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WORKING TIME SPECIAL

The time is nigh

Government consultation on Measures to implement the provisions of the Working Time Directive and the Young Workers Directive (April 1998).

The implementation of the Working Time Directive and the Young Workers Directive is long overdue. The Directives should have been introduced into UK law in November 1996.

The Conservative government made no real effort to do so. It pinned its hopes on fighting a European Court of Justice case which it comprehensively lost ten days before the Directive had to be implemented.

The Labour government has found the issue sufficiently complex or controversial to delay its proposals until eleven months after the election, with a proposed implementation date of 1 October 1998. This leaves open the possibility of claims against the Government or public sector employers by workers who have lost out through the failure to implement the Directives in 1996.

The delay has fuelled speculation on the content of the proposals. The Public Consultation document issued on 8 April 1998 shows a number of welcome improvements from the Conservative proposals (reported in issue 8), but there are shortcomings and, in some respects, missed opportunities.

The implementation of the Working Time Directive & the Young Workers Directive is long overdue.

Thompsons will be producing a formal response to the Government's proposals and to be circulated to trade unions. In this article, we comment on the main aspects of the proposals and issues of particular interest or controversy.

References to Regulations are to the draft Working Time Regulations 1998.

What does it cover?

WHAT IS WORKING TIME?

The Government takes the option of repeating the definition in the Directive, so that working time is a period when a worker is "working, at his employer's disposal and carrying out his activity or duties". This may be the most obvious approach, but it does leave a number of questions unanswered.

The biggest uncertainty covers time spent available to work, but not actually carrying out a work-related activity. Obvious examples are zero hours contracts or periods spent "on-call".

The Government agrees that these may amount to "working time" depending on the circumstances, but makes no reference to this in the Regulations, leaving it for the courts to decide. This is an unsatisfactory approach which leads to uncertainty and litigation.

The same comments apply to time spent on trade union activities or duties, which should be regarded as working time, but is not dealt with in the Regulations.

The Government's suggestion to achieve greater clarity in practice is to allow employers and workers' representatives to agree that periods should be regarded as working time. This could cover on call, zero hours, trade union activities or other periods.

WHO IS COVERED?
Workers (Regulation 1)

It is welcome that the Government proposes that the rights under the Directives should apply to "workers", adopting the broader definition which will also apply to minimum wage legislation. This reduces the risk of avoidance by employers setting up bogus "self-employment" arrangements to get round the Regulations.

Working time is a period when a worker is "working, at his employer's disposal and carrying out his activity or duties."

All those who provide their services personally will be covered, which will include freelance workers. The only exception is those who are providing their services as a business to a customer or client.

There is still an unwelcome emphasis on the requirement for a contract between the parties, when it should be sufficient that there is a relationship under which the service is provided. The onus should be on the employer to show that any person providing personal services should not be regarded as a worker.

Young workers are those over compulsory school age, but under 18.

Excluded sectors (Regulation 16)

The proposed Regulations exclude the same sectors as are excluded by the Directive. These are transport (air, rail, road, sea, inland waterway, lake), sea fishing and other work at sea. These will be covered by new proposals to be put forward by the European Commission, which has issued a Consultation Paper covering those sectors.

The Government correctly recognises that it is the activities of those sectors which are covered, not merely employment in a location where those activities are carried out. The Conservatives believed that anyone who worked at a transport location was excluded whatever their activity.

This would have meant that someone employed in a shop at an airport would be excluded from the legislation. Labour disagrees and also points out that workers at docks and harbours would not be excluded, nor would those who transport goods within buildings, for example fork-lift truck drivers. This guidance is welcome, but it has no legal effect and should be spelt out in the Regulations.

The other excluded sectors are junior doctors and also armed forces, police or other civil protection services, but only in relation to specific activities which inevitably conflict with the working time requirements: a strict test.

Entitlements and limits: Enforcement

General

The Government's approach is to divide the working time provisions into two categories: those which give "entitlements" to workers, and those which impose "limits" on employers.

