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European Commission Consultation on

Review of the Working Time Directive

Response from the Employment Lawyers Association

15 March 2015

EMPLOYMENT LAWYERS ASSOCIATION

RESPONSE TO THE EUROPEAN COMMISSION CONSULTATION ON REVIEW OF THE WORKING TIME DIRECTIVE (DIRECTIVE 2003/88/EC)

Introduction

The Employment Lawyers Association ("ELA") is a non-political group of specialists in the field of employment law and includes those who represent Claimants and Respondents/Defendants in the Courts and Employment Tribunals. It is therefore not ELA's role to comment on the political merits or otherwise of proposed legislation, rather to make observations from a legal standpoint. The ELA's Legislative and Policy Committee is made up of both Barristers and Solicitors who meet regularly for a number of purposes, including to consider and respond to proposed new legislation. Its International Committee also comments on matters of European Community law and cooperated on this response

A sub-committee, chaired by David Widdowson, was set up by the Legislative and Policy Committee of ELA to provide responses to the questions set out in the Survey as part of the European Commission's review of the Working Time Directive (Directive 2003/88/EC) which, along with its predecessor Directives 93/104/EEC and 2000/34/EC, are referred to collectively in this response as "the Directive".

1. A Impact of the Working Time Directive

We have no comment to make on this as it is essentially a policy issue.

2. Thematic Questions

A Scope

Concurrent Contracts

This is an issue in the UK with part-time employment significantly on the increase and presently accounting for well over 8m workers. Statistics suggest that many of those will have more than one job.

So, for example where A works 25 hours a week for employer B and a further 25 hours a week for employer C, it is unclear from the Directive whether employer B (or employer C for that matter) is intended to be under any obligation to prevent the outcome that A has worked in excess of 48 hours, even if not for B or C individually.

The UK Working Time Regulations do not specifically deal with the issue. There is currently no means by which an employer in the UK can find out what hours are being worked elsewhere by one of its employees otherwise than by asking. Similar issues will arise in respect of weekly rest.

The options identified in the survey document are we consider comprehensive. The option where the limit of 48 hours applies where the worker has more than one contract in any event is, we would suggest, less likely to be capable of effective national legislation and practical management by employers.

B Concept of working time

On call time and stand by time

The decisions in the cases *Sindicato de Médicos de Asistencia Pública (Simap) v Conselleria de Sanidad y Consumo de la Generalidad Valenciana C303/98* and *Landeshauptstadt Kiel v Jaeger 2003 C-151/02* deal with the question of whether "on-call" time is to be regarded as working time for the purposes of the Directive. The combined effect of these two cases is that:

- where workers are required to be at their employers premises, time spent there is to be regarded as working time even when the workers concerned are not required to actually perform any duties

- if workers are on call but not required to be at the employer's premises then only time actually spent working amounts to working time.

These two cases have given rise to rise to many practical issues for employers, particularly in the healthcare sector regarding how they ensure that they have sufficient staff to cover their workload without falling foul of the WTD.

These cases have been cited numerous times by UK Employment Tribunals and Courts over the past decade. In relation to consideration of the question of whether 'on call' amounts to working time the following two cases dealt with this issue specifically.

MacCartney v. Oversley House Management [2006] IRLR 514

Ms MacCartney, a manager at a residential home for elderly people, was required to work "four days per week of 24 hour on site cover", and had tied accommodation including an office at the home for this purpose. Her contract did not provide for either night time or daily rest breaks.

Ms MacCartney claimed that this was in breach of the UK Working Time Regulations. The Employment Tribunal rejected her claims reasoning that Ms MacCartney was not working the whole time that she was on-call, and therefore not the whole of that time was working time.

On appeal, the Employment Appeals Tribunal, applying the ECJ judgments in ***Jaeger*** and ***Simap***, upheld Ms MacCartney's appeal, deciding that the whole 96-hour period when she was 'on-call' and required to be within three minutes of the site, constituted working time, including the time when she was sleeping. The EAT held that the extent to which workers are likely to be called out does not determine whether they are working.

Trustlove and another v Scottish Ambulance Service [2014] All ER (D) 112

The Claimants in this case were ambulance paramedics who sometimes worked 'on-call' night shift duties away from their home base station. On such occasions, they were required to take accommodation within a three mile radius of the distant ambulance station, at which they were to park the ambulance. They were to meet a target time of three minutes within which to respond to a call. The Claimants claimed that all the time they spent 'on call' counted as working time and so they were entitled to a rest period according to the Working Time Regulations.

The Employment Tribunal dismissed their claim. The Employment Judge drew a distinction between situations where the employee was 'on call' but free to be in any

location and situations where the employee was confined to a specific location. The Employment Tribunal decided that the Claimants in this case were not confined to one specific location and therefore were at rest during the periods they spent on call. The Claimants appealed to the EAT.

The EAT considered that it was clear that the Claimant's time was not their own whilst on this duty. The central question was whether the employees were on the facts required to be present at a place determined by the employer. They had to be where they were, within narrow limits. They could not be at home. Therefore they could not enjoy the quality of rest which they were entitled to have under the Working Time Regulations.

