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work place news

by Chloe

Working time, rest & on-call

There are lots of good reasons for employers to remind themselves of the rules around maximum limits on working time, required rest breaks and the interplay of these with workers who perform on call work.

With hybrid working being the rising trend, one of the issues that employers need to consider is whether, for some, it might lead to a worse work/life balance as employees blur the lines between work and home.

We're seeing more businesses diversifying and requiring, for one reason or another, unsociable hours working in order to service their client base or keep their operations running smoothly.

Although derived from EU law, our rules around working time are enshrined in UK law and continue to apply despite the UK having left the EU.

Background

The Working Time Regulations 1998 (WTR) were introduced to regulate the number of hours workers perform, and the ways in which rest periods and holidays work.

It's important that employers note that the factors which determine working time for the purposes of the WTR are not necessarily the same as those which determine working time for the purposes of National Minimum Wage.

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The editor's welcome

This last month has flown by, quite literally – as Storm Eunice and Franklin see off the last of February in dramatic fashion.

In this month's issue we're focusing on some wellbeing topics as well as covering some key recent case rulings – including one with a rare multi-million pound pay out.

As always, please follow us on LinkedIn to make sure you don't miss out on important updates in between newsletters - including my light-hearted focus on employment issues via the unlikely medium of reality TV.

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£2m tribunal award

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In other words, just because a period of working time is required to be paid under the National Minimum Wage Regulations, that does not automatically mean it will be working time for the purposes of the WTR. This article examines WTR issues only.

Key principles under the WTR include:

Workers' weekly working time must not exceed 48 hours per week on average. This average is calculated over 17 weeks.

- A worker may sign an opt-out of the maximum 48-hour working week. However, they can't be forced to opt-out or subjected to victimisation for not opting-out and, even if they do opt-out, they can cancel this on 7 days' notice (or up to three months' notice if the opt-out agreement provides for that).

Rest-periods are a key responsibility of the employer to allow workers to take. As a starting point, the WTR generally allows workers the following:

- Daily rest period of 11 hours uninterrupted rest per day
- Weekly rest of 24 hours uninterrupted rest per week, or 48 hours per fortnight (which of the two is at the discretion of the employer).
- 20 minute break when working more than 6 hours in a day.

Further key points around rest periods are:

- Employers need to **actively encourage the taking of breaks**. This means creating an atmosphere were breaks are a scheduled part of the working day.
- **Workers mustn't feel under pressure to not take a break**. That doesn't just mean direct pressure – this can include being made to feel as though they shouldn't take a break because their colleagues don't and they feel under pressure to follow suit.
- **Workers carrying out monotonous work, e.g. on a production line, attract special protection**. They may need to be given more regular, short breaks, in addition to the above standard breaks.
- Workers must, wherever possible, be given **compensatory rest if they've had to work through a rest period.** This might happen, for example, with a shift worker changing from day to night work.
- Employers must **keep and maintain records around average working time and night work** demonstrating that the rules are being complied with.

On-call – or stand-by is time spent by workers where they aren't necessarily always actively performing work, but they are required by the employer to be available and can be called upon to perform work if required. On call work has been the subject of a great deal of debate and case law.

Determining whether shifts spent on call are working time for the purposes of the WTR are important for workers who also carry out other, set working patterns, as it can impact whether they are being afforded sufficient rest.

In broad terms, the current position under the WTR in relation to being on call is that:

- **Time spent on-call or on standby at a location specified by the employer is all likely to be working time**, regardless of how much time the worker spends actively carrying out work, and even if the chance of being called upon to perform duties is low. This also applies even if the employer gives a little bit of freedom, but still requires the worker to be within, for example, a few miles of their normal place of work.
- Even if the employer doesn't set rules around where the worker needs to be, but they impose other constraints which objectively have a very significant impact on the worker's opportunity to pursue personal and social interests, it's likely that all of the on call time will be working time.
- **The WTR only distinguishes between working time and rest time**. In practice, many workers on call aren't actually carrying out work, but can't pursue their own activities either in case they're called on to work.
- **Factors which will help determine whether on call time is working time include:**
  - Any constraints imposed on a worker that objectively and very significantly affect their ability to freely manage the time during which their services are not required and use that time as they want. The more constrained they are, the more likely it is that merely being on call will be considered working time
  - Conversely, when there are no such constraints, only the time when work is actually carried out will constitute working time
  - In principle, if a worker on call is able to plan personal and social activities, and carry out any required work around this, this does not constitute working time. On the other hand, if an on call worker is required to return to work within a few minutes then the whole period of being on call will be considered working time. The requirement to resume work quickly makes it very difficult for the worker to plan any kind of recreational activity, even something short.

