ELA – INTRODUCTION TO EMPLOYMENT LAW - WORKING TIME

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1. OVERVIEW

1.1 The Working Time Regulations 1998 SI 1998/1833 ('WTR") came into force on 1 October 1998. Prior to this point working time in the UK had been largely unregulated. The few statutory provisions that did exist were limited to certain sectors.

1.2 The WTR implement the Working Time Directive 2003/88/EC ('the WTD') which, accordingly to article 1, 'lays down minimum safety and health requirements for the organisation of working time'. Therefore, the WTR were adopted as a health and safety measure to protect workers by setting out minimum conditions relating to weekly working time, rest entitlements and annual leave.

1.3 The impact of the WTR may vary depending on the type of work being done and the relevant contractual arrangements. Please note in particular that the application of the WTR in relation to Young Workers and Night workers is not covered in this note.

1.4 The impact of the Retained EU Law (Revocation and Reform) Act (the **"Act"**) is as follows:

1.4.1 On 31 December 2023, the Act will revoke all laws which came from EU law, which are not yet an Act of Parliament, unless they are elected by Ministers to be saved or amended by the Government. There is no phasing out or transition period.

1.4.2 The Act will affect all regulations passed as a result of EU laws since 1972 under the European Communities Act 1972 or in compliance with an EU obligation. This will include employment rights covering not only working time but also agency workers, part-time and fixed-term workers and maximum working weeks for office workers.

1.4.3 The Act is set to remove the principle of supremacy of EU law, the duty of consistent interpretation for domestic legislation and the principle of direct effect.

1.4.4 The Act also grants the UK Government unprecedented powers to rewrite, restore and revoke any of the affected regulations subject to only one condition that no additional regulatory burdens are introduced.

2. The Government consulted over proposals to retain certain elements of EU case law and to introduce other changes to the law on Working Time earlier this year. The response to the consultation and draft Regulations (The Employment Rights (Amendment, Revocation and Transitional Provision) Regulations 2023)

(the "**Amendment Regulations**") have now been published. They apply to Great Britain only, not to Northern Ireland. See further below.

3. WHO IS COVERED BY THE WORKING TIME DIRECTIVE?

3.1 The WTD and consequently, the WTR protect "workers", defined within Regulation 2(1) as all those working under either:

3.1.1 A contract of employment.

3.1.2 Any other contract whereby the individual undertakes to perform personally any work or services for the other party to the contract, where the other party is not by virtue of the contract a client or customer of any profession or business undertaking carried on by the individual.

3.2 This means that the WTR cover employees and workers (including temporary workers) but not those who are self-employed.

4. AVERAGE WEEKLY WORKING TIME

4.1 The 48-hour limit on average weekly working time

4.2 Regulation 4 WTR stipulates that a worker's average working time (including all overtime) must not exceed 48 hours per week. An employer must take all reasonable steps in order to protect health and safety of its workforce, to ensure that this limit is complied with. Failure to do so is a criminal offence punishable with a potentially unlimited fine.

4.3 Workers can still work more than 48 hours in any one week provided the overall weekly average measured over 17 weeks (the reference period) is 48 hours or less.

4.4 All workers are covered unless they are expressly excluded by the WTR. The main exemptions are:

4.4.1 Workers who have validly "opted out" (Regulation 5).

4.4.2 Workers in particular sectors partially excluded from the WTR including Mobile Road transport workers (regulation 18) and armed forces, police, emergency and civil protection services, where the nature of those services conflict with the requirements of the WTR (regulation 18(2)(a)).

4.5 Calculation of weekly average hours

4.5.1 A worker's weekly average working time is calculated by adding up all working time (including overtime) over the reference period (usually 17 weeks) and dividing that figure by the number of weeks in the reference period.

4.5.2 The following formula applies: Regulation 4(6) WTR:

(a) (A + B) / C, where:

(b) A is the hours actually worked in the reference period;

(c) B is the hours actually worked in a number of days immediately after the reference period equivalent to the number of "excluded days" in the reference period; and

(d) C is the number of weeks in the original reference period.