Martin v Southern Health and Social Care Trust (2010) IRLR 1048

This case concerned a nurse claiming payment for her breaks on the basis that, because there was a risk of interruption the breaks constituted "on call" time and were working time, so she should be paid for them.

The Belfast Employment Tribunal held that, because Martin was working at her employer's disposal and carrying out her duties, she was "on call" and the rest breaks should be regarded as working time. The employer had, however, complied with the Working Time Regulations as it had an appropriate compensatory rest system in place.

The Northern Ireland Court of Appeal agreed that the rest breaks should be unpaid because the compensatory rest provisions applied. The arrangements between the employer and workers had been specifically negotiated with the unions to make sure the regulations were implemented properly. However, it concluded that Martin was not "on call" during her rest breaks

There is therefore a need for further clarification on the issue of on call time. This is particularly so for the healthcare sector where there are these areas of uncertainty:

1. Where doctors or other staff are required to be within a particular radius of their place work whilst on call is this working time if their home is not within that radius?

2. To what extent are rest periods not working time if there is a possibility of interruption?

The survey document offers three options in respect of on call time. The option that this should be a matter for national social partners would not be effective for those member states where national bargaining systems are not widely used. This would include the UK. In the interests of clarity and consistency we would suggest that an amendment to the Directive to take account of our comments above would be desirable.

As to stand by time, we assume that the option of partially counting stand by time as working time is intended to implement the European Court decisions in the *Simap* and *Jaeger* cases. As noted above, that would not specifically deal with our points at 1. and 2. above. We make no observations as to the option that stand by time be subject to a limit in any one week as we expect that that would be a matter of some controversy between workers and employers. It would at least, however, have the advantage of certainty.

An alternative to both would be to permit member states to set their own definition of on call time and associated issues.

C Derogations

Compensatory Rest

The Right

Under the Directive, subject to certain exemptions, workers may be required to work during what would otherwise be a rest period or a rest break provided that: (i) they are given an equivalent period of compensatory rest (Regulation 24(a)); or (ii) in exceptional cases, where it is not possible for objective reasons to grant an equivalent period of compensatory rest, the employer affords the worker such protection as may be appropriate in order to safeguard his or her health and safety (Regulation 24(b)).

Application

In the case of daily or weekly rest, the right arises for workers who:

(i) fall within special case exemptions in Article 17(3);
(ii) are changing shifts in circumstances where it is not possible to take a break in between the beginning of the new shift and the end of the old one or whose work is split up over the course of the day (Article 17(4); and
(iii) are subject to a collective agreement that modifies or excludes their entitlement (Article 18).

In relation to special cases the UK case of *Hughes v Corps of Commissionaires Management Ltd (No 2)2011 IRLR CA* considered whether a particular worker fell within the scope of Article 17(3) as a "special case" depended on an analysis of what the worker's activities were rather than the employer's activities. The Directive does not contain any guidance on this.

Meaning of compensatory rest

The wording of Article 17 is unclear as to whether, where the worker falls within the category of a "special case", the worker must be provided with a break of exactly the same nature as the period of rest that was missed or whether the period of rest should be as close as possible, in character and quality to the lost rest period.

This point was considered by the UK Court of Appeal in the *Hughes* case. The Court of Appeal upheld the EAT's decision that a rest break need not be uninterrupted. It had to have the characteristics of a rest in the sense of a break from work and had to ensure, so far as possible, that the break lasted at least 20 minutes. In the absence of those two characteristics, the principles of equivalence and compensation could not be met.

In that case, the employee's compensatory rest period could be substantial as it started again if it was subject to interruption. In any event, it was noted that, even if such a break did not amount to an equivalent break, the employer had nonetheless, by allowing the break to restart if interrupted, provided appropriate protection to safeguard the health and safety of the worker.

Duration of compensatory rest

In the *Jaeger* case, the European Court of Justice held that a reduction in the period of daily rest must, in principle, be offset by the grant of an equivalent period of compensatory rest made up of the number of consecutive hours that correspond to the reduction applied *(Landeshauptstadt Kiel v. Jaeger 2004 ICR 1528, ECJ).*

However, whether this provides an adequate period of compensatory rest in practice depends on the extent to which the original period was interrupted - i.e. is the worker compensated for a one-off period of interruption or a series of interruptions over a lengthy period?

Timing of compensatory rest

The timing of compensatory rest has caused uncertainty in the past:

There are three areas which remain unclear under the Directive

(i) Does the period of compensatory rest have to be granted during what would otherwise be working time?

The UK EAT in the *Hughes* case suggested that compensatory rest breaks (in relation to the 20-minute rest break only) must be granted during what would otherwise have been working time. This point was not specifically considered by the Court of Appeal, although they did state that compensatory rest could fall within working hours.

(ii) Does compensatory rest have to follow immediately after the extended period of work that it compensates?

The ECJ decision in the *Jaeger* case states that compensatory rest (for daily or weekly rest periods) had to be provided immediately after the end of the relevant period of extended work. There were proposals for amendments to be made to legislation governing the timing of compensatory rest so that it would be granted, "within a reasonable period", but these have not progressed.

