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Proposals for the reform of the law relating to Working Time.

September 2015

Proposals for the reform of the law relating to Working Time

Employment Lawyers Association

INTRODUCTION

1) 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 in courts and employment tribunals. It is not ELA's role to comment on the political or policy merits or otherwise of proposed legislation, rather it is to make observations from a legal standpoint. Accordingly it is not the intention of this paper to suggest changes to the content of the law but we do seek to make it more accessible and coherent. ELA's Legislative and Policy Committee, which is made up of both barristers and solicitors meet regularly for a number of purposes including to consider and respond to proposed new legislation and on this occasion to highlight the serious need for an area of law to be redesigned and consolidated.

2) The Employment Law Oversight Committee of ELA set up a sub-committee under the chairmanship of Stephen Levinson of Keystone Law to consider and propose changes to the structure and design of the law relating to Working Time. A list of the members of the sub-committee is in Appendix 1 to this response.

Executive Summary

A. The law on the regulation of working time in the UK is now seriously out of date. In parts employers and employees alike find the rules incomprehensible.

B. There is accordingly a pressing need for domestic law to be consolidated to take into account many decisions of the European Court of Justice.

C. In particular the rules on holiday pay and payment in lieu of holidays require clarification.

D. There is no clarity as to when leave should be taken or in relation to the carry-over of holiday entitlement.

E. The rules governing the relationship between holidays, family rights and discrimination law all require consolidation.

F. The rules relating to ‘on-call’ time, compensatory rest and the order in which leave is taken all require clarification and consolidation.

The need for change

3) The Working Time Regulations (the Regulations) are now more than 15 years old and very significant changes in case law at both national and European level have rendered

many parts of the Regulations out of date, for example on holiday pay and the definition of working time.

4) On key aspects there is now a major gulf between decisions of the European Court of Justice (the ECJ) and the face of the Regulations. This matters because application of working time rules, including the law on holidays, is an everyday issue for employers and workers and if the rules are not clear, it adds significant burdens to business and the cost of employment. It also makes it much more difficult and costly for workers to understand and enforce their rights.

5) Members of the ELA, whether they tend to represent employers or employees, report significant difficulties in interpreting and applying the legislation. Indeed, especially in relation to the relationship between the Directive, the Regulations and the Employment Rights Act 1996, lawyers who represent employers tell us that their clients are finding it increasingly difficult to achieve actual compliance. It is our view that something is seriously amiss when good employers, intent on complying with the law, find it difficult to discern what the law is, never mind apply it.

6) We are conscious that the European Commission has launched a public consultation on the review of, and possible changes to, the Working Time Directive (Directive 2003/88/EC), from which the Regulations are derived. That consultation closed on 18th March 2015. We have submitted a response to that consultation and our response is attached to this report at Appendix 1

7) There is as yet no clear indication of what action (if any) the Commission will take in response to the consultation, and within what timescale any such action would take place. However, it is our experience that it can take many years for proposals made at European level to be carried into legislative change, which would then need to be implemented at national level. We therefore suggest that the government should address the significant issues with the Regulations outlined in this report at the earliest opportunity, rather than waiting for the outcome of the Commission's consultation. Having done so, we will be in a better position to make any further changes to the Regulations which may potentially be required in the future.

Our approach

8) Our view is that the government should take stock and consolidate the mature jurisprudence of the ECJ into the domestic legislation and introduce greater legal certainty on areas where there is currently ambiguity. The opportunity should also be taken to reduce the complexity of the regulations.

9) Points arising from case law are considered below and we refer to themes arising at EU level although acknowledge that there is more limited scope to suggest change in such cases. We have also highlighted cases where there is a conflict between UK provisions and ECJ determinations. There is an opportunity for the government to reconcile UK and EU law, although there may be a small number of winners and losers (i.e. employer or worker, depending on which case is being considered), although all would benefit from clarity.

A Calculation of Holiday Pay

Variable pay

10) The ECJ in *Williams v BA* [2011] IRLR 948 ruled that pay for annual leave must represent "normal remuneration" otherwise workers will suffer a disincentive to take their leave entitlement.

