directive 2003/88 in the light of Article 31(2) of the Charter of Fundamental Rights of the European Union, that the concept of 'working time' within the meaning of Directive 2003/88 covers the entirety of periods of stand-by time, including those according to a stand-by system, during which the constraints imposed on the worker are such as to affect, objectively and very significantly, the possibility for the latter freely to manage the time during which his or her professional services are not required and to pursue his or her own interests.*

39. Conversely, where the constraints imposed on a worker during a specific period of stand-by time do not reach such a level of intensity and allow him or her to manage his or her own time, and to pursue his or her own interests without major constraints, only the time linked to the provision of work actually carried out

during that period constitutes 'working time' for the purposes of applying Directive 2003/88 (judgment of today, Radiotelevizija Slovenija (Period of stand-by time in a remote location), C-344/19, paragraph 38 and the case-law cited)."

33. Most recently, in the *MG* case, in a judgment delivered on 11 November 2021, the CJEU set down the relevant principles at paras. 38 to 41 of its judgment and summarised them in the following test set out at para. 42:

"*It is for the referring court to assess, in the light of all the circumstances of the case and relying on the information set out in paragraphs 38 to 41 of the present judgment, whether, during his periods of stand-by time according to a stand-by system, MG is subject to constraints of such intensity such as to constrain, objectively and very significantly, the ability that he has freely to manage, during those periods, the time during which his professional services as a retained firefighter are not required.*"

34. I turn now to apply the relevant principles of law to the issues that arise on this appeal. Findings of primary fact can only be overturned on an appeal on a point of law, if there is no evidence to support them. Inferences from such facts, can only be set aside if no reasonable decisionmaker could have drawn such inferences from the primary facts as found: *Deely v. Information Commissioner; Fitzgibbon v. Law Society; and Web Summit Services Limited v. Residential Tenancies Board*, supra.

35. I am satisfied that the findings of fact and inferences drawn by the Labour Court in this case flowed from the facts as found, which were either expressly agreed between the parties, or not seriously contradicted before the Labour Court. The 75% turnout minimum, was the only area on which there was a factual dispute between the parties. There was ample evidence before the Labour Court to support the findings that it made in this regard. Accordingly, I am satisfied that there is no basis on which to set aside any of the primary findings of fact, or the inferences drawn therefrom, as made by the Labour Court.

36. At the hearing of the appeal before this Court, Mr Power SC did not seek to challenge the findings of primary fact as made by the Labour Court, but rested his submission on two distinct grounds: first, it was argued that the Labour Court had been wrong to hold that the *Matzak* decision had been predicated primarily, although not exclusively, on the requirement in that case that the fire fighter should remain at his home during the periods when he was on standby. It was submitted that the Labour Court had

erred in holding that the CJEU had based its conclusion that Mr Matzak was engaged in "working time" while on call, due to this constraint; and on that basis it was submitted that the Labour Court had erred in holding that that decision was not strong persuasive authority in favour of the appellant's case.

37. I am satisfied that there is no substance in this argument. While it is true that AG Sharpston in her opinion, pointed out that there was no such constraint in the fire fighter's contract of employment, it is clear from the terms of the reference made by the national court in that case and from the terms of the judgment of the CJEU, that the national court had asked for a decision on the basis that Mr Matzak was required to remain at his home during his periods on standby.

38. It is equally clear that the CJEU had answered the question posed to it on this basis. That is abundantly clear from the terms of the judgment: see in particular paras. 61, 63 and 65, which all refer to the requirement imposed by the employer that the firefighter remain at his home during the periods on standby.

39. Accordingly, I am satisfied that the Labour Court did not err in law in holding that the *Matzak* decision was predicated on a requirement that the worker on standby remain at his home, which was a place specified by his employer. That being the case, the Labour Court was entitled to hold that the constraints in the *Matzak* case were considerably more restrictive, than the case before them; and accordingly, the Labour Court was entitled to hold that the decision in the *Matzak* case was not binding on it.

40. Turning to the appellant's main ground of challenge to the Labour Court decision, which was to the effect that the Labour Court had focussed in a restrictive way on the decision in the *MG* case. It was submitted that the Labour Court had simply followed that decision, because it had also pertained to a retained fire fighter in the Irish fire service. It was submitted that the Labour Court had erred in failing to have regard to the full panoply of constraints that existed in this case; which, it was submitted, when taken cumulatively, interfered in an objective and significant way in the ability of the appellant to manage his time spent on standby and to engage in business or social activities.

41. In this regard, counsel had laid particular stress on para. 42 in the *Matzak* decision, which had stated that it was for the referring court to assess "*in the light of all the circumstances of the case*" whether the constraints on the worker were such as to objectively and very significantly interfere with his freedom to manage his time and

engage in business and other activities. It was submitted that the Labour Court had failed to engage in the level of assessment of the entirety of the circumstances in this case and on that basis, it was submitted the decision had been based on an error of law and should be set aside.