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Tips for reducing the risk that all on call time (even when no work is performed) is considered working time:

- Don't require the worker to be at any particular location (whether that is a workplace or their home) – for example, make clear they can be anywhere as long as they have their phone/laptop available
- If certain response times are required, have these as long as possible. The shorter the response time, the greater the risk all on call time will be considered working time. Cases have determined that 3 and 10 minute response times rendered all on call time to be working time
- Don't require the worker to have to attend the workplace when called – or, if they may need to, limit this as much as possible and have a lengthy response time. Also, don't require them to wear anything in particular, e.g. a uniform, which might restrict them further
- The greater the number of calls the worker will need to respond to, the higher the chance that all of their on call time will be considered working time (as they won't have sufficient time between calls to realistically pursue leisure activities)
    - If the worker is able to choose to accept/reject a % of calls that will help minimise the risk of all time being on call time. This is more relevant where, for example, a number of workers are on call at the same time and if one rejects a call it bounces to another.

Increased costs for Skilled Worker Sponsors

Employers who sponsor oversea workers under a Worker or Temporary Worker licence may have noticed that it's slightly cheaper when the worker is a national of certain European countries.

This is because a number of countries ratified the European Social Charter, which enabled nationals to benefit from a £55 discount on visa applications, and free certificates of sponsorship (usual cost £199).

Sadly, this concession ends on 26 February 2022. For all Certificates of Sponsorship assigned to a worker from 26 February onwards, the £199 fee will apply and the worker will have to pay the full visa application cost, regardless of where the individual is from.

Get in touch if you want to know more about the cost of sponsorship. We've developed a handy calculator, which we've updated to take account of the above changes.

Click here to download our free sponsorship cost calculator

Positively Working with Ayda

Ayda is carrying out her training contract with Outset, currently working in the employment team. With a real passion for penning her tips and experience in her professional and personal journey, she's going to share these with us as a regular feature. We hope you find Ayda's insights as helpful and thought provoking as we do.

Resolutions or intentions?

The start of the year is often the time where people overwhelm themselves by focusing on substantial changes down the road, rather than on small changes in the here and now.

Resolutions tend to inspire negative thoughts about your current situation and as many of us are aware, most resolutions rarely last past Valentine's Day.

We underestimate how long it takes to kick a bad habit or adopt a good one. Studies indicate that on average it takes approximately 66 days before a new habit becomes automatic.

Resolutions are often focused on smaller goals like having a good posture or substantially cutting down on sugar whereas an intention has a broader focus and often relates to relationships, careers, self-improvement or travel.

An intention focuses on the positives and is much more forgiving, without the built-in succeed-or-fail dynamic that seems to come with resolutions. The idea of intention praises effort and process, and not just results.

An intention does not imply something is wrong with the way you currently live, but instead, it motivates you to live even better.

Here are some examples of my intentions:

- I intend to live in the moment without worrying about the past or future.
- I intend to live with more compassion for myself and others.
- I intend to maintain my fitness.

What are yours?

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Ms S Macken v BNP Paribas London Branch

Underpaid "not now, Stacey" awarded over £2m

They don't come along often, but when an employee is awarded millions by the Employment Tribunal it's sure to hit the headlines.

Stacey Macken was employed by BNP Paribas London Branch, and lodged a number of claims in 2017, mostly centred around sex discrimination. Ms Macken's complaints included:

- Being paid £40,000 less a year than a male colleague performing the same role
- Receiving half the level of bonus than her male colleague, despite achieving the same performance grading
- Being belittled by her boss, who said "not now, Stacey" so often that it was a source of commentary among her colleagues
- Having a witches hat left on her desk by a drunken male colleague

The Employment Tribunal upheld the majority of the Claimant's claims in 2019. Largely due to the pandemic, the remedy hearing didn't take place until early 2021 and the judgement was published earlier this month. It attracted headlines due to being one of, if not the, highest ET award ever made.

Ms Macken was awarded a staggering total of £2,081,449.70. The other numbers in this case are equally eye-watering, especially for a remedy hearing:

- An 8 day remedy hearing
- A trial evidence bundle of 3,395 pages
- 9 witnesses in total (4 of which provided only written statements)
- 6 months for the tribunal to prepare the written judgement
- A remedy judgement that runs to 74 pages

The tribunal's analysis and calculation of loss was complex, and clearly fact specific, but this case serves as a memorable reminder of the potential exposure where claims not subject to a cap on compensation are involved.