11) Under the Regulations, however, workers are entitled to pay calculated in accordance with ss.221-224 Employment Rights Act 1996 (ERA). The approach set out in the ERA does not reflect the requirement in *Williams* that pay for annual leave must not be restricted to basic salary but must represent "normal remuneration", particularly in relation to workers with normal working hours. Examples are *Bear Scotland* [2015] IRLR 15 and *Neal v Freightliner Ltd ET/1315342/12*. In these cases, in summary, the courts held that the ERA's definition of a week's pay had the effect of reducing a worker's holiday pay by excluding overtime premiums and requiring the employer to ignore non-contractual hours, such as voluntary overtime. The ECJ in *Lock v British Gas Trading* [2014] IRLR 648 held that regular commission payments should also be included in the calculation of holiday pay.

12) The ECJ in *Williams* held that the method for calculating holiday pay is a matter for each member state although such method must take account of the "normal remuneration" principle and "be carried out on the basis of an average over a reference period which is judged to be representative" to reflect an appropriate rate of holiday pay where pay varies over time. In *Bear Fulton* the EAT suggested that the reference period must be made for "a sufficient time to justify" normal remuneration. It is likely, due to pay fluctuations through the year, that the 12 week calculation period used in ss.221-224 would not be appropriate in many situations (from retail to factory workers who work more hours in some parts of the year) to ensure a fair rate of holiday pay for each worker.

13) *Lock* was remitted to the employment tribunal, which held that the Regulations can be interpreted consistently with ECJ's judgment. It also decided that wording should be read into Regulation 16(3) so that in the case of the entitlement to four weeks' leave under Regulation 13, a worker with normal working hours whose remuneration includes commission or similar payment shall be deemed to have remuneration which varies with the amount of work done for the purpose of ss. 221-224. Although this suggests that a 12 week calculation period should be used in the calculation of holiday pay, the tribunal has expressly not decided this point yet, and will do so at a further hearing. Uncertainty and and therefore greater cost, is assured.

14) In our view, this illustrates the difficulty of leaving the Regulations in their present form and requiring tribunals and courts to seek to interpret them consistently with European case law by rewriting them. The judgments of employment tribunals are often piecemeal and fact-specific, and are not binding on other tribunals in future cases. There is also a very real prospect of an appeal from tribunal judgments in this area, which will prolong the uncertainty for employers and employees alike.

Determining which payment rate is applicable

Calculation of payment in lieu of untaken holiday pay

15) The Regulations specify that payment in lieu on termination is to be calculated at the rate of pay applicable at termination, unless the employee's employment contract (or other "relevant agreement") specifies the sum due. Many employers will not have such a provision in place.

16) There is also confusion about how far a relevant agreement can go and this confusion should be removed. The EAT has held that the flexibility provided under the 'relevant agreement' option does not go so far as to permit an employer to pay nothing at all by way of an in lieu payment (*Witley & District Mens Club v Mackay [2001] IRLR 595)*. A tribunal has held that the relevant agreement can't go so far as to provide for only a token payment (*Podlasiak v Edinburgh Woollen Mill Ltd ET/270129/13, 9 July 2013)*.

17) The ECJ ruling in *Heimann v Kaiser* (conjoined cases C-229/11 and C-230/11) permits the Regulations to provide that payment in lieu of accrued but unused annual leave on termination is to be calculated at the rate of pay applicable when the leave was accrued (save in respect of leave accrued while on sickness or family-related leave), rather than the rate applicable at the date of termination.

Non-payment in lieu cases

18) There is also a conflict between the ECJ case law and the Regulations in that the latter specify that the pay rate is that applicable when the leave is taken, rather than at the time of accrual.