"Entitlements" are the provisions on breaks, daily rest, weekly rest , annual leave and compensatory rest. These are to be enforced by claims to Industrial Tribunals (to be re-named Employment Tribunals under the Employment Rights (Disputes Resolution) Act 1998).

"Limits" are the provisions on maximum weekly working time, length of night work, health assessments and transfers of night workers, patterns of work and keeping records. These are to be enforced by the Health and Safety Executive and local authorities with power to prosecute in line with existing health and safety legislation.

This is undoubtedly an improvement on the Tory approach which denied workers any remedy unless they were sacked or victimised for seeking to exercise rights under the Directive. However, it has its faults.

Employees who come under pressure from their employers not to take up "entitlements" to rest or holidays do not have adequate protection against coercion and cannot turn to the HSE for health and safety enforcement. From the other perspective, the enforcement of "limits" is dependant on the HSE or other authorities taking action, without giving employees themselves rights which they can enforce in Tribunals.

There is one significant further legal weapon at the worker's disposal. An employer may be liable in a claim for damages if a worker suffers any loss or injury through working in excess of a working time limit. This would permit claims for personal injury or industrial disease where the injury or condition is caused by the excessive hours.

Tribunals

A three month time limit applies for those rights (with the exception of claims for damages which have different time limits) to be enforced through tribunals and there are also provisions for compromise agreements. There is provision for a declaration of rights plus compensation which is not confined to financial loss, but also takes account of the extent of the employers' default.

Workers are also protected against detriment or dismissal for enforcing rights under the legislation, although these provisions fall short of adequate protection against coercion or inducements to give up rights.

Adapting work to the worker

(Regulation 7)

Article 13 of the Working Time Directive places obligations on employers who "intend to organise work according to a certain pattern". It is a perplexing provision which the Government has chosen to implement merely as a provision relating to rest breaks.

The regulation applies only where the pattern of work is such as to put the worker at risk, particularly because of monotonous work and work at a predetermined rate. The Government describes this as essentially a health and safety provision building on the requirement in the Framework Directive.

The proposal focuses on the obligation on employers "especially as regards breaks during work". It is wrong to regard this as the only obligation deriving from this Article. Not only does this distort the text of the Directive, there are other ways of alleviating monotonous work, job rotation for example. The object of protecting health must be seen in the broad context of providing a healthy working pattern and environment.

Increased breaks may play a part in this process, but the Regulations fail to provide any specific remedies. This appears to be inadequate and inappropriate.

Working to the limit

Weekly working time limits (Regulation 4)

The maximum of an average 48 hours weekly working time is to be enforced by the Health and Safety Executive. There is no entitlement which workers can enforce in a tribunal, although workers could bring a claim for damages if they suffer loss or injury because of a breach of the limit.

The 48 hour limit is an average over 17 weeks (26 weeks for the special cases in Regulation 19). It is welcome that for new employees the average must be calculated over actual weeks worked, so that the average at any time in the first 17 weeks cannot exceed 48 hours per week.

The effectiveness of the weekly maximum is substantially undermined by the Government's decision to take up the individual opt out inserted by the previous government. This means that individual employees may agree in writing to work in excess of 48 hours: this is inconsistent with viewing this as a health and safety limit to be enforced by the HSE.

Workers are not given adequate safeguards against duress or inducements. They are only given rights if they suffer detriment for refusing to sign. There is no requirement to give a copy of the agreement to the worker, nor any requirement that the worker receive independent advice.

A worker who has signed away his rights in this way must give seven days' notice of withdrawing agreement. However, agreements can extend this notice requirement to three months. This is absurd and oppressive: three month notice provisions would become the norm in agreements, locking employees in for an unacceptable period.

The 48 hour limit is an average over 17 weeks.

The Government proposes that records on those agreeing to work in excess of 48 hours should be made available to the HSE. There is no provision enabling inspection by workers or their representatives. Workers should also be given a right to enforce in tribunals their compensatory rest where the maximum weekly working time limit is modified or excluded.

