


Holiday pay and other key Working Time Regulation developments

Employment Lawyers Group
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Agenda

- What is “Working Time” for the purposes of the Working Time Regulations (Northern Ireland) 2016?
- Holiday Pay
- Other thorny issues

Working Time Regulations 1998 / Working Time Regulations (Northern Ireland) 2016 (“WTR”)



- Take all reasonable steps to ensure **working week** does not exceed **48 hours** (including overtime)
- Take all reasonable steps to ensure that **night workers'** normal hours of work do not exceed **8 hours per day** on average
- Allow workers **5.6 weeks' paid holiday** each year
- Allow workers **rest breaks** (unless they are exempt in which case compensatory rest should be given):
 - 11 hours' uninterrupted rest per day;
 - 24 hours' uninterrupted rest per week (or 48 hours per fortnight);
 - Break of 20 minutes when working more than 6 hours per day.

What is “working time” under WTR?



“Working time”, in relation to a worker, means—

- (a) any period during which the worker is working, at the employer's disposal and carrying out the worker's activities or duties,
- (b) any period during which the worker is receiving relevant training, and
- (c) any additional period which is to be treated as working time for the purpose of these Regulations under a relevant agreement;

and “work” shall be construed accordingly. (Reg 2 WTR)

What is “working time” under WTR?



In??	Out??
Overtime (whether paid or not, unless purely voluntary)	Voluntary overtime
Working lunches	Lunch breaks / coffee breaks
Work taken home at employer's request	Work undertaken voluntarily at home in evenings
Work related training	Evening classes that aren't a requirement of job
Travel time where travel intrinsic to job	Travel to and from work/home (usually...)
Work related business functions	Work related social events
On-call time at workplace/ a place required by employer	On-call time if not required to be at a particular place

WTR “working time” – tricky areas



On-call/standby time

- If time on call spent at work, or a place dictated by employer = WTR working time (even if asleep)
- SIMAP and Jaeger ECJ cases
- *Ville de Nivelles v Matzak* (ECJ C-518/15)
 - Retained firefighter, on call 1 week in 4, evenings and weekends; unpaid
 - 8 minute reporting time to fire station, necessitated living close to station
 - Geographic and temporal constraints “significantly restricted” his activities = working time for WTD

WTR “working time” – tricky areas



Travelling time

- WTR silent on the issue (as is WTD)
- Test is: does the travel time meet the three limbs (working, at employer’s disposal, carrying out their duties)?
- Travel to and from place of work: no
- Other travel starting/ finishing at home:

Federacion de Servicios Privados v Tyco Integrated Security SL

Peripatetic workers, no fixed place of work – travel time to/ from home and assignments is “working time”

Holiday - WTR



- 5.6 weeks’ statutory annual leave (4 weeks EU leave / 1.6 additional weeks)
- Entitled to be paid a “week’s pay” for a “week’s leave”. Week’s pay cross references to Employment Rights (NI) Order 1996 (“ERO”)

- ERO distinguishes between those with normal working hours and those who do not.

Normal hours = amount payable under contract

No normal working hours = average of 12 weeks’ pay

Holiday Pay -WTR



[Robinson-Steele v RD Retail Service Limited \[2006 \] ICR 932](#)

- ECJ held that workers must receive “normal remuneration”

[Williams and others v British Airways PLC \[2011\] IRLR 948](#)

- Workers on holiday are entitled to remuneration which is:
 - “intrinsicly linked” to the performance of the tasks which the worker is required to carry out under the contract of employment; and
 - “relates to the personal and professional status of the worker”

Holiday Pay -WTR



[Lock v British Gas Trading Limited and others \[2014\] IRLR 648](#)

- Where remuneration includes contractual commission by reference to sales achieved, calculating holiday pay by reference to basic salary only is contrary to WTD.

