



Pinsent Masons

Working Time

Linda Jones and Amy
Hextell

A purpose-led professional services
business with law at the core

Agenda

- Overview
 - Who is covered?
 - The 48 hour week and average weekly working time
 - What is working time?
 - Rest breaks and periods
 - Annual leave : where we are currently and the new draft Regulations
 - Record keeping
 - Enforcement and remedies
-



Overview

- Working Time Directive – a health and safety measure
 - Working Time Regulations 1998
 - Impact of case law
 - Impact of Retained EU Law (Revocation and Reform) Act 2023 and new draft Regulations
-



Who is covered?

WTR 1998 – Regulation 2(1)

“**worker**” means an individual who has entered into or works under (or, where the employment has ceased, worked under):-

(a) a contract of employment; or

(b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual



48 Hour Limit & Average Weekly Working Time

WTR 1998 – Regulation 4(1)

Subject to regulation 5, a worker's working time, including overtime, in any reference period which is applicable in his case shall not exceed an average of 48 hours for each seven days.

Worker can agree to **opt-out**

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

Working Time

Working time:

- Working
- Carrying out their duties
- At the employer's disposal



Receiving relevant training



Relevant agreement



Rest breaks and periods

Daily rest

- not < 11 consecutive hours in each 24 hour period

Weekly rest

- not < 24 hours' uninterrupted rest in each 7 day period (either 2 x rest period of not < 24 hours in each 14 day period, or 1 x rest period of not < 48 hours in each 14 day period)

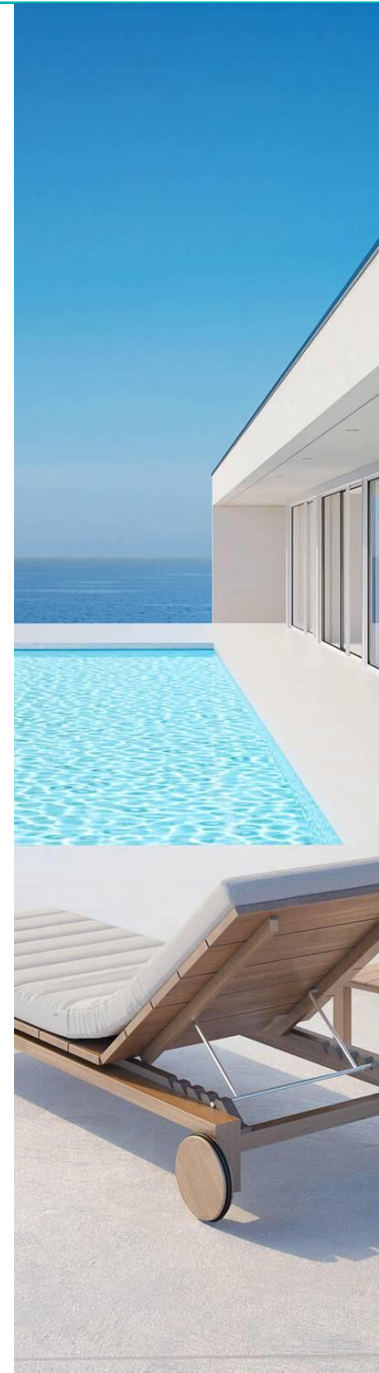
Rest break

- not < 20 minutes if working time is more than 6 hours

Adequate rest breaks

Annual Leave – the basics

- 4 weeks entitlement under the WDT
 - 5.6 weeks entitlement under the WTR
 - Can include bank holidays
 - Pro rated in first and last year of employment
 - Notice required to take annual leave
 - Contract of employment may provide for additional leave.
-



Annual Leave – a week's pay

- A week's pay for a week's leave – under Reg 16 of WTR this must be calculated in accordance with Employment Rights Act 1996 SS 221 – 224 which distinguishes between workers with normal working hours and workers with no normal working hours or whose pay varies with the work done
 - BUT – WTR held not to be compatible with WTD – Bear Scotland Ltd and Others v Fulton
 - Workers must receive “normal remuneration” while on 4 weeks of WTD annual leave
 - SS 221 – 224 still applies to additional 1.6 week's leave under Reg 13A WTR. No rules for contractual leave – governed by the contract
 - What is normal remuneration for the purposes of the WTD? A number of elements including overtime, commission and shift allowances
-