The equal pay elements of Ms Macken's claim alone accounted for over £400,000 of the award. Future losses almost £1m. Over £200,000 for psychiatric personal injury.

Employers familiar with the concept of Vento bands will appreciate that, although discrimination awards are uncapped in theory, Tribunals will tend to award within the low, middle or high Vento bands for injury to feelings.

Ms Macken was awarded in the middle of the high band which, for the relevant date of her claim, amounted to £35,000, plus £15,000 aggravated damages. The discrimination dated back over several years, the Tribunal considered the Respondent's conduct to be "spiteful and vindictive" and they weren't impressed at the bank's failure to apologise.

On top of all of the various elements of the award, the total was uplifted by 20% for the bank's failure to follow the Acas Code. That uplift alone totalled over £300,000.

This is a helpful reminder to employers and employment law practitioners alike, that the elements of compensation in complex discrimination claims can easily combine to create potentially ruinous (or life changing, depending on your viewpoint) amounts.

RECENT CASE LAW

Smith v Pimlico Plumbers Ltd

Mis-classified workers entitled to compensation for unpaid holiday for their whole engagement

There have been a number of cases which have examined the complex issues of holiday entitlement and pay, including the time limits for being able to claim unpaid holiday, how far back an employee can claim (i.e. the 2-year backstop), and whether periods of unpaid holiday can be linked or broken by a period of 3 months.

The issues are particularly complicated given the split of entitlement to holiday, and pay for that holiday, being treated separately in the Working Time Regulations 1998 (WTR). Not only that, but workers can bring claims in relation to holiday pay under the WTR and/or the Employment Rights Acts 1996 (ERA), and each have different rules, for example around time limits, how far back underpayments can be claimed and whether series of underpayments can be linked.

If you've been following the Pimlico Plumbers worker status/holiday litigation, you'll remember the 2018 Supreme Court decision that Mr Smith was a "worker" and not, as he had been treated by Pimlico Plumbers, a "self-employed independent contractor". The case created wide-ranging consequences for all those in the gig economy.

Although the issue of Mr Smith's employment status was determined, various legal questions remained following his success in court – including how much he was owed in holiday pay.

By virtue of his "worker" status, Mr Smith should have been entitled to paid annual leave, but was only permitted by Pimlico Plumbers to take periods of unpaid leave (as they considered him to be self-employed).

The Court of Appeal in Pimlico Plumbers issued a key ruling that could have wide reaching consequences for employers who misclassify workers as self-employed. This decision means that where someone has been wrongly denied paid holiday:

1. The right to accrue paid holiday rolls over each year
2. The right crystallises on termination of employment (the worker must bring a claim within 3 months of termination)
3. There is no limit to how far back the worker can claim (in other words, the 2 year backstop won't apply, and they will be able to claim holiday pay covering their entire engagement)

The above principles apply to the 4 weeks leave afforded under the EU Regs. Whilst workers are still able to bring claims in respect of the additional 1.6 weeks, a more restrictive legal analysis will apply, including the 2-year backstop on historical claims.

What does this mean for employers?
This probably isn't the end of the holiday entitlement/pay saga (we could see the issue referred to the Supreme Court), but for the moment this case is a warning to employers who engage individuals who are not classed as workers (and therefore not afforded holiday leave and/or pay).

If paid leave hasn't been provided, then "misclassified" individuals may seek to recover compensation from employers to account for unpaid EU leave during the entire period of their engagement. Relevant businesses should make sure they're confident of their assessment of employment status – and keep a look out for further developments.

Believe it or not?

In putting together this month's 'believe it or not', I started to type into Google "top jobs…" I was going to write "for dogs" (don't ask) – but got distracted by the fifth suggested option.

Top 10 jobs for psychopaths

1. CEO
2. Lawyer
3. Media (Television/ Radio)
4. Salesperson
5. Surgeon
6. Journalist
7. Police officer
8. Clergy person
9. Chef
10. Civil servant

In his book, The Wisdom of Psychopaths: What Saints, Spies and Serial Killers Can Teach Us About Success, Dr Kevin Dutton lists the above jobs, that he believes are the top career choices for psychopaths.

Fortunately, and in case you were wondering, he also has a handy on-line quiz that has reassuringly certified that I "rank 'Low' on the Psychopath Spectrum". Phew.

P.S. If you're curious, you can access the survey here.