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February 2016

Member Brief No. 151

Mobile Workers – Travel, Time and Pay

Labour providers will be familiar with the reality that different workers will be engaged on a variety of different terms and working practices under different contracts. In some assignments it is the nature of the role for workers to have no fixed place of work or "base" on an assignment, travelling from job to job. These workers may be referred to as mobile workers.

The rules in relation to mobile workers, and their working time, have changed following the landmark decision of the Court of Justice of the European Union in the case *of Federación de Servicios Privados del sindicato Comisiones Obreras v Tyco Integrated Security SL and another*.

What has the European case changed?

Historically, the assessment of working time for mobile workers has, legally, been treated in a similar way to workers who are assigned to a fixed place of work. The definition of "working time" under the Working Time Regulations 1998 is defined for all workers as time when:

1. The worker is working; and
2. They are at their employer's disposal; and
3. They are carrying out their duties or activities.

On this basis, time spent travelling by a mobile worker from their home to the first assignment, and from the last assignment to their home was not thought to fulfil the definition (as they were not at their employer's disposal) and this did not count as "working time" - it was treated in the same way as commuting to and from work, which is not considered working time.

However, the European case changed how working time should be calculated for mobile workers' time spent travelling to and from work.

The European case addressed the question of working time of mobile workers. Tyco's mobile technicians had reported each morning to a branch office to pick up a job list and their van. Their working time was calculated to start when they arrived at the branch office and ended when they returned to the office to drop off the van at the end of the working day.

When Tyco closed the branch offices, the technicians had no fixed or regular place of work. Instead they were given a van and would travel directly from home each day to the customer sites, which could be up to 100km away, and return directly home from their last assignment.

The Court of Justice of the European Union agreed that the technicians' **journey time from their home to their first job and from their last job to home each day** was working time under the European legislation and was not rest time. The court went on to set out the three criteria test for identifying mobile workers which is set out in *"What is 'Mobile Working'?"* below.

The decision therefore establishes that mobile workers travelling time between home and their first job of the day and from their last job to their home constitutes 'working time'. The fact that the first and last journeys started from, and ended at, home is irrelevant. In the context of this case travelling time will include all time spent travelling from home to the first assignment and from the last assignment to the worker's home. Interestingly, no guidance has been provided and it is likely

that this will apply regardless of the worker's mode of transport (for example bike or car) or traffic and travel issues.

It will therefore be increasingly important to accurately identify which workers truly are "mobile" workers, and those workers who merely travel as part of their work.

What is "Mobile Working"?

It is important to note that the decision only affects and impacts mobile workers. To assess the effect of the European case it is therefore important to understand what "mobile working" is.

The Court of Justice of the European Union in their decision set out three criteria where a worker will be considered to be a mobile worker. This will be the case for the worker if they meet any of these three criteria:

1. They are not assigned to a fixed place of work, or have no fixed place of work (they are not assigned to a specific location); or

2. They have no habitual place of work (they do not generally work at the same location); or

3. They no longer have a fixed place of work (for example, where the worker's fixed place of work has closed).

This will have an impact on labour providers and their workers in the food and agricultural sectors who do not have a fixed place of work and may begin work at a different site each day.

By way of example, a poultry catcher who has a different rota every day and travels directly from their home to their first shed of the day and then travels from farm to farm before travelling directly home **will** be considered to be a mobile worker.

A poultry catcher who travels from their home to the labour provider's place of work each day before travelling to their first job and other locations or who are required to return to the client's place of work before travelling home **will not** be classified as a mobile worker - as the client's premises will be their fixed place of work.

In the European case Tyco's workers were deemed to fall into category 3, as they had previously been assigned to a fixed branch which then closed.

Perhaps unhelpfully, there is no definition of "place of work" or when a place of work becomes "habitual" due to the numerous working patterns that operate across a multitude of sectors of private and public industry in Europe. It is therefore likely that the position will only become clearer in time as courts interpret the European case and this decision was not considered in the context of workers engaged by agencies or labour providers.

Many labour providers will engage workers on a number of separate assignments and under a range of different contracts, including:

i. Agency workers on contracts for services;

ii. Workers on overarching contracts (flexiworkers); or

iii. Employees under Swedish Derogation contracts.

It is important to note that the **type** of contract the worker is engaged on will not be relevant to the question of whether a worker is a "mobile worker" or not – it will be about the nature of the assignment carried out by the worker. A worker will only be a "mobile worker" if their assignment falls within one of the three categories set out above.

By way of example, agency workers may be issued with numerous short term assignments at different factories or offices, for only a day or two at a time. If each assignment has a fixed place of work, or a habitual place of work, the fact that this worker carries out multiple assignments is unlikely to lead to them be considered a mobile worker.