42. I am not satisfied that this ground of appeal has been made out. When one reads the decision of the Labour Court as a whole, it is obvious that the Labour Court had had regard to all the relevant facts in the case. Many of these were agreed between the parties and others had been alluded to in the evidence of the appellant, or in the submissions of the respondent, without contradiction.

43. I am satisfied that the Labour Court applied the correct test emanating from the caselaw of the CJEU, culminating in the decision of that court in the *MG* case. In essence, the Labour Court had to look at all the constraints that existed under the terms of the appellant's employment with the respondent and had to determine whether they were such as to constrain "objectively and very significantly" the ability of the appellant to manage his time while on standby, or to engage in business or social activities. I am satisfied that on a reading of the entire decision of the Labour Court, they did just that.

44. In the *MG* case, the CJEU, had identified a number of factors that were relevant to the consideration of the question in his case: In that case the CJEU noted that *MG* was permitted to carry out another professional activity during his standby period and was permitted to effectively pursue that activity (para. 43); he did not have to be in a specific place during his periods on standby; nor was he obliged to participate in the entirety of the interventions effected from his fire station, since he was only obliged to attend a minimum of 75% of alerts (para. 44); the foregoing were objective factors from which it could be concluded that *MG* was in a position to develop other professional activity and to devote a considerable part of the time to that activity, unless the average frequency of the emergency calls and the average duration of the interventions, prevented the effective pursuit of that professional activity (para. 44); and the court noted that organisational difficulties that a period of standby may generate for the worker concerned, such as a choice of residence or place for the pursuit of another professional activity, which are more or less distant from the place that he must be able to reach within the time limit set in the context of his post as a retained fire fighter, may not be taken into account (para. 45).

45. There are marked similarities between the appellant's case and that of the applicant in the *MG* case; but this does not mean the Labour Court did not have adequate regard to the appellant's personal circumstances.

46. In the present case, the Labour Court had regard to the relevant factors which could be deemed to be constraints on the appellant's ability to carry out activities while on call. The Labour Court had regard to the following: the fact that he had ten minutes to get to the fire station; that he had to have permission to leave the Ballybunion area, which permission had been refused on one occasion when he wanted to attend a golf tournament, albeit he had been able to attend on another day in the same week, and on other occasions when he had been asked by the station officer to defer his departure by thirty minutes; that he had to carry an alerter, which had a transmission radius of 15km from the fire station; that when asked in cross-examination how many hours he spent working in his business as a bed and breakfast owner and as an organiser of golf tours, the appellant was unable to give an exact number of hours spent on these activities, but had said that he was "actively involved in running his business"; that he was aware that he would only face possible loss of retainer fee and/or disciplinary action, if he failed to respond to at least 75% of alerts; that the frequency of alerts in the station for the past six years was 52 a year, with the average duration of a call being 2 hours and 20 minutes and that the appellant was on average obliged to attend 84 hours per annum at fire incidents, averaging 1.7 hours per week. It is clear from the Labour Court decision, that the Labour Court had had regard to all these matters.

47. In these circumstances, the court is satisfied that the Labour Court had regard to all relevant circumstances, as required by the test set down in the *MG* decision.

48. The court is satisfied that the Labour Court was entitled to reach the conclusion that the constraints on the appellant were not such as to "objectively and very significantly" affect the appellant freely managing his time and pursuing his business and social interests during his periods on standby.

49. In summary, therefore, I am satisfied that the Labour Court had regard to all relevant factors said to constitute constraints on the appellant. It correctly applied the legal tests as set down in the decisions of the CJEU. Accordingly, I am satisfied that there is no basis on which to set aside the decision of the Labour Court as having been reached through an error of law.

50. Insofar as it was argued that there had been a failure by the State to implement the Directive due to the fact that the provisions relating to the civil protection services in the Organisation of Working Time (Exemption of Civil Protection Services) Regulations 1998 (SI 52/1998) operated as an exemption from the application of ss.11, 12, 13, 15 and 16 of the 1997 Act; the court is satisfied that this issue does not arise for determination on this appeal. This is due to the fact that the Labour Court expressly declined to determine this issue having regard to its previous findings in the matter.

51. The court is satisfied that this Court should decline to decide a point of law in a statutory appeal, where it has not been part of the decision made by the original decisionmaker; see *Ash v. Residential Tenancies Board* [2023] IEHC 627.

52. Furthermore, the respondent in this case is not the proper party to respond to such a complaint. While it is correct to say that the Labour Court must disapply provisions of national law which breach EU law, the Labour Court does not have jurisdiction to declare that the State has failed to properly transpose measures of EU law into national law: see *Mallon v. Minister for Justice* [2022] IEHC 546. Accordingly, the court is satisfied that this ground of appeal is without substance.

53. The final order shall provide that the court dismisses the appellant's appeal against the decision of the Labour Court dated 8 November 2022.

54. As this judgment is being delivered electronically, the parties shall have four weeks within which to furnish brief written submissions on the terms of the final order and on costs and on any other matters that may arise.

55. The matter will be listed for mention at 10.30 hours on 19 January 2024 for the purpose of making final orders.