4.5.3 Excluded days are those days during the reference period when the worker was absent for certain specified reasons. These "excluded days" include statutory annual leave, sick leave, maternity, paternity, parental or adoption leave, or when an opt-out agreement was in force (*regulation 4(7)*). In relation to annual leave, only days spent taking the four weeks' statutory annual leave under regulation 13 of the WTR will constitute excluded days (*regulation 4(7)*). Therefore, the following will not be excluded days, and will serve to reduce the average working hours during the reference period:

(a) Statutory annual leave under regulation 13A (1.6 weeks) and;

(b) Contractual annual leave in excess of the statutory entitlement.

4.6 Opting out of the 48-hour week

4.6.1 The limit on average working hours does not apply if the employer has obtained the worker's agreement in writing to perform work in excess of the limit. This is generally referred to as an "opt-out agreement".

4.6.2 The opt-out agreement can last for a fixed period or indefinitely. Any opted-out worker can cancel the opt out by giving at least seven days' notice unless the opt-out agreement provides for longer notice (which cannot exceed three months) (regulation 5 WTR).

4.6.3 Even if a worker has agreed to opt out of the limits, they cannot be required to work excessively long hours if this creates a reasonably foreseeable risk to their health and safety or the health and safety of others. The employer has a duty at common law to protect workers' health and safety.

4.6.4 Employers must keep records covering the last two years showing which workers have opted out.

4.6.5 The opt-out should specify that the worker agrees to disapply the statutory 48-hour limit and not simply state that they agree to work more than 48 hours.

4.6.6 Some employers include an opt-out in job offer letters or in the contract of employment itself. However, this practice has attracted considerable criticism from both unions and employers as being an abuse of the opt-out.

4.6.7 Employers pressurising workers to sign an opt-out or victimising anyone for refusing to do so risk infringing the provisions of Section 45A of the Employment Rights Act 1996.

4.6.8 An employer can refuse to accept a worker's request to opt out but must be consistent in doing so to avoid potential discrimination or victimisation claims.

4.6.9 Although it is unlawful to dismiss a worker or otherwise victimise them for refusing to sign an opt-out or for opting back in, there is currently no prohibition on refusing to employ someone unless they opt out.

5. WHAT IS WORKING TIME?

5.1 Meaning of working time

5.2 The concept of "working time" is relevant to the WTR rules on the average maximum working week, night working, rest periods and rest breaks. Working time is defined in Regulation 2(1) WTR as:

5.2.1 Any period during which the worker is doing all of the following:

(a) working;

(b) carrying out their duties; and

(c) at the employer's disposal.

(d) any period during which the individual is receiving relevant training, and

(e) any additional period which is to be treated as working time under a relevant agreement.

5.3 Article 2(1) of the WTD provides: “working time” means 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…’

5.4 The following will normally be treated as working time:

5.4.1 Paid overtime and some unpaid overtime (unless it is purely voluntary in which case the worker is arguably not at the employer's disposal).

5.4.2 Time spent waiting or "on call" at the workplace (or at another place chosen by the employer), even if the worker is allowed to sleep. For example junior doctors required to be present and available at the

workplace, even though they were provided with a rest room and a bed for sleeping was considered to be working time (*Landeshauptstadt Kiel v Jaeger [2004] ICR 1528 (CJEU))*

5.4.3 Responding to telephone calls while on call (at any location).

5.4.4 Travelling to incidents while on call

5.4.5 Travel time where travel is part of the job.

5.4.6 Working lunches.

5.4.7 Work taken home at the request of the employer.

5.4.8 Attending work-related training

5.4.9 Other time that is treated as "working time" under a relevant agreement. A "relevant agreement" could be contained in a collective agreement, a workforce agreement, or a contract of employment.

5.5 The following activities will not normally be considered working time:

5.5.1 Rest breaks including lunch breaks and coffee breaks

5.5.2 Daily and weekly rest periods

5.5.3 Annual leave.

5.5.4 Time spent "on call" if the worker is not required to be at a particular place. The following were not engaged in working time:

(a) Junior doctors required merely to be ‘contactable’ *(SIMAP v Conselleria de Sanidad y Consumo de la Generalidad Valenciana [2001] ICR 1116 (CJEU))*

(b) A hospital estates officer simply required to be available to deal with calls, which might or might not then involve him attending the workplace to address the issue *(Blakely v South Eastern Health and Social Services Trust [2009] NICA 62)*

5.5.5 Travelling to the workplace for workers who have to travel as part of their job (for example travelling sales reps or 24-hour plumbers). Other examples could include a solicitor travelling to court or to visit a client.