The same rule is likely to apply to workers on overarching contracts or Swedish Derogation arrangements. These workers will only be mobile workers if their assignments involve no fixed or habitual place or work, or they no longer have a fixed place of work. Just because workers may work multiple assignments, this will **not** make them mobile workers if they have a fixed place of work at each assignment.

It is also important to note that this case only applies to mobile workers. Travel to and from home to the labour provider's or client's site or base at the start or end of the working day will still **not** count as working time, even if it then involves onward travel. This will be of particular relevance for labour providers whose workers will normally be placed at one location but who may be required to travel to a number of different sites once they have arrived at work – for example crop pickers and planters who may be required to attend a client's farm or nursery before being assigned to work at a different location.

What is the Impact of the Case?

The European case has led to two key considerations for labour providers, namely:

i. Working Time and the Working Time Regulations; and
ii. Pay and the National Minimum Wage.

At this point it is important to consider the difference between UK law and European law.

Working Time is governed by the European Working Time Directive and is required to be adopted by all European member states. In the UK this is addressed by the Working Time Regulations 1998 – and this must be consistent with the European Working Time Directive.

Pay, and the National Minimum Wage, is **not** governed by European law and therefore this case does not affect the UK's current laws in respect of pay. Turning to each in more detail:

Considerations under the Working Time Regulations 1998

By far the greatest impact of the European case decision will be the effect under the Working Time Regulations.

Labour providers will be familiar with these but can be briefly summarised as follows:

Working Time Regulations 1998 Summary

Employers' obligations under the Working Time Regulations 1998 are as follows:

- To take all reasonable steps to protect workers' health and safety to ensure that each worker's average working time (including overtime) does not exceed **48 hours per week**.
- Allow workers the following **rest periods** unless they are exempt, in which case **compensatory rest** will usually have to be given:
    - **11 hours'** uninterrupted rest **per day**;
    - **24 hours'** uninterrupted rest **per week** (or 48 hours' uninterrupted rest per fortnight); and
    - A **rest break of 20 minutes** when working more than six hours per day.

The Ethical Trading Initiative also details requirements to ensure that working hours are not excessive as follows:

6. **WORKING HOURS ARE NOT EXCESSIVE**

6.1 Working hours must comply with national laws, collective agreements, and the provisions of 6.2 to 6.6 below, whichever affords the greater protection for workers. Sub-clauses 6.2 to 6.6 are based on international labour standards.

6.2 Working hours, excluding overtime, shall be defined by contract, and shall not exceed 48 hours per week.*

6.3 All overtime shall be voluntary. Overtime shall be used responsibly, taking into account all the following: the extent, frequency and hours worked by individual workers and the workforce as a whole. It shall not be used to replace regular employment. Overtime shall always be compensated at a premium rate, which is recommended to be not less than 125% of the regular rate of pay.

6.4 The total hours worked in any seven day period shall not exceed 60 hours, except where covered by clause 6.5 below.

6.5 Working hours may exceed 60 hours in any seven day period only in exceptional circumstances where all of the following are met:

- this is allowed by national law;
- this is allowed by a collective agreement freely negotiated with a workers' organisation representing a significant portion of the workforce; appropriate safeguards are taken to protect the workers' health and safety; and
- the employer can demonstrate that exceptional circumstances apply such as unexpected production peaks, accidents or emergencies.

6.6 Workers shall be provided with at least one day off in every seven day period or, where allowed by national law, two days off in every 14 day period.

* International standards recommend the progressive reduction of normal hours of work, when appropriate, to 40 hours per week, without any reduction in workers' wages as hours are reduced.

For employers of mobile workers, the key issue raised is whether they will have to change their existing working patterns in order to comply with the restrictions on working time highlighted in the table above.

The first key restriction under the Working Time Regulations is the average weekly working time limit of 48 hours per week, typically calculated over a reference period of 17 weeks. Unless the worker has opted out of this limit, employers have an obligation to take reasonable steps to ensure that this limit is observed and to keep and maintain records to show compliance with the limit over the previous two years. Breach of these obligations is a criminal offence. Case law under the Working Time Regulations also establishes that workers who have not opted out have a contractual right to cease working if continuing to work would exceed the maximum hours permitted in any reference period.

Without an opt-out to the 48 hour weekly working limit, the mobile worker's employer faces a number of challenges. Assignments will need to be allocated so that the average weekly working time limits are not exceeded when travel time to and from home is factored in. From a practical perspective this is likely be difficult to assess and manage, and very labour intensive. In effect, labour providers would need to assess the home address of all of its mobile workers, their means of travel to and from work and variable factors such as traffic or their mode of transport. It is important to reiterate that the worker's travel time in these circumstances will count as working time, regardless of the method of travel or unexpected delays, including road closures or rail disruption. It may therefore be prudent for labour providers to require workers to inform them of their intended travel arrangements to enable advance planning.