Annual Leave – carry over

- Annual leave accrues while employees are employed whether they are at work or absent on another form of leave
 - Carry over is prohibited under WTD and WTR, although employment contracts may permit a certain element of carry over
 - Exceptions: maternity leave, sickness absence and where prevented by employer from taking holiday
 - Maternity leave: holiday cannot be taken while on maternity leave, unlike other forms of leave (Merino Gomez). Carry over of up to 5.6 weeks must be permitted
 - Sickness absence: employees are entitled to take paid holiday while off sick (Stringer) but can't be compelled to do so (Pereda)
 - An employee who becomes ill while on holiday can take the holiday at a later date (Pereda)
 - Workers who do not take 4 weeks annual leave due to sickness can carry over untaken leave (Larner)
 - WTD does not require unlimited carry over : 18 month limit is acceptable (Schulte; Plumb v Duncan Print Group Limited)
-



Annual Leave: Part Time and Part Year workers

- Workers are entitled to 5.6 weeks annual leave per year and this cannot be pro rated for part time or part year workers
 - Part time workers: a week's leave will reflect the number of days in a week that they work
 - Part year workers: can be term time or casual
 - No entitlement to pro rate under WTR so may be better off than full time colleagues: Harpur Trust v Brazel
-



What's changing?

- Two post-Brexit consultations on reforming holiday pay (and TUPE) have concluded - consultation responses and draft legislation published
- **GB only**

Normal remuneration defined

Part-year and irregular hours workers - accrual % introduced

Part-year and irregular hours workers - rolled-up holiday pay introduced

Carry-over of annual leave – 5 new statutory carry forwards

Working time record obligations clarified

Single pot of annual leave and pay rejected


- Govt. not legislating for a single pot of leave and pay for regular hours workers
- Would have replaced the two existing leave entitlements (EU 4 weeks @ normal pay + UK 1.6 weeks @ basic pay)
- However, Supreme Court (Chief Constable of The Police Service of NI v Agnew) = favoured a composite approach to these 'pots' of leave
- BUT is the possibility of separate pots being retained if practical left open?


“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”


Normal remuneration for EU leave clarified

- Case law = 'normal remuneration' paid for 4 weeks EU leave
- Includes elements of variable remuneration such as bonuses and commissions regularly paid

Draft legislation now provides a statutory definition, which includes:

 commission payments and payments intrinsically linked to the performance of tasks which a worker is contractually obliged to carry out

 for professional or personal status relating to length of service, seniority or professional qualifications

 overtime payments which have been regularly paid to a worker in the 52 weeks preceding the calculation

Part-year and irregular hours workers % holiday accrual

Supreme Court Harpur Trust v Brazel

Workers 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 (5.6 weeks) with no pro-rata reduction for weeks they have not worked

REVERSED

Rolled-up holiday pay for irregular hours workers and part-year workers

Rolled-up holiday pay = a worker receives an additional amount or enhancement with every payslip to cover their holiday pay, as opposed to receiving holiday pay only when they take annual leave