5.5.6 Attending work-related social events.

5.5.7 Unpaid overtime undertaken voluntarily

5.5.8 Responding to telephone calls voluntarily out of hours, including when travelling.

5.6 These activities will not normally be considered working time because the worker does not fulfil one or more of the criteria of working, carrying out their duties, and being at the employer's disposal.

5.7 The critical question is whether the worker 'is required to be physically present at a 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' *(European Commission v Ireland [2016] IRLR 77 (CJEU), Landeshauptstadt Kiel v Jaeger [2004] ICR 1528 (CJEU))*

5.8 If the employee has to travel to somewhere other than their workplace then it appears that a journey during the working day would fall within the definition of working time, while a journey in the employee's "own time" would not.

5.9 Travelling time

5.9.1 Neither the WTD nor the WTR say anything about whether travel to and from a place of work or between places of work should be considered as working time. Assuming there is no relevant agreement covering travel time, the question is therefore whether the worker can be said to satisfy all three limbs of the definition of working time, in that they must be working at their employer's disposal, and carrying out their duties or activities.

5.9.2 It is open to an employer to provide in a contract of employment that certain travelling time is to be regarded as working time, even if it is not regarded as such under the WTR.

5.9.3 Time spent commuting would therefore not usually be viewed as working time. The employer has no control over how long the worker spends commuting as this will depend on where the employee lives. The worker is, as a general rule, not at the employer's disposal until they reach the workplace. Therefore, even if the worker uses some of their daily commute to carry out work-related activities such as making telephone calls or reviewing documents, the time would still not generally be treated as working time, unless the employer was compelling them to do so.

5.9.4 The ECJ in *Federacion de Servicios Privados del sindicato Comisiones Obreras v Tyco Integrated Security SL and another (c-266/14)* held that for peripatetic workers who are not assigned to a fixed place of work, the time spent travelling from their home to their first assignment, and from their last assignment back to their home, should constitute working time. The travelling is still done within the context of the hierarchical employment relationship and the journeys are subject to the authority of the employer, who can choose to change the order of customers or cancel an appointment, or require workers to call on an additional customer on their journey home. The workers are therefore at the employer's disposal for the purposes of the WTD. Note that this does not mean that such workers are entitled to be paid for their

travelling time, as the definition of working time under the National Minimum Wage Regulations 2015 differs from the definition in the WTR.

6. REST BREAKS AND PERIODS

6.1 Rest Periods

6.1.1 Article 3 and Article 5 of the WTD stipulates the requirements for rest periods.

6.1.2 A rest period is defined in regulation 2(1) WTR as a period which is not working time, other than a rest break or annual leave.

6.1.3 Subject to certain exemptions, the WTR (which implements Article 3 of the EWTD) provides that workers are entitled to:

6.1.4 A daily rest period of not less than 11 consecutive hours in each 24-hour period (regulation 10(1), WTR).

6.1.5 A weekly rest period of not less than 24 hours' uninterrupted rest in each seven-day period, or, at the employer's choice, either:

(a) Two uninterrupted rest periods of not less than 24 hours in each 14-day period; or

(b) One uninterrupted rest period of not less than 48 hours in each 14-day period.

(Regulation 11(1) and (2), WTR)

6.1.6 There is no particular point in the week when the rest period must be provided for example, an employer could have a Monday as off one week and a Thursday off the following week.

6.1.7 The ECJ has made it clear that time spent on call at a place determined by the employer, which could include the worker’s home, is counted as working time irrespective of whether the person actually works, provided they are ready to work if required. Periods of inactivity while on call could not be treated as rest periods.

(a) In *Landeshauptstadt Kiel v Jaeger*, the ECJ held that time spent by a doctor on call at a hospital, including periods of inactivity when the doctor might be sleeping, constituted working time for the purposes of the Directive. The doctor was subject to constraints to remain apart from their family and social environment and have less freedom to manage their time. The Court held that periods of on call could not be treated as rest periods regardless of when he or she is actually carrying on any professional activities.

6.2 Rest Breaks

6.2.1 Under Regulation 12(1) and (3) WTR a worker has the right to take an uninterrupted 20-minute rest break if their daily working time is more than six hours.