19) This approach conflicts with an ECJ ruling relating to the move from full to part time work. The ECJ in *Zentralbetriebsrat der Landeskrankenhäuser Tirols* v *Land Tirol* [2010] All ER (D) 172 held where a worker changes from full time to part time work, having previously accrued but not taken holiday while full time, if the worker has not had the opportunity to take their leave before the change, they must not suffer a reduction in the number of paid days leave. So a worker who has changed from 5 to 4 days a week and then takes a

previously accrued week off should be paid 5 days' pay. The Regulations do not reflect this, providing that a week's pay is calculated with reference to the worker's pay at the time when the leave is taken rather than at the time of accrual.

Atypical contracts

20) As with the question of how the principle of 'normal remuneration during holidays' is achieved, both employers and workers need the legislation to establish a coherent approach to questions about when the reference point for the calculation is made (and which reflect the fact that different types of contract exist (including zero-hours contracts) and that working patterns, and remuneration, change.

21) We suggest the Regulations would be more workable for all parties if they addressed explicitly the practical implications of a variety of working patterns (including zero hour's contracts which are becoming more prevalent). They could address the implications too of a worker increasing or decreasing their working hours over time, i.e. what this means for the amount of leave a person is entitled to, what they are to be paid for it when taking the leave and on termination if the employer is paying in lieu.

22) It should be noted that in *Heimann v Kaiser GmbH* [2013] IRLR 48 the ECJ decided that it was not contrary to the Working Time Directive for employees to receive no payment in lieu of untaken annual leave in respect of a period when they performed no work under a temporary zero-hours contract.

Our recommendation

23) The reference to an un-amended s221-224 of the ERA is no longer a sustainable position in the light of *Williams* and *Bear Scotland.* The rules for calculating holiday pay currently set out in the ERA were not designed for this purpose and should be replaced with a tailored approach, rather than it being left to the courts to discern how to refashion the rules on a case by case basis.

24) It should be for government to revise the law rather than it being left to the domestic courts to construe the legislation to conform to the starting principle of 'normal remuneration'.

25) We believes there is a pressing requirement for the Regulations to be clarified on how holiday pay, and a payment in lieu (see below), is to be calculated. From a workability test, the legislation fails employers and their workers. Myriad calculations of this kind are done on a daily basis and the law is currently unclear and in a state of flux.

26) The challenge is how to achieve codification of the ECJ's decisions on the calculation of holiday pay in a way that is flexible enough for all circumstances. Without a proactive approach employers, their workers and their representatives, and advisers face years of uncertainty as the courts instead take up the task and strive to establish principles based, haphazardly, on the cases brought before them.

27) Given the myriad potential working patterns and components of pay to be taken into account, the current rules should be replaced with a simple default approach, supplemented by a set of principles for reaching an alternative approach to the default. A statutory Code of Practice, binding on employment tribunals, should illustrate the application of those principles in common scenarios.

28) Employers, workers and their representatives, and advisers could then rely on those principles, knowing that they would guide employment tribunals. This mechanism could achieve the need for certainty. We suggest that this proactive approach would save years of uncertainty and would enable Government to establish an approach that achieves legal certainty without 'gold plating' the decisions of the ECJ on how to approach the calculation of holiday pay.

29) In summary, therefore, we recommend:

- an approach to calculating 'normal remuneration', based on averaging pay received across a representative reference period. Given the variety of payroll practices and patterns of work, an averaging approach based on a representative period would reduce the need for establishing what constitutes 'normal' and would assist in reducing the scope for manipulation of the formula by a minority of employers.
- further clarity around the concept of a 'reference period' and a 'representative' reference period could potentially be achieved by setting out principles in a Code of Practice. The Code would be relevant for those employers and workers who consider that the statutory default approach to averaging does not produce a fair or representative sum and are seeking to agree an alternative, either by collective or workforce agreement. Alternatively one might consider an annual reference period in respect of any worker who has been employed for more than a year and the length of employment where employed for less than a year.
- also as working time legislation creates such uncertainty, and is such a costly component of the employment relationship, any code should have statutory code status and be not merely 'guidance'.
- that the Regulations would be more workable for all parties if they addressed explicitly the practical implications of a variety of working patterns (including zero hours contracts). Guidance could also address questions of how the rules apply to different types of contract exist (including zero-hours contracts) and acknowledge that working patterns, and remuneration, change over time.
- There should be a simplification on the rules for determining which holiday payment rate is applicable across all circumstances.