NIGHT WORK (Regulations 5 and 6)

This is also introduced as a limit to be enforced by the HSE, with the only individual enforcement through claims for damages if injury or loss is suffered through a breach of the limits. The obligation on the employer should be absolute: not merely to take "all reasonable steps" as specified in the Regulations.

The averaging period is set at 17 weeks, although once again it accrues weekly for new workers.

There are two substantive limits for night workers: an average of 8 hours of normal working hours in each 24 for all night workers, and an absolute maximum of 8 hours in any 24 hour period for those engaged in special hazards or work involving heavy physical or mental strain.

Night time is between 11pm and 6am. A night worker is someone who works at least three hours of his daily working time at night "as a normal course", which the Government defines restrictively as meaning on a majority of days worked.

The proposals on the maximum average normal working hours appear to allow employers to get around the restriction simply by paying premium rates for hours in excess of eight. That cannot be right. Work rosters should be the key.

There is a major loophole for workers engaged on risky or onerous work. If there is no agreement which defines the work falling in that category, and no risk assessment on that issue, those workers are deprived of the specific protection of the Regulations. This cannot be an adequate implementation of the Directive.

The provisions on health assessments for night workers are inadequate as they do not provide for the intervals between assessments, and appear to permit so-called "health assessments" not carried out by a qualified medical practitioner.

The draft Regulations fail to give a worker an enforceable right to insist on a transfer to day work for health reasons. The proposals do not adequately provide for specific health protection for night and shift workers.

Give us a break

Rest and breaks
Daily rest (Regulation 9)

An adult worker is entitled to a rest period of not less than 11 consecutive hours in any 24 hour period: a young worker is entitled to 12.

This covers any 24 hour period, not merely midnight to midnight. The Government believes that someone who works between, for example, 10am and 2pm has the right to 11 hours rest because although there is less than 11 hours between midnight and 10am or 2pm and midnight, there is more than 11 hours between the end of work at 2pm and the beginning of work at 10am the following day.

Weekly Rest (Regulation 10)

An adult worker is entitled to an uninterrupted rest period of not less than 24 hours in each seven day period: a young worker is entitled to two days.

The employer is allowed to translate the adult worker's entitlement into two 24 hour rest periods in a 14 day period or one 48 hour rest period in a 14 day period. The Government expresses the hope that this would be by agreement with workers or their representatives, but does not make this a requirement and does not even require the employer to consult with a view to reaching agreement on this issue (or indeed any issue relating to working time).

Although the 24 hour period of weekly rest must be in addition to the 11 hour daily breaks, there is no specific provision for a 35 hour rest period. The Directive allows for the 11 hours daily rest to be counted as part of the 24 hours weekly rest where justified by "objective, technical or work organisation conditions".

This nebulous phrase is repeated in the Regulations without any clarification. The Government says that the "work organisation conditions" must be relevant to any situation where the reduction of the break was required, but fails to include this requirement in the Regulations. Once again this will lead to uncertainty.

Breaks (Regulation 11)

Adult workers are entitled to a rest break of at least 20 minutes if their daily working time is more than six hours. The rest break must be uninterrupted and the worker is entitled to spend it away from the workstation. This represents a significant improvement on the Tory proposals for a 5 minute "break" to be spent at the workstation.

The Government states it is "implicit" that the break must be taken during working time and cannot be taken either at the start or end of a period of working time as it cannot overlap with periods of daily or weekly rest. This must be right, but once again the Government fails to spell it out in the Regulations leading to possible legal argument and uncertainty.

There are no other requirements or conditions attached to the breaks, for example no requirement for the employer to give notice of taking a break, unless agreed between the employer and workforce.

Modifications and restrictions

DEROGATIONS (Regulations 17-20, 22)

General

The Government takes up the full range of opportunities to modify or restrict the application of the Directive, although it does not demonstrate how it has "had due regard for the general principles of the protection of health and safety of workers", as it is required to do by the Directive. The two main categories in the Regulations are those relating to "unmeasured working time" and to other particular activities.