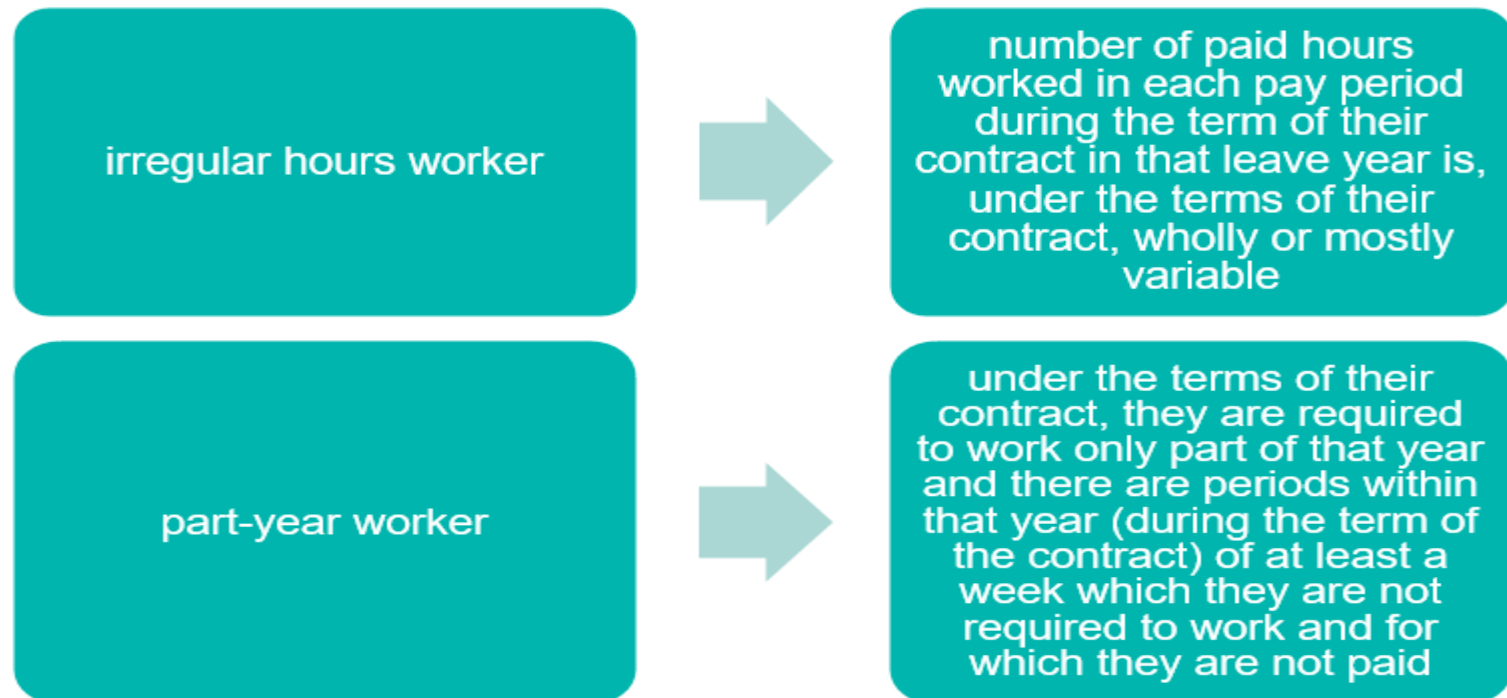
CJEU = unlawful as disincentivises workers from taking leave

REVERSED

Changes for irregular and part-year workers



Definitions:



Rolled-up holiday pay for irregular hours workers and part-year workers



Introduced for irregular hours workers and part-year workers



A single rate of holiday pay based on worker's total earnings in a pay period = a 12.07% uplift to the worker's remuneration for work done



Provisions to determine rolled-up holiday pay when worker is sick or on statutory leave



Must be paid at the same time as the worker's remuneration for work done



Itemised pay statement must indicate rolled-up holiday pay



Continued legal risk for rolled up holiday pay for regular hours workers but likely to remain low

Carry-over of annual leave (1) & (2)

- Restates EU case law in relation to carry-over of annual leave when a worker is unable to take their leave due to being on statutory leave or sick leave

Sick leave =
absence from work due
to sickness or injury

Statutory leave =
leave provided for in Part 8 of
the 1996 Act
maternity, adoption, SPL, parental
leave, paternity leave, bereavement
leave

- Worker must have been “unable” take some or all of the leave
- Different provisions for carry over of as a result of statutory leave and sick leave:

Sick leave

carry forward to “the following leave year provided it is taken by the end of the period of 18 months from the end of the leave year in which the entitlement originally arose”

Statutory leave

carry forward such untaken leave into the “following leave year”

Carry-over of annual leave (3), (4) & (5)

Worker can carry forward leave untaken in a leave year or that has been taken but not paid if employer fails to:

Recognise a worker's right to annual leave or to payment for that leave

Give the worker a reasonable opportunity to take the leave or encourage them to do so;
or

Inform the worker that any leave not taken by the end of the leave year, which cannot be carried forward, will be lost

Cannot be carried forward beyond the end of the first full leave year in which such failures do not apply AND payment in lieu due if carried over leave outstanding on termination

1st January 2024: retained EU Law reforms

- What will happen to case law based on EU holiday pay cases/ WTRs?

Is retained EU case law binding from January 2024, or not?

(1) EU case law **cannot be applied** in UK courts, so far as based on EU law supremacy, direct effect, consistent interpretation, general principles

e.g. case law on meaning of EU Directive, as dictating consistent interpretation of domestic legislation

(2) **Other** EU case law remains binding on lower UK courts; higher UK courts have discretion to depart (but have shown reluctance to exercise it)

e.g. case law on meaning of EU Regulation still applying in UK

(3) **Hybrid cases** where legislation engages both type (1) and type (2) EU case law on its interpretation - different approach for each

e.g. case law on meaning of EU Regulation, having regard to general principles of EU law



Will UK courts still follow EU case law and reach same conclusions?

