In two recent cases (DJ v. Radiotelevizija Slovenija and RJ v. Stadt Offenbach am Main), the European Court of Justice (ECJ) has set out the factors to be taken into account when deciding if standby time should be counted as working time under the Working Time Directive (WTD).

The law

Article 2 of the WTD defines "working time" as any period during which a worker is working, at the employer's disposal and carrying out their activity or duties, in accordance with national laws and/or practice. While a "rest period" simply means any period that is not working time.

The WTD is implemented in UK law as the Working Time Regulations 1998 (WTR). The WTR sets out the requirements relating to working hours, rest breaks and annual leave with the intention to support the health and safety of workers.

Although the ECJ's rulings no longer bind the UK following Brexit, under the European Union (Withdrawal) Act 2018 UK courts and tribunals may still "have regard" to case law from the ECJ where relevant. These two cases may therefore be taken into account when applying the WTR.

The facts

The first case concerned a specialist technician, DJ, who was responsible for operating television transmission centres located in the mountains in Slovenia. DJ had to be contactable and able to be on-site within one hour of a call when on standby. As DJ lived more than an hour away from the sites he covered, he could not spend his standby time at home and had to stay in on-site service accommodation during his standby hours, where he had very few opportunities for leisure activities.

The other case concerned a Divisional Commander and fire fighter, RJ, who is based in the German city of Offenbach am Main. During his standby period, RJ had to be contactable and able to reach the town boundary of his place of work in uniform and in his service vehicle within 20 minutes of a call. The required response time meant that he had little choice but to remain at home during any standby period.

Both workers claimed that, due to the restrictions imposed on them by their respective standby systems, such periods should be considered in their entirety as "working time" under the WTD and that they should therefore be remunerated accordingly, whether or not they had undertaken any specific work during their standby period. The domestic courts in each case referred the question of interpretation to the ECJ.
The ECJ decision

In both cases, the ECJ did not feel able to reach a conclusion but, instead, provided guidance to the national courts on the factors to take into account when assessing time under the WTD:

- A period of standby time must be regarded as working time in its entirety when the constraints imposed on the worker "objectively and very significantly" impact that worker's ability to freely manage their time when their professional services are not directly required. In the absence of such constraints, only that time when actual work is performed must be classified as working time.

- Only the constraints that are imposed on the worker by law, by a collective agreement or by the employer are relevant. Any difficulties that the standby time may cause for the worker that are the consequence of "natural factors or of his or her own free choice" may not be taken into account. For example, the fact that DJ's home was far away from the workplace and that he had to stay in a place that had limited leisure opportunities were irrelevant factors.

- The factors that will be relevant when assessing whether the constraints imposed on a worker during standby are such as to warrant classifying that period as working time include the required response time. If a worker is allowed a reasonable time to resume their professional activities, such that they may plan their personal and social activities, that period will not amount to working time. Conversely, if a worker must return to work within a few minutes, that period must be regarded as working time. The frequency with which workers are called upon during standby is also relevant – the higher the frequency, the less scope for the worker to manage their time freely.

Comment

These judgments provide guidance to employers on how to assess standby time where the worker does not have to be physically present on-site but does have to be contactable and responsive. We recommend employers who operate standby systems and whose employees are not remunerated (or are remunerated at a lower rate) for their standby hours should review their standby hours policies to establish if such policies are in breach of the WTD and/or WTR.

We also recently blogged on the Supreme Court's decision in Royal Mencap Society v. Tomlinson-Blake which ruled on whether care workers who "slept-in" during their shift were entitled to national minimum wage. That blog post can be read here.

It is unclear in the post-Brexit era how the UK's position will develop when it comes to calculating the hours and salary for workers who are required to be on standby and/or "sleep-in". The distinction between a sleep-in worker and a worker on standby can be subtle and fact-sensitive. Therefore, if unsure, it is worth asking your legal advisers to confirm the position of your workers and their hours.

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