[Bear Scotland Limited and others v Fulton and others \[2015\] IRLR 2015](#)

- WTD required normal remuneration to be paid;
- Payment has to be made for a sufficient period of time to be “normal”
- Intrinsic link between payment and worked carried out.
- Series of deductions – underpaid holiday cannot be claimed as the last in a series of deductions where more than three months has elapsed between deductions

Holiday Pay - WTR



Patterson v Castlereagh Borough Council [2015] NICA 47

- Tribunal was wrong to conclude that voluntary overtime cannot be included in statutory holiday pay as a matter of principle

Dudley Metropolitan Borough Council v Willetts and others [2017] IRLR 870

- Voluntary overtime pay, out-of hours standby payments and call-out payments should be included if sufficiently regular to amount to "normal".

Taking all that into account.....



- Pay **normally** received – **sufficiently regular**
- Include payments **linked intrinsically to work carried out** which the worker is required to carry out e.g. overtime (guaranteed, compulsory and voluntary), shift allowances and production bonuses.
- Payments to reimburse worker for expenses are not included e.g. fuel allowance
- Include payments that **relate to worker's professional and personal status** e.g payments relating to seniority or length of service
- Where a settled pattern of work – payment has to be made for a **sufficient period** of time to justify the label of "normal"
- Where no settled pattern of work, **average remuneration** should be calculated over an appropriate reference period (**determined by national legislation**).

Questions.....



- Appropriate reference period?
- Breaking the chain / series of deductions
- Which 4 weeks are WTD holiday?
- How regularly must the payment be made to be "sufficiently regular"?

Holiday Pay - WTR



Agnew & Others v Chief Constable of Northern Ireland & Others [2018]

- Reference Period – issue must be determined by reference to the individual facts of each individual case.
- Breaking the series of deductions – the decision in Bear Scotland is wrong and should not be followed in this jurisdiction.
- WTD / WTR holiday – each day's annual leave must be treated as a fraction of a composite whole.

Holiday Pay – What's next?



- [Police Cases](#) – appeal?
- **More case law!!** [Hein v Albert Holzkamm GmbH & Co, KG](#)
- [The Good Work Plan](#) – amendment to Employment Rights Act 1996 (in GB) to provide for a 52 week calculation.

Other thorny issues..



- Casual and zero hours workers - 12.07% of hours worked?
- The 12.07% approach can be problematic, especially for term time only - [Brazel v Harpur Trust UKEAT/0102/17](#)
 - Zero hours contract, term time only
 - Contract specified 5.6 weeks' paid holiday per year
 - Holiday pay in practice = 12.07% annual earnings
 - s.224 average previous 12 weeks = 17,5%
- Distinction between holiday **entitlement** (how much accrues) and holiday **pay** (how much is paid when entitlement is used)

Other thorny issues..



- WTR has no mechanism for pro-rating holiday **accrual/entitlement** (except first and last year of employment)
- Reg 15 and 16 refers to (cumulatively) 5.6 weeks' leave (or a max of 28 days Reg 16(2))
- Does not say "pro rated for part time working, or working fractions of the year"
- Brazel – EAT said WTR does **not** require that pro-rating exercise; just requires 5.6 weeks leave paid at average over previous 12 weeks

Other thorny issues..



- Disguised self-employment and indefinite carry forward – *King v Sash Window Workshop (ECJ C-214/16)*
 - Commission only salesman; 13 years' service; no salary; no paid holiday; terminated his contract when age 65
 - ECJ – WTR split right to leave and right to pay not effective remedy; two sides of the same coin
 - Where worker precluded from taking annual leave because employer wrongly failed to pay holiday pay WTD requires indefinite carry forward until termination of employment
 - Distinct from sickness carry forward (KHS AG v Schute; Plumb v Print Group Ltd)

Other thorny issues..



- The march of worker status...gig and caring economies – foster parents?
 - Not workers – AG Opinion *Sindicatul Familia Constanta*
 - Employees – Scottish ET *Johnstone & Johnstone v Glasgow CC* (2017)
 - Pending English ET – *Fisher v Kent CC*, *Anderson v Hampshire CC*



Thank You

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