(iii) Article 17 (2) - exceptional cases and objective reasons

The question of the meaning of exceptional cases was examined by the Court of Appeal in the *Hughes* case. The Court of Appeal considered that this is narrow and must be applied restrictively. The employer does not have

to show both exceptional circumstances and objective reasons. If there are objective reasons why the period of compensatory rest cannot be granted, the circumstances will be exceptional.

The Directive provides no definitive statement on this so clarification would be desirable

Healthcare

As noted above, the *Jaeger* and *Simap* decisions of the CJEU referred to above state that compensatory rest to make up for missed rest periods must be taken as soon as the period of work ends rather than at a later time. Although ELA does not express a view on policy issues, it is noted that the lack of any apparent flexibility in this aspect of the Directive has had an effect if the provision of healthcare in the NHS and also other emergency services.

This has had a major impact on the way the NHS organises its rotas with many specialities having moved away from on-call to full shift working patterns. There is concern that this leads to an over-reliance on trainees who spend a significant amount of time working without direct supervision and problems relating to hospital care at night which is provided by a largely junior workforce supervised by consultants who will be on call but may not be present at all times.

In June 2008 EU ministers agreed that the Directive should be amended to provide that compensatory rest should be given within a reasonable period but the proposed changes were not implemented. This proposal, if taken up in a revision to the Directive, would assist in resolving this issue in this specific sector.

Subject to the above, each of the options apart from "No change" would have the merit of providing more certainty on at least some of the issues above. Allowing a short period within which to allow compensatory rest would provide some solution to the identified problem in the health sector.

Reference periods

We have no particular comments to make on this. In view of the fact that the purpose of the Directive is to protect the health and safety of workers, the current reference period is more likely to prevent sustained periods of working time in excess of the maximum.

Opt Out

In that our role is not to comment on issues of policy we have no comments to make on this other than to say that at a national level the opt out is well understood and clear in its operation. Amending the Directive as suggested in any of the second, third and fourth options in the survey on this issue is likely to unnecessarily complicate the position and would not seem warranted.

Autonomous Workers

This exemption from the scope of article 17 is not well understood in our experience, at least in the United Kingdom. Early on in the history of the Working Time Regulations a belief grew up that it was apt to include all those with managerial responsibilities (fuelled, no doubt, by the use of the term "managing executives" in Article 17(1)) but that is not, we

think, correct. At all events, it is our experience that it is relatively rare for an employer to seek to exclude the 48 hour maximum working week on the basis that the employee concerned has "autonomous decision taking powers", principally, we believe, because the scope of the term is in practice very difficult to apply. The lack of any litigation over this term in the UK courts underscores this.

In terms of remedying the position one can see why it might be considered that those who truly are free to decide on the hours they can work without external pressure to do so do not perhaps need the protection of the Directive. The same might also be said of the most senior level of management in an organisation although rather more because of the commercial need for this level to have a focus on the business not limited by particular times.

With these observations in mind we do not consider the present position is adequate in that, whilst the Directive clearly contemplates a category of workers who do not need its protection, it is extremely difficult as drafted to identify who falls within that category. Our preference would be for greater clarity if the exemption is to be maintained which would be the second option identified in this part of the survey.

D Specific Sectors/Activities

Emergency Services

Healthcare

See our comments under 2C above

E Patterns of Work

Changes in Working Patterns

There are obvious problems in applying much if not all of the directive's requirements to atypical working arrangements, particularly those which involve work away from and with no connection to a particular workplace. There are the following particular problems:

(i) Holiday pay for zero hours contract workers or those who work on a casual or unpredetermined basis. The practice of rolling up the value of holiday pay in an hourly rate which provided at least the pay element of holiday entitlement was a means of dealing with this in practice though is not permitted following the decision of the CJEU in the UK case of *Robinson-Steele v PD Retail Services and other cases*. Although this decision enables the rolled up element of holiday pay to be offset against a claim for holiday pay it is not an adequate solution where employers of such workers wish to employ them legally but have little in the way of practical means of enabling workers to take holiday and to be paid for it, given the inherent nature of this type of working relationship.

(ii) Weekly rest periods may also be difficult to administer for this group of workers where they have more than one contract of employment. See our comments at 2A above.

(iii) There are also issue relating to the calculation of holiday pay for zero hours contract workers, in particular in relation to the reference period over which pay should be averaged to take account of elements of remuneration such as overtime and commission. At present this is effectively a matter for member states to deal with although, in its judgement in the case of *Lock v British Gas Trading Limited (C-539/12)* it was suggested by the advocate general that 12 months might be an appropriate reference period for assessing the value of

commission payments to be added to basic pay for the purposes of calculating holiday pay entitlement.

Reconciliation of Work and Private Life

The suggested specific rights in this part of the survey are essentially matters of policy and so outside our remit as an organisation.

3. <u>Looking Ahead</u>

Objectives for the future of the Working Time Directive

Approach for the Future of the Working Time Directive

In respect of each of these our wish as an organisation is for there to be more legal clarity in the areas identified.

Working Party

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