6.2.2 A worker is entitled to have this rest break away from their workstation (if they have one) (Reg 12(3)) but they can be required to remain at their workplace for the duration of the rest break.

6.2.3 An employer is not obliged under the Regulation to pay the worker for the rest break and hence this can be unpaid. However, there may be an express right to be paid for rest breaks provided for in their contract.

6.2.4 The regulation nor the directive specify when the break should be taken. The details of rest breaks, including their duration and the terms on which they are granted, may be set by collective or workforce agreements (Reg 12(2)). If a collective or workforce agreement specifies a minimum rest break which is greater than 20 minutes, then that provision will prevail over Reg 12(1) and (3).

6.2.5 The EAT has held in *Grange v Abellio UKEAT/0130/16* that the worker need not request a break for it to be construed as having been refused. An employer must proactively put breaks in place.

6.2.6 Regulation 12(1) left the position as to whether an employee who works for 12 or more hours is entitled to more than one rest break unclear. Reg 12(1) could be read as meaning either that where a worker works for more than six hours, they are entitled to a single rest break (regardless of how many additional hours are worked) or in the alternative that for each period of six hours worked, the worker is entitled to take a rest break. The latter interpretation was rejected by the EAT in *Corps of Commissionaires Management Ltd v Hughes 2009 ICR 345, EAT* and means that a worker working a 12-hour shift is only entitlement to one 20-minute rest break.

6.2.7 Regulation 8 WTR provides that, where the pattern of work puts the health and safety of a worker at risk, in particular because the work is monotonous or the work-rate is predetermined, the employer is required to ensure that the worker is given 'adequate rest breaks'. For example, this is likely to cover workers who carry out a single task on a continuous production line.

6.3 Exemptions:

6.3.1 Articles 17 to 21 of the WTD provide that member states may derogate from the rights to rest breaks, daily rest periods and weekly rest periods in certain circumstances. These may apply, for example, to persons engaged in offshore work, workers engaged in security and surveillance activities, and 'mobile workers' (that is, travelling staff

engaged in the transportation of passengers and goods). Under article 18, derogations in other contexts are also permissible if they are set out in collective agreements

7. **ANNUAL LEAVE**

7.1 Article 7 of the WTD entitles an employee to a minimum period of four weeks annual paid leave per year. However, it does not specify how a worker's pay while on annual leave should be calculated. This four-week period must be used in the entitlement leave period to which it relates and cannot be carried over, save in the circumstances set out below as Carry Over Exceptions.

7.2 The WTR provide that an employee is entitled to 5.6 weeks paid leave each year. This includes bank holidays. This is equivalent to 28 days for those who work five days a week. This is made up of:

7.2.1 The right under the WTD to a minimum of four weeks' annual leave (20 days for full-time employees) each year (regulation 13(1) WTR – “Reg 13 leave”).

7.2.2 The domestic right to an additional 1.6 weeks' annual leave (8 days for full time employees) each year, which represents the number of public holidays in England and Wales in a year (“Reg 13A leave”).

7.3 A worker is not entitled to more than 28 days' statutory leave in a single leave year (regulation 13A(3)), although many employers provide more leave than this minimum entitlement.

7.4 A part-time worker is also entitled to 5.6 weeks' leave, but a week will be the number of days on which they work. So for someone who works 3 days a week, 5.6 weeks leave equates to 17 days.

7.5 No minimum period of continuous service is required to qualify for statutory annual leave. A worker whose employment begins part way through a leave has a pro rata statutory holiday entitlement for that year.

7.6 Under the WTR, workers are entitled to be paid during statutory annual leave at a rate of a week's pay for each week of leave, calculated in accordance with sections 221 to 224 of the Employment Rights Act 1996 (ERA 1996) (regulation 16, WTR). There is no cap on the amount of a week's pay. The way the payment is calculated under ERA 1996 depends on a number of factors, and a distinction is made between workers with "normal working hours" and those with "no normal working hours".

7.7 A week's pay under ERA 1996

7.7.1 From 6 April 2020, the 12-week reference period used to calculate statutory holiday pay was extended to 52 weeks in GB (not N Ireland) (or the number of complete weeks for which the worker has been employed, if that period is less than 52 weeks).