These "derogations" exclude the operation of provisions on daily and weekly rest, breaks, weekly working time and night work.

Each of them is subject to the requirement that the worker be provided with "equivalent periods of compensatory rest".

It is particularly important that this is complied with in order to achieve the health and safety objectives of the Directive. However, the Regulations make no provision for the length of this rest, when it must be granted, or any obligation specifically to identify the periods allotted as compensatory rest.

Only in "exceptional cases in which it is not possible for objective reasons to grant such a period of rest" can this obligation be avoided. The Government says that these circumstances will be "rare, but self-evident". This is unacceptably vague: the Regulations should spell out the detailed position and should also specify what is required of the "adequate protection" to be afforded to those workers.

The regulations should spell out the detailed position.

Workers are given the right to complain to tribunals if they are denied compensatory rest or adequate protection, but not in relation to the limits on maximum weekly work or night work.

Unmeasured working time (Regulation 18)

The Government correctly focuses on the fact that this derogation only applies where the specific characteristics of the work activity mean that working time is not measured or predetermined, or is determined by the workers themselves. The key is the characteristics of the activity, not the arrangements made by the employer.

This means that the derogation may apply to some activities of workers without necessarily applying to the whole of their employment.

The Regulations "copy out" the examples of the type of workers most likely to be affected: managing executives; people with autonomous decision-making powers; family workers and clergy officiating at religious ceremonies(which suggests that these categories - including clergy - should otherwise be covered by the legislation).

OTHER SPECIAL CASES

Note: All focus on the activities of the individual worker.

a) Activities mean that either work and residence or different places of work are distant from each other.

b) Working as security guard or caretaker where a permanent presence is necessary.

c) Worker's activities involve need for continuity of service or production, particularly:

- hospitals, residential institutions, prisons
- docks or airports
- press, radio, television, film production
- postal and telecommunications
- civil protection services
- gas, water and electricity
- household refuse collection and incineration
- where work cannot be interrupted on technical grounds
- research and development
- agriculture

d) Where there is a foreseeable surge of activity, for example agriculture, tourism, postal services.

e) Where there are unforeseeable circumstances beyond the employer's control or an accident or imminent risk of accident.

"Other special cases" (Regulation 19)

Once again the Government "copies out" the categories listed in the Directive [see box].

The significant aspect of the proposed Regulations is the specific focus on the activities of the workers concerned, rather than the activities of the sector or industry as a whole.

To take a particular example, a hospital worker will only be affected by the derogation where her/his own activities "involve the need for continuity of service or production", not merely because the activities of the hospital as a whole must be carried on continuously.

There are also specific provisions in Regulation 20 to deal with the situation where workers change from one shift to another, without the normal rest break in between.

PAID LEAVE

Minimum holiday rights

PAID ANNUAL LEAVE (Regulations 12-14)

There are currently 2.5million UK workers who have no right to a paid holiday, and as many again who have an entitlement to less than the amount the Regulations will now provide.

Disappointingly, the Government chooses to exercise the option of a lower entitlement of three weeks per year for a transitional period until 23 November 1999. Not only is this unnecessarily mean, it creates complication and confusion.

The three week entitlement will come into force on 1 October 1998, but the increase to four weeks will come into force on 23 November 1999, leaving awkward calculations and bureaucracy with a changeover 53 days into the second holiday year. This is because the holiday year will start on 1 October 1998 for all existing employees, unless another date is agreed with the employer.

The Government fails to provide that the statutory entitlement should be in addition to bank holidays, despite an EU Social Affairs Council Minute to that effect.

The comments in the Consultation Document concerning part-time workers are misleading. The Government suggests that a part-time worker who works 50% of the time of a full-time worker should receive only half the number of days leave.

No paid holidays for 2.5 million UK workers.

The worker should receive the number of days leave, equivalent to three working weeks, albeit that the pay received for those days will be half that of the full-time worker.