B When annual leave can be taken

30) The Regulations are not clear as to when leave can be taken particularly in relation to the use of weekend days. In a case relating to non-working time in shift patterns, the Supreme Court held in *Russell* v *Transocean International Resources* [2011] UKSC 57 that non-working time can be designated as annual leave under the WTR. This is a satisfactory solution where employees' working patterns involve considerable periods of non-work, but leaves open the possibility of arguing that employers can designate one of

the normal weekend days off as a single day's annual leave each week (as there must be a period of at least 24 hours weekly rest). The Supreme Court suggested that, as the entitlement is measured in weeks, employers may not be permitted to designate single days (although employees can opt to take single days).This might be an issue which a revised WTR could address, perhaps by prohibiting employer-designation of single days with the express exception of bank holidays.

31) The legislation should be updated to resolve this ambiguity and set out clear rules.

C Carry over on holiday entitlement

32) In our response to the Government's consultation called Modern Workplaces, we suggested that the Government might want to consider providing clarity as to when in the subsequent holiday year any accrued carried-over leave should be taken.

33) In *KHS AG* v *Schulte* C-214/10, a German case concerning the relationship between holiday rights under the Working Time Directive and long-term sick leave, the ECJ ruled that there is a limit to the length of time an employee on long-term sick leave can continue to carry over untaken statutory annual leave under the Directive. It concluded that if leave is carried over indefinitely, there comes a time when it "ceases to have its positive effect for the worker as a rest period and is merely a period of relaxation and leisure". The period in which to take carried over leave must be substantially longer than the reference period in respect of which the leave is granted (the leave year). But employers should also be protected from the risk that a worker will accumulate excessively long periods of absence which may cause organisational difficulties. The Court considered that a 15 month period in this case was sufficient, but also noted the longer 18 month period in the provisions of ILO Convention 132, which the Advocate General had recommended as a general guideline. The ECJ ruled that a period of 9 months was insufficient in *Neidel* v *Stadt Frankfurt am Main* C-337/10 ECJ

34) We recommend that the Regulations expressly deal with the question of carry over. All parties would benefit from the certainty because, at present it is not clear whether employers are safe to apply a 15-month minimum cut off period, or 18-months or some other period.

35) In 2012 the Court of Appeal in *NHS Leeds* v *Larner* [2012] 4 All ER 1006 held that a worker who has been on sick leave for a continuous period up to the end of the holiday year can carry over the 4 weeks' statutory minimum entitlement even if the worker did not request to take it or to carry it over before the end of the holiday year. Further, a worker who remains sick until employment ends will be entitled to pay in lieu of this entitlement on termination. The Court set out how Regulation 13(9) and 14 should be construed; it would be sensible if the WTR were amended to reflect this. It may also be helpful if Regulation 15 expressly required notice to be in writing, to reduce arguments over whether an employee has requested leave, to reduce the potential for disputes between

the parties.

D Relation between holiday rules and family rights

36) Our members report that the absence of a codified set of rules relating to the interrelationship between the working time rules, family rights law and discrimination law is impenetrable to most ordinary users of the law and indeed many parts of it are not easily fathomable by lawyers.

37) Separately, we have recommended government should codify and simplify family rights legislation and this project would provide an opportunity for a rethink to achieve a workable set of principles on the overlap between working time and family rights/discrimination law. BIS has already carried out a consultation on the relationship between annual leave and sickness and family-related leave, to which ELA has responded, although that consultation would now need to be updated in the light of subsequent cases.

38) One main objective of a consolidation exercise would be to produce a cohesive approach, in particular providing clarity on the relationship between the laws on discrimination, maternity rights and working time. Clearly, the restrictions imposed by discrimination law have to be recognised, but without leaving users of the law guessing as to their interaction with operational issues. This approach would involve taking some decisions in the light of the relatively mature ECJ jurisprudence and, if a topic were to go to the ECJ, anticipating how it may develop-for example: maternity leave and bank holidays/leave in excess of the 4-week statutory holiday entitlement under the WTD/WTR.