7.7.2 If a worker does not have "normal working hours", a week's pay is calculated as an average of all remuneration earned in the previous 52 weeks, or the number of complete weeks the worker has been employed/ Weeks in which no remuneration is due are ignored, and earlier weeks are brought into account, up to a maximum of 104 weeks before the relevant date. This includes any overtime payments and commission.

7.7.3 A worker who has "normal working hours" will have their week's pay calculated with reference to those hours. This usually means basic salary, disregarding any overtime hours (except guaranteed, compulsory overtime) and without any additional bonuses, commission payments, overtime premiums or allowances.

7.7.4 There has been extensive case law on the question of whether for the purposes of calculating holiday pay, other payments need to be taken into account when calculating a week's pay under ERA 1996 for workers with normal working hours.

7.8 In *Williams v British Airways Plc (C-155/10) [2012] IRLR 948,* a case which concerned the Aviation Directive, the ECJ held that basic salary is not enough and that holiday pay should be "normal remuneration". In Williams, this included various flying and other allowances. Although the case was brought under the Aviation Directive, the ECJ found this calculation under the ERA was also contrary to Article 7 of the WTD .

7.9 This decision was followed by the EAT held *in Bear Scotland Ltd and others v Fulton and others UKEAT/0047/13*. The EAT held that the domestic week's pay rules in ERA 1996 do not provide workers with the holiday pay to which they should be entitled under the WTD. The WTD requires workers to receive their "normal remuneration" during periods of WTD leave (the four weeks of leave under regulation 13 WTR). This means for the purposes of calculating holiday pay for WTD leave, they must be interpreted in line with ECJ case law and the EAT's judgment in Bear Scotland.

7.10 Following Bear Scotland, in *Lock v British Gas Trading Ltd and others [2014] IRLR 648,* the ECJ applied *Williams.* The ECJ held that where a worker's remuneration includes contractual commission, calculating statutory holiday pay based on basic salary alone is contrary to the WTD. If commission payments are not taken into account the worker will be at a financial disadvantage when taking statutory annual leave. The worker might be deterred from exercising the right to annual leave. This would be contrary to the WTD's purpose.

7.11 Note that the EAT's view in Bear Scotland that a gap of more than three months between periods of underpaid holiday pay would break a series of deductions and thus limit the ability of a worker to claim back pay over a long period has now been overturned by *Chief Constable of the Police Service of Northern Ireland & PSNI another (Appellants/Cross-Respondents) v Agnew & others*

(Respondents/Cross-Appellants) (Northern Ireland) [2023] UKSC 33, in which the Supreme Court has held that underpayments of holiday pay can form a series of deductions regardless of the period between each underpayment as there is a common reason for the underpayment. In Great Britain, regulations passed by the Government limit the period for which back pay can be claimed to two years. In Northern Ireland there is no such limit.

7.12 Following various ECJ and domestic cases on holiday pay under the EWTD, it became clear that the following should be included in the calculation of the first 4 weeks of holiday pay for leave under regulation 13 WTR, as long as they are paid regularly or repeatedly over a sufficient period to count as "normal remuneration":

7.12.1 Commission payments.

7.12.2 Incentive bonuses.

7.12.3 Overtime pay including overtime premiums whether compulsory or voluntary, guaranteed or non-guaranteed.

7.12.4 Payments that relate to the "personal and professional status" of workers, such as those based on seniority, length of service or professional qualifications.

7.12.5 Productivity/performance bonuses.

7.12.6 Shift allowances and premiums (additional rates for working particular shifts, such as "time and a half").

7.12.7 Standby payments and payments for emergency call-out duties.

7.12.8 Travel and other allowances that are treated as taxable remuneration.

7.13 The following elements of remuneration should not be included in the calculation of holiday pay for WTD leave:

7.13.1 Benefits in kind.

7.13.2 Bonuses not linked to workers' performance.

7.13.3 Expenses (including travel expenses) which reimburse workers for costs incurred.

7.13.4 One-off bonuses and occasional payments.

7.14 The Government has now published the draft Amendment Regulations to clarify what is meant by “normal remuneration”. The draft Amendment Regulations codify the existing case law and provide that overtime regularly paid in the 52 weeks preceding the calculation date should be included. There is no definition of what is meant by “regularly”.