The Government proposes a three month qualifying period before leave can be taken. This is a considerable improvement on the 49 week qualifying period proposed by the Tories, but it still runs the risk of abuse by employers seeking to establish a series of interrupted short-term contracts.

Paid annual leave cannot be carried over to another year, although contractual leave may be. If leave is untaken when employment comes to an end, there must be a payment in lieu. There is no corresponding obligation to repay the employer for excess leave taken unless this has been agreed by a workforce agreement.

The proposals requiring notice of proposed leave are slanted heavily in favour of employers. Employers can require employees to take all of their leave on certain dates.

Employees must give 4 weeks' notice of proposed leave, but the employer has seven days in which to refuse the request. There is no obligation on the employer to act reasonably, nor is there any restriction on the grounds for refusal.

The pay for annual leave must be the higher of any contractual entitlement or a "week's pay" within the meaning in the Employment Rights Act, but without any statutory maximum.

What about the workers?

COLLECTIVE AGREEMENTS AND WORKFORCE AGREEMENTS (Regulations 1, 21 and Schedule 1)

Perhaps the most disappointing, and most worrying, provisions relate to the type of agreements which can modify the operation of the legislation. These can modify the provisions on daily and weekly rest, breaks, maximum weekly hours and night work.

The Regulations permit these modifications to be made by collective agreements. This is required by the Directive.

The Regulations introduce the additional (but desirable) requirement that the collective agreement must be with an independent trade union. It would be preferable if the Regulations also required the agreement to be in writing.

Rights to compensatory rest under agreements are enforceable in Tribunals, and the Regulations do provide that all rights granted under agreements which modify the Regulations should be enforceable by individual workers: rights under the Directive should only be given up when enforceable rights are guaranteed in return.

The Directive allows derogations by collective agreements or "agreements between the two sides of industry". These agreements must be "at the appropriate collective level", but like their predecessors, the Government believes this permits agreements with elected workforce representatives, of no permanence or status. It goes further: it allows for agreements made between employers and the majority of individual members of the workforce. These "workforce agreements" with representatives or workers are only permitted for workers not covered by collective bargaining.

This does not adequately implement the Directive. It also causes immense practical and policy problems.

Take first agreements made with representatives. The Regulations allow the employer to determine the number of representatives and their term of office. There is no requirement of independence. There is no protection against representatives being under the domination or control of employers, or offered inducements by employers. There are inadequate safeguards for the election of representatives.

For agreements with the majority of individual members of the workforce, there is inadequate protection against workers being coerced or induced to sign agreements which give up rights. This is bad enough for the workers who sign: even worse for those who refuse to sign but then find their rights removed through the actions of others over whom they have no control.

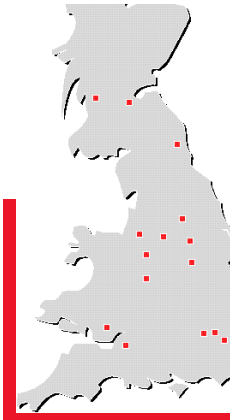
This is the central problem: how can individual employees be bound by these agreements? What redress do they have to challenge the validity of the agreements: the appropriateness of the representatives and the status of agreements purportedly reached by representatives. The answer appears to be "none", which is in breach of European law requirements regarding representatives and is a recipe for industrial chaos.

The Regulations do not even require the employer to take account of the views of the workforce when deciding the arrangements for representatives.

The position is particularly acute for workers who join the employer after a workforce agreement has been concluded and yet are bound by it for up to 5 years.

There is a democratic deficit. Workers who are dissatisfied with an agreement have no way of challenging it or calling representatives to account, whereas unions are accountable to their members through their rule books and democratic procedures.

Employers who wish to take advantage of flexibility under the Regulations should have one option: recognise a trade union in respect of working hours. This gives flexibility coupled with the protection of an independent representative and also achieves the policy of encouraging union recognition without a proliferation of ballots, elections and attendant legalism and bureaucracy.



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