E Rules on leave in excess of the WTD leave

39) We believe that a key objective of a simplification and codification exercise on holiday rights is that the legislation addresses directly the differences between rights and obligations attaching to leave derived from the Working Time Directive and leave in excess of that requirement.

40) As a guiding principle of the exercise, where UK law is more generous than EU law, this should be identified and ambiguity removed. Similarly, the legislation should expressly address the situation where the contract of employment provides for more generous terms than the WTR.

41) For example, the ECJ's decision in *Dominguez v Centre Informatique du Centre Ouest Atlantique* C-282/10 supports the view that the EU case law on carryover need only apply to the minimum 4 weeks' leave, and not to the additional 1.6 weeks provided by UK law. Similarly, the ECJ ruling in *Neidel v Stadt Franfurt am Main* C-337/10 ECJ established that the requirement to pay in lieu on termination need only apply to the

minimum 4 weeks' leave. The law would be more workable for employer and workers if the Regulations were clear on what the requirement is in the UK.

F Special cases

42) There have been a number of high profile EU cases relating to specific working arrangements which have left employers unclear on the scope of their WTR obligations.

Issue: On-call time

43) Currently, the Regulations (and the Directive) only distinguish between working time and rest time. The ECJ held in the *SIMAP* v *Conselleria de Sanidad y Consume de la Generalidad Valenciana* C-303/98 and *Landeshauptstadt Kiel* v *Jaeger* [2003] IRLR 804 a cases that on-call time, when a worker has to remain at the workplace after regular working time, available to work if they are needed, must be fully counted as working time.

44) This is a restrictive approach which causes difficulties in certain sectors (for example, healthcare or residential roles) that rely heavily on on-call time to ensure that an effective service is provided

45) There was a proposal several years ago from EU ministers to revise the WTD to distinguish between “active” and inactive” on-call time. However, this has not yet been implemented. The result has been that the English courts and tribunals have been required to interpret on-call time within the context of the ECJ’s approach in *SIMAP* and *Jaeger* – see, for example, the recent EAT decision in *Truslove* v *Scottish Ambulance Service* [2014] All ER (D) 112.

46) The recent ELA response to the European Commission consultation (see Appendix 1) has further highlighted the current difficulties in the area of on-call working time.

47) In particular, case law developments in the UK have created uncertainties around: (a) the treatment of on-call working time where workers are subject to geographical restrictions which prevents them from spending inactive on-call time at home; and (b) whether the likelihood of interruption during on-call time (or, indeed, rest breaks) should determine if such time is properly deemed working time. In its response to the European Commission, ELA has already recommended changes to the WTD to clarify these issues at a supra-national level.

48) The European Commission also invited proposals relating to what it called “stand-by time” – that is, where a worker is not required to remain at the workplace, but has to be contactable and ready to provide services. Currently, only active stand-by time – that is, time in which a worker responds to a call, has to be fully counted as working time.

49) There is considerable scope for confusion and overlap between “on-call time” and “stand-by time” (particularly where such time is “inactive”). As the law currently stands, inactive on-call time is considered to be working time, whereas inactive stand-by time is not.

50) One alternative put forward by ELA in its European Commission consultation response was to permit Member States to set their own definition of on-call working time and associated issues. However, it is acknowledged that given the relatively settled state of EU case law on on-call time, there is currently limited scope for change in this area without legislative reform at European level.

51) If this is something that might be possible in the future introducing a simple distinction between “active” and “inactive” on-call time (to include stand-by time) would be one means of achieving a sensible reform and could be managed in such a way as to give greater flexibility to employers without unduly compromising workers’ rights to adequate rest and relaxation. Active time would be working time and inactive time would not.

52) For example, “active” on-call time could be defined to include any time outside a worker’s core working hours in which he is not required to perform work; or (b) not required to perform duties but is either required to be at his normal place of work; or subject to such restrictions (geographical or otherwise) as to be considered under the employer’s control during that period.