7.15 The Government had also been considering whether to legislate to put an end to the practice of designating the first four weeks of holiday as Reg 13 holiday and the next 1.6 weeks as Reg 13A holiday so that all WTR holiday would be regarded as “one pot”. The response to the consultation has stated that this proposal will not be implemented. Note however that the Supreme Court in Agnew held that if and in so far as it is not practicable to distinguish between different types of leave, then all the leave to which the worker is entitled must form part of a single, composite pot.

7.16 Irregular hours and part year workers

7.16.1 In *Harpur Trust v Brazel [2022] UKSC 21* the Supreme Court held that holiday pay for part-year workers should not be calculated on a pro rata basis, but by applying the approach set out in s.224 ERA 1996. Workers who are only employed during some weeks of the year, but who have a contract which lasts for the full year, are entitled to a full year’s statutory holiday entitlement, which is 5.6 weeks per annum. The Court dismissed the argument that employers should be able to reduce part-year workers’ holiday entitlement on a pro-rata basis to account for weeks they have not worked. The effect of this is that if workers work full time while they are working, they will be entitled to proportionately more holiday than full time workers.

7.16.2 However the draft Amendment Regulations will overturn the impact of *Harpur* as they provide a formula for calculation of holiday from 1 January 2024 for irregular hours and part year workers at the rate of 12.07% of hours worked and will be paid at the rate of 12.07% of pay in a pay period which removes the possibility of part year workers being treated more favourably. This formula is the one that had been used by most employers prior to the Harpur decision.

7.16.3 The draft Amendment Regulations also provide that it will be lawful to pay rolled up holiday pay to irregular hours and part year workers.

7.17 Holiday Carry Over

7.17.1 The WTD and the WTR state that any untaken holiday will be lost at the end of the holiday year unless it is agreed between the employee and employer to be carried over. However, despite this an employee is entitled to carry forward leave because of the impact of case law in the following circumstances:

(a) Where an employee is prevented from taking annual leave because they are on maternity leave;

(b) Where an employee is prevented from taking their leave due to long term sickness absence;

(c) Where an employee is prevented by their employer from taking their leave entitlement.

7.17.2 Maternity leave

(a) Employees continue to accrue annual leave while on all types of family leave – maternity, paternity, adoption, shared parental and unpaid parental leave. This applies to statutory and contractual leave.

(b) Despite the WTD stating that leave must be taken in the specific annual leave period to which it relates, and the WTR having similar provisions, the European Court of Justice and subsequently the Court of Appeal have ruled that a woman must be entitled to carry over any annual leave which she has not been able to take while on maternity leave.

(c) A woman cannot take annual leave while on maternity leave. This is because maternity leave is viewed as a health and safety measure to protect women who have given birth and may be breast feeding. A woman is entitled to take 5.6 weeks paid annual leave each year and if she is prevented from taking that amount because of being on maternity leave, she is entitled to carry over the balance.

(d) Not allowing the carry-over of any untaken statutory leave by reason of maternity leave will be unlawful under the WTR as interpreted by case law and discriminatory under the Equality Act 2010. Refusal to allow carry over of untaken statutory leave could lead to claims of unlawful deductions from wages, direct maternity/pregnancy discrimination and/or direct sex discrimination; and possibly indirect discrimination by reason of maternity/pregnancy and sex.

(e) The position above is specific to maternity leave and unpaid parental leave which also derives from a European Directive and has been the subject of ECJ case law. The treatment for other types of family leave for example adoption leave differs as adoption leave is not subject to ECJ law and the same health and safety considerations do not apply.

(f) The draft Amendment Regulations just published by the Government in response to consultation about the Act are intended to preserve the position set out above and also go further in that they refer to all forms of statutory family leave. Under the draft Amendment Regulations, a worker may carry forward untaken holiday into the following leave year if they have been prevented from taking it due to being on statutory leave.

7.17.3 Sickness Absence

(a) Following a number of European Court of Justice and Court of Appeal cases, it is now settled law that employees who are not able to take holiday because they have been on sick leave should be permitted to carry over four weeks of holiday (being the entitlement under the WTD) if they do not take it in the leave year in question. The key cases are *Stringer and Others v HM Revenue & Customs [2009] IRLR 214* and *Pereda v Madrid Movilidad SA IRLR [2009] 959*.