The worker needs to keep accurate records of start and finish times each day to enable labour providers' compliance with the record keeping obligations and to allow the labour provider to keep track of how much working time is left in the reference period. This exercise may be particularly impracticable due to the potential number of workers provided to an assignment, and where the client's working arrangements and the geographic territory of the assignment may be unknown to the provider.

Opt-out agreements are the key method of avoiding these problems. They also remove the obligation to keep records of daily working time. However, workers do have the right to refuse to opt out or to opt back in by giving at most three months' notice. Without the opt out, the labour provider would have to explore whether other flexibilities under the Working Time Regulations would allow average weekly working time to be calculated over a longer period than 17 weeks, in order to provide greater flexibility in work scheduling.

Another key provision of the Working Time Regulations is the entitlement to a daily rest period of 11 hours, in particular as travel time was held not to be "rest" time. In theory, this means that a mobile worker returning home at 8.00pm could not be required to set off the next day before 7.00am. However, this is an entitlement which workers can waive and employers do not have a strict obligation to enforce these rest periods. There is also scope under the Working Time Regulations to require work on an ad hoc basis during a rest period as long as compensatory rest is offered later, or to modify the entitlement to rest periods through a collective or workforce agreement on a more permanent basis.

Where such a worker is required to work during a period which would otherwise have been a rest period, the labour provider is obliged to ensure that wherever possible it will allow the worker to take an equivalent period of compensatory rest or, in exceptional cases where this is not possible, make arrangement to safeguard the worker's health and safety.

The following examples show how being a mobile worker will affect working time:

Example 1

Michael, a fruit/vegetable picker, is assigned to carry out work for a client who is a large farming company with a number of sites in the county. He is notified by text each day which site he will be required to attend. If a job is finished in the day he is directed to another site. He is not required to attend the same farm or site before going to his first job of the day, or before he drives home at the end of the day but updates the company by phone during the day. Michael **will** be a mobile worker as he has no fixed or habitual place of work.

On Monday it takes Michael 1 hour to drive to his first job and he arrives at 9.00am. Michael finishes his last job at 6.00pm, which is a considerable distance from home, and it takes him 2 hours to drive home.

His "working time" for the day will be **12 hours** as his travel time will be included in his working time as he has no fixed place of work. Whether he should be paid for this time or not will depend on the terms of his contract (see below).

Example 2

David, also a fruit/vegetable picker, is assigned to carry out work for another large farming company with a number of sites in the county. Each morning he attends the farm's main depot along with other workers to be given his job sheet, equipment and assignment for the day. He then travels between the client's farms and at the end of each day he returns to the depot to return his equipment and sign out. David's time travelling between the depot and the farms will be working time and he would be entitled to pay as he is at the client's disposal. However, David **will not** be a mobile worker as he is assigned to a fixed place of work – the client's main depot.

On Monday it takes David 1 hour to drive to the company's premises and he arrives at 9.00am. David finishes his final job and returns to the company's depot at 6.00pm. While driving home the traffic is bad and it takes him 3 hours to get home.

His "working time" for the day will be **9 hours** as he has a fixed place of work which he is required to attend. His time spent travelling to and from the depot and his home will not count towards his working time.

National Minimum Wage and Pay

The decision in the European case considered working time rather than pay and does not bind the courts in the UK. It is therefore necessary to look at working time and pay as two very separate issues.

Employers and labour providers will need to consider two factors when determining whether there is any liability to pay mobile workers for the travel time, namely;

i. any obligation under the National Minimum Wage legislation; and

ii. any contractual pay.

The National Minimum Wage (and the obligation to pay this) is governed by the National Minimum Wage Act 1998 and the rules set out in the National Minimum Wage Regulations 2015 ("the Regulations").

In the European case, the court held that employers were free to determine pay for time spent travelling between home and customers. Subject to the question of the National Minimum Wage, the first question for labour providers to ask is whether the workers' contracts require the worker to be paid for travel time.

Labour providers who use the ALP's template contract for Direct Contractors specifically allows for this travel time to be excluded:

"*Your normal hours of work will be notified to you as set out above. Travel time to the first assignment of the day and travelling time after the last assignment of the day [is/is not] normally payable*"

Labour providers who have opted not to pay workers for this time are unlikely to be contractually obliged to pay mobile workers their contractual rate of pay even though this would be classified as working time.

For labour providers who do make payment for this travel time it may be necessary to conduct a review to consider how this may affect its business and to make changes to the contracts. However, as the effect of the European decision is that mobile workers are considered "at their employer's disposal" it may be possible for these mobile workers to claim travel expenses and subsistence to be deducted from their taxable pay – which would lower the labour provider's national insurance contributions liability. Labour providers are advised to take independent tax advice on this point.