53) “Inactive” on-call time would include time outside a worker’s core working hours in which he is free to do as he pleases, save that he should be available to deal with work-related matters if required.

54) As set out in the ELA response to the European Commission consultation, we make no observations regarding the possibility that a weekly limit should be placed on such time.

G Compensatory rest

Issue: When must compensatory rest be taken?

55) On the question of when compensatory request must be taken, the Government’s guidance says that “*ideally taken during the same or following working day*. It used to say “*need not be given immediately and that the entitlement to rest can be banked and accounted for at a later date*”

56) ECJ guidance in *Jaeger* does not sit easily with the UK’s approach. In *Landeshauptstadt Kiel* v *Jaeger* [2003] IRLR 804, the ECJ held that compensatory rest periods must "follow on immediately from the working time which it is supposed to counteract". The clear view of the ECJ seems to be that the impact on a worker's health of losing a rest period can only be made up immediately after the time that it has been lost. Accordingly the existing guidance, implying that there seems to be an option (‘ideally’) seems to be at odds with this view.

57) In June 2008, EU ministers discussed the timing of compensatory rest and agreed that the EWTD should be amended to provide that compensatory rest should be granted "within a reasonable period". This would appear to be more flexible than the interpretation in the *Jaeger* case. However, the proposed changes to the EWTD were not implemented.

58) The WTR should be amended to clarify when compensatory rest must be given.

Issue: Does compensatory rest need to be taken during working time?

59) Government's view has been that since the key objective of compensatory rest is to ensure that workers receive adequate rest, provided each worker receives on average at least 90 hours' rest a week, then the obligation to give compensatory rest will have been discharged. This would mean, if correct, that, for example, an employee who was on-call for a period of 14 hours between shifts (during which the employee was allowed to be at home) would not be entitled to compensatory rest if they were required to work for anything up to 3 hours during this period.

60) In *Corps of Commissionaires Management* Ltd v *Hughes (No.1)* UKEAT/0196/08 the EAT held that compensatory rest, in the context of the 20-minute rest break only, needed to be taken during the working day. Considering the meaning of "compensatory rest", the judge dismissed the employer's argument that it could be taken between shifts, pointing out that the term connoted something "over and above the rest to which the claimant is otherwise entitled to between shifts" and that it would be strange if a worker could be "compensated" with something he was already entitled to receive.

61) The WTR should be amended to clarify whether compensatory rest has to be taken during what would otherwise be working time within the meaning of the WTR.

H Order in which leave is taken

Issue: clarification of which days of holiday are derived from the Working Time Directive

62) A key issue not addressed by the Regulations and not yet established with certainty in case law is determining what type of leave a particular day of holiday constitutes. This is relevant in determining which method of calculating holiday pay (WTD leave, the UK's 1.6 weeks leave or contractual holiday) is applicable. Being able to label with certainty what type of holiday a particular day represents is also central to working out the scale of any back pay liability following the decision in *Bear Scotland* (which involves the tribunal look backwards for a chain of underpayment on WTD leave not broken by a 3-month or more gap).

63) An approach that would be in keeping with the current structure of the Regulations and with dicta from the EAT is to adopt the principle that the first 20 days taken in any leave year constitute WTD leave. To provide an easement for those employers who permit untaken contractual holiday in excess of WTR leave to be carried forward, which is commonly done only for a short period of the next holiday year) a derogation could be permitted from this default where it is provided for in a collective, workforce or individual agreement.

September 2015

Appendix 1

Members of Working Time Sub-Committee

Chair: Stephen Levinson, Keystone Law
Martin Brewer, Mills & Reeve LLP
Clare Fletcher, Slaughter and May
Caspar Glyn QC, Cloisters
Anna Henderson, Herbert Smith Freehills LLP
Judith Hogarth, Excello Law
Dominic Holmes, Taylor Vinters LLP

Peter Wallington QC
Chris Wellham, Virgin Media

Appendix 2

EMPLOYMENT LAWYERS ASSOCIATION

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

[pdf version available here]

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 Sin*dicato 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. Looking Ahead

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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