(b) Subsequent case law in the UK (specifically, the Court of Appeal in *Leeds v Larner [2012] IRLR 825*) has confirmed that an employee does not have to show that they were unable to take leave. The entitlement to carry over applies whether the employee is unwilling or unable to take leave while on sick leave. Note that an employee must also be permitted to take up to four weeks annual leave and be paid for it while on sick leave if they wish to do so but they cannot be compelled to do so.

(c) This means that if an employee goes on sick leave before the end of the leave year when they have accrued untaken leave, they will be entitled to carry over up to four weeks of that leave if they are not able to take it by the end of the year. However, if an employee returns before the end of the leave year and there is enough time available for them to take their outstanding WTD annual leave entitlement (i.e up to four weeks) then they can be asked to do so. They cannot be obliged to take the leave but as long as they are given the opportunity to take it, they have no right to carry it over.

(d) Failure to allow carry over leave accrued while on sickness absence in circumstances where an employee has not been able to take it in the leave year in question may give rise to claims of unlawful deduction from wages and potentially, disability discrimination.

(e) In *KHS AG v Schulte [2012] IRLR 256* the ECJ held that the right to carry over leave is not indefinite and a 15 month limit was not in breach of the Directive. Subsequently the EAT in *Plumb v Duncan Print Group UKEAT 0071/15* indicated that it would be reasonable to place an 18-month time limit on the right to carry over leave. Employers should therefore permit carried over leave to be available to be taken for an 18-month period from the end of the leave year. Note that there is very recent ECJ case law (*P and AR v Fraport AG Frankfurt Airport Services Worldwide and St. Vincenz-Krankenhaus GmbH)* which indicates that the right to carry over leave should not be time limited. However, as the UK has now left the EU and this

is new case law, it will not be binding on UK courts, although the appeal courts may choose to refer to it.

(f) The draft Amendment Regulations published by the Government in response to consultation about the Act are intended to preserve the position set out above.

(g) The draft Amendment Regulations provide that a worker may carry forward untaken holiday that they have been unable to take because of sickness for 18 months following the end of the leave year in which they were unable to take the leave.

7.17.4 The draft Amendment Regulations also provide for carry forward in other situations where a worker has been prevented from taking statutory leave.

8. **RECORD KEEPING**

9. Employers are required under Regulation 9 to keep and maintain adequate records showing whether the limits on average working time and provision of health and safety assessments are being complied with.

10. An employer should retain records for the 2-year period after those records were made.

11. Health and Safety Executive (HSE) guidance states that specific records are not required and that employers may use records maintained for other purposes, such as pay. However, ECJ case law has questioned whether Regulation 9 and HSE guidance on record keeping is compliant with the WTD. In *Federación de Servicios de Comisiones Obreras (CCOO) v Deutsche Bank SAE (C-55/18)* the ECJ held that in order to comply with the WTD Member States must require employers to set up a system for recording actual daily working time for individual workers.

12. The draft Amendment Regulations will overrule the ECJ case law and provide that records may be created, maintained and kept in such manner and format as the employer reasonably thinks fit and that an employer need not record each worker's daily working hours if the employer is able to demonstrate compliance without doing so.

13. **DRAFT REGULATIONS AND RESPONSE TO CONSULATION**

13.1 As noted above, the Government has now published its response to the consultation 'Retained EU Employment Law', which proposed reforms to the calculation of annual leave and holiday pay and the record-keeping requirements under the WTR. It has also responded to the earlier consultation on calculating annual leave entitlement for part-year and irregular hours workers following the Supreme Court's decision in Harpur. The response confirms that the Government will go ahead with the proposed clarification of the WTR record-keeping requirements; will introduce 'rolled-up' holiday pay for irregular hours

and part-year workers; and will allow for an annual leave accrual method of 12.07% of hours worked for irregular hours and part-year workers. However, it will not take forward the proposal to merge the current ‘basic’ and ‘additional’ annual leave entitlements to create a single annual leave entitlement of 5.6 weeks governed by one set of rules. The Government will also legislate to restate EU case law providing for the carry-over of annual leave where the worker has been on maternity/family-related leave or sick leave.