- UK court cannot apply principles of EU law supremacy, direct effect, consistent interpretation, general principles.

- EU case law requiring application of those principles to interpret legislation cannot be considered binding.

- But UK courts may apply common law principles to interpret legislation, such as purpose of legislation; so may have regard to EU case law assisting with ascertaining purpose and intended effect.

e.g. case law on meaning of EU Directive cannot dictate consistent interpretation of domestic legislation, but may be relevant nonetheless to ascertaining meaning and intended effect of domestic legislation

Annual Leave – pay in lieu

- Only lawful on termination of employment
 - Entitlement calculated in accordance with formula in Regulation 14 WTR
 - Leave taken in excess of accrued entitlement can be deducted from final pay if contract provides for it
 - Contract can provide for holiday to be taken during notice period
 - If there is a PILON no holiday is due for the notice period unless contract provides for it
 - Otherwise holiday continues to accrue during the notice period and pay in lieu must be given in respect of it if worker is dismissed without contractual notice and there is no PILON clause
-



Record keeping

Regulation 9

An employer shall:-

(a) keep records which are adequate to show whether the limits specified in regulations 4(1) and 6(1) and (7) and the requirements in regulations 7(1) and (2) are being complied with in the case of each worker employed by him in relation to whom they apply; and

(b) retain such records for two years from the date on which they were made.

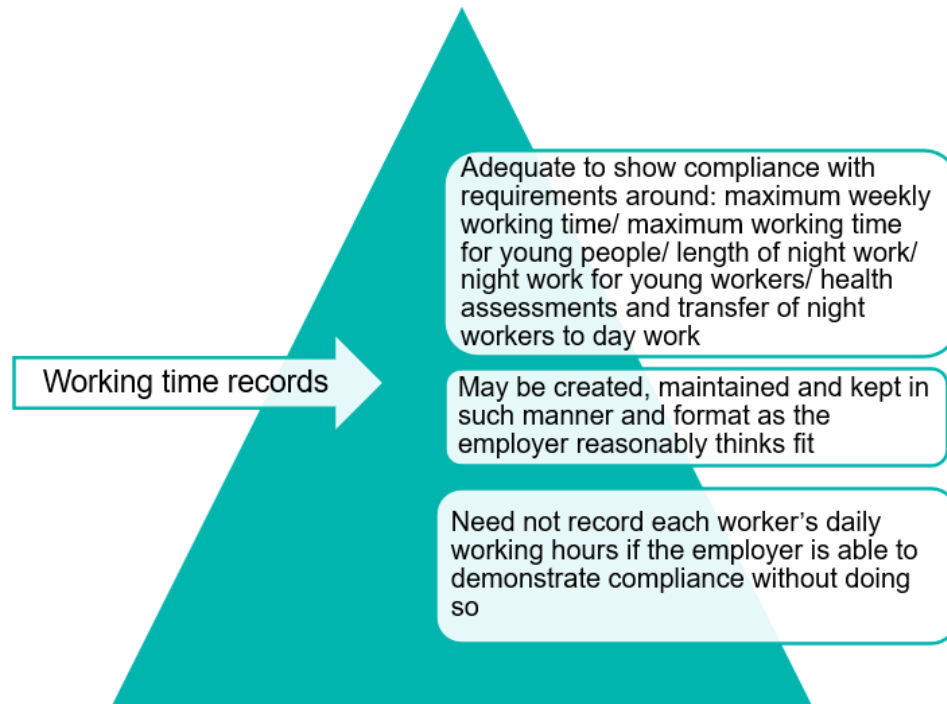


Working time records

- CJEU = Member States must require employers to set up a system to measure the duration of time worked each day by each worker
- Went beyond the GB obligations

REVERSED

- Employers need only keep adequate records



Enforcement & Remedies

Regulation 29(1)

Failure to take reasonable steps to comply with the limits on working time or the record-keeping requirements will render the employer guilty of a criminal offence. Potentially **unlimited fines**

Local authority or Health and Safety Executive (HSE) inspectors may issue "**prohibition**" or "**improvement**" notices

Individual enforcement via Employment Tribunal