If there is no obligation to pay contractual pay to mobile workers should they receive the National Minimum Wage for this travel time?

The National Minimum Wage Regulations deal expressly with the time spent travelling to and from home to work or assignments. Specifically this is set out in regulation 34 and states that for time work (workers paid by the hour) and output work (piece rate workers) broadly, the hours spent travelling for the purposes of working are counted for National Minimum Wage purposes **unless** that travel is between the worker's home and a place of work or "*place where an assignment is carried out*".

Therefore, travel time between the mobile worker's home and the "*place of work or place where an assignment is carried out*" is expressly excluded for the purposes of the National Minimum Wage – so whilst this time would need to be considered for the Working Time Regulations, there is no obligation for labour providers to pay the workers for this travel time.

In summary, whilst there is no obligation under UK legislation to pay the National Minimum Wage for the mobile worker's travel time between their home and first assignment it is necessary for labour providers and employers to check the wording of workers' contracts.

If this travelling time is currently unpaid then it is unlikely that this decision will create any new right to be paid. However, ambiguous wording in a contract, especially where workers are paid on an hourly rate basis, could be exploited to trigger overtime rates during what are currently treated as standard working hours.

The Future and Practical Steps for Labour Providers

It is difficult to accurately predict how this area of the law will develop, not least because the UK has been interpreting the Working Time Regulations differently to the decision in the European case. However, it is likely that UK will follow the Court of the European Justice's position, both in the courts and in legislation. Whilst there is no current requirement under the National Minimum Wage legislation to pay mobile workers for the time spent travelling between the mobile worker's home and the "*place of work or place where an assignment is carried out*" this may be tested in the courts, and the National Minimum Wage Regulations amended.

There remain a number of questions which are not yet answered, in particular in the context of labour providers. It will be for the courts to determine the interpretation of "habitual", and this is likely to be more open to argument in the context of temporary workers where this may be less clear.

In the meantime, there are some practical steps employers and labour providers can take to minimise risk when engaging workers who could be considered to be mobile workers:

1. Express Pay Provisions in Contracts

As set out above, at present there is no requirement for employers to pay mobile workers for travel time from their home to their first assignment, or from their final assignment to their home. It is advisable that employers review the contracts for mobile workers to ensure that it is expressly clear that there is no obligation on the part of the labour provider (or party paying the worker's wages) to pay them for this travel time.

As the European decision has immediate effect it is recommended that labour providers review the pay provisions for any current mobile workers to assess any current potential risks as soon as possible.

2. Opt Out Agreements

It is not possible to force workers to agree to opt out of the limited 48 hour working week, however, it would be sensible for labour providers to include opt out agreements as part of the recruitment process and to ensure that valid agreements remain on workers' files.

For those mobile workers who will not agree to the opt out, or who give notice of their intention to opt back in, the pay provisions set out at (1) will make this option less financially appealing to the worker, as while travel time will count towards the 48 hour limit, there would not be an obligation to pay these workers for the hours spent travelling.

3. Consider the Worker's Place of Work

The decision in the European case only applies to those mobile workers with no fixed or habitual place of work. In the event that engaging mobile workers may be unattractive, consideration should be given to assigning a worker to a set location or base, for example with a requirement to sign in or collect a job sheet, before travelling to their first job.

For labour providers it may be sensible to discuss a set location to assign to workers with the client. As set out above, whilst the UK courts are obliged to follow the European case this decision was not decided in the context of workers engaged by labour providers. It therefore appears likely that provided the workers has some fixed or habitual place of work for an assignment that this will mean that they are not considered to be mobile workers, even if this then results in onward travel. Therefore, it may be possible for labour providers to avoid the "mobile worker" provisions by setting

a fixed place of work for the worker, whether that is the labour provider's premises or the end user client's, before the workers travel between jobs in the day.

4. Restrictions on Engaging Workers Outside of Geographic Areas

Where mobile workers will be carrying out their activities in a particular geographic location or territory, labour providers could consider only engaging those workers who live or who are based in certain areas or postcodes. This could include a requirement for workers to stay within these geographic boundaries, and reduce the risk of mobile workers moving considerable distances from the territory – this would have the effect of limiting the travel time at the start and end of each day.

Further Advice

Members are invited to contact the ALP if they have any other questions with regard to the worker's travel time or with any queries in relation to the working time regulations or the decision in *Tyco*. Alternatively, our Legal Partners, Brabners LLP can assist. Paul Chamberlain at Brabners may be contacted on 0161 836 8864 or paul.chamberlain@brabners.com.