13.2 The amendments in the draft Amendment Regulations include amendments to clarify the requirement to keep records in respect of working time; amendments which restate and sets out, in statutory form, EU rights that would otherwise be revoked by the Act as to carry over of annual leave under the WTR in various different situations including sickness, failure to recognise employment status, failing to afford the right to paid annual leave and as a result of being unable to exercise the right as a result of statutory leave; amendments defining normal pay under regulation 13 WTR; and amendments in response to the Harpur decision so that leave for part year workers and irregular hours workers will accrue from 1 January 2024 at the rate of 12.07% of hours worked and will be paid at the rate of 12.07% of pay in a pay period.

14. ENFORCEMENT AND REMEDIES

14.1 There are a wide range of sanctions available against an employer under Regulations 28-32 WTR, depending on the breach in question. These include:

14.1.1 A potentially unlimited criminal fine (Regulation 29).

14.1.2 "Improvement" or "prohibition" notices issued by the HSE or local authority inspectors, with potentially unlimited fines and up to two years' imprisonment for directors on conviction on indictment if such a notice is not complied with.

14.1.3 Compensation for workers in the employment tribunals (Regulation 30-32).

14.1.4 Agreements being rendered unenforceable (Regulation 35).

14.2 The limits on working time and the record-keeping requirements are enforced by the HSE or local authority environmental health departments. The enforcing authorities can appoint inspectors with powers of enforcement (including the power to issue improvement and prohibition notices) set out in Schedule 3 WTR.

14.3 Individual enforcement **-** Refusal of breaks, rest periods or holiday:

14.3.1 A worker can bring a tribunal claim where the employer has "refused to permit" them to exercise any right under regulations 10 to 13A of the WTR (Regulation 30 WTR).

14.3.2 A claim must be presented to a tribunal before the end of the period of three months beginning with the date on which it is alleged that the exercise of the right should have been permitted or, in the case of holiday pay, the date on which it is alleged that the payment should have been mad

14.4 Individual enforcement: Enforcing the 48-hour week

14.4.1 There is no provision in regulation 30 allowing a worker to bring an action in the tribunal where the employer has required them to work above the 48-hour limit. It would seem that the only remedy available in the employment tribunal to a worker for breach of regulation 4 is an action for detriment or unfair dismissal if they are penalised for complaining about the hours or refusing to work in excess of the 48-hour average.

14.4.2 Where there has been a breach of the 48-hour working week, the worker may also be entitled to bring an action based on breach of contract in the civil courts, although that right is limited (*Barber v RJB Mining UK Ltd [1999] IRLR 308).*

14.5 Individual enforcement: Enforcing rest and holiday entitlements

14.5.1 Where a complaint under Regulation 30(1) is well-founded, the tribunal must make a declaration to that effect and may make an award of such compensation as is just and equitable in all the circumstances, having regard to the employer's default and any loss sustained by the worker as a result. In the case of a failure to pay holiday pay, the tribunal must award the holiday pay due.

14.5.2 The compensation is not designed to be punitive and, in *Miles v Linkage Community Trust Ltd UKEAT/0618/07*, the EAT held that the tribunal had not erred when it decided to make an award of no compensation, despite finding a breach of the WTR. Compensation for injury to feelings is not available under Regulation 30; the reference in regulation 30(4)(b) to "loss sustained by the worker" refers only to economic loss *(Gomes v Higher Level Care Ltd [2018] EWCA Civ 418).*

14.5.3 Unlike injury to feelings, compensation for personal injury is available under WTR, Reg 30(4) (*Grange v Abellio London Ltd [2019] ICR D2, EAT)*. In Grange, the Claimant was awarded £750 for 'discomfort and distress' in relation to the Respondent's failure to afford him rest breaks.

14.6 Enforcement in the civil courts

14.6.1 In *Barber v RJB Mining UK Ltd [1999]*, the High Court held that the rights and obligations conferred by the WTR were intended to be dealt with exclusively by way of the enforcement regimes set out in the WTR. However, it went on to create a limited exception to that rule, holding

that the 48-hour limit on the average working week set out in regulation 4(1) modified the workers' employment contracts to give them a contractual right, justiciable in the civil courts, to refuse to work in excess of the limit. Other than that, the court accepted that breach of the WTR was not intended to give rise to a remedy in the civil courts.

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