

# Briefing on ...

# Working Time Regulations

## Work, Rest and Holidays

### Introduction

The Working Time Regulations 1998 were introduced to improve protection of worker's health and safety through guaranteed rest. However, what qualifies as rest, whether daily, weekly or annual and likewise what constitutes working time continues to confuse and confound.

The purpose of this briefing is to provide a summary of the rights to rest under the Regulations and to consider what can be done when an employer breaches those rights. The briefing also contains an explanation of the recent decision from Europe on the right to paid annual leave.

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### Rest Periods

**Rest breaks** – When a working day is longer than six hours, the worker is entitled to an uninterrupted rest break of at least 20 minutes away from their work station. The Courts have ruled that the break must be 20 minutes that the worker can use as they please and cannot be broken by the employer and then restarted.

**Daily rest** – A worker is entitled to at least 11 hours rest in every 24 hour period, unless the worker is involved in certain jobs, such as residential care, in which case they are entitled to an equivalent period of compensatory rest. A worker, who is on call at their place of work, is working not

resting, even when asleep and is entitled to compensatory rest. However, workers at their place of work who are not on call, for example workers on an oil rig, are resting between shifts.

**Weekly rest** – A worker is entitled to at least 24 hours rest in every 7 days, or two 24 hours periods in every 14 days.

**Annual leave** – Unlike other rest entitlements, the right to annual leave includes payment and cannot be altered by agreement. The entitlement is to 4.8 weeks from 1<sup>st</sup> October 2007 and increases to 5.6 weeks from 1<sup>st</sup> April 2009, with an upper cap of 28 days.

### Breach of the Regulations

The Regulations are worded in a way that provides entitlements to workers as opposed to duties on employers. The Regulations are breached, and a right to complain to a Tribunal arises, only when the worker's request to exercise the right is refused. The worker must then raise a claim **within 3 months of the time the rest should have been allowed**.

When an employer is found to have breached the Regulations the Employment Tribunal must make a declaration and may make an award of compensation. When deciding what compensation to award the tribunal have to consider what is fair, based

on the employer's fault and any loss caused to the employee.

In Miles v Linkage Community Trust Ltd [2008] IRLR 602, the Employment Appeal Tribunal considered what factors would influence the level of compensation in a case where the employee has no financial losses.

The EAT looked at the fault of the employer and held that relevant factors included the length of time the employer has defaulted; the behaviour of the employer in refusing the request; and the size of the default in terms of the hours worked without proper rest. In deciding these questions a tribunal

may also consider whether the employer was acting in good faith on legal advice.

So far, the courts have not given any guidance on the amounts of compensation but, where there are no financial losses, awards are likely to be modest.

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## **The Right to Annual Leave**

Entitlement to paid annual leave was the most important, and is the most litigated, provision in the Working Time Regulations. One of the most challenging questions that arose was what effect sick leave had on the right to paid annual leave, whether workers on sick leave were due any paid leave and if so, when could they take that leave.

The European Court of Justice (ECJ) has now ruled in the case of HMRC v Stringer that:

- workers on sick leave continue to accrue statutory holidays;
- workers are entitled to paid statutory holiday irrespective of whether they are at work or on sick leave during the leave year;
- national legislation or national practices can allow workers to take statutory holiday whilst on sick leave;
- the right to paid annual leave is not lost if untaken by the end of a leave year where a worker has been on sick leave for the whole of that leave year or

where his incapacity to work continues until the end of his employment;

- on termination of the employment relationship workers who have been on sick leave for the whole or part of a leave year are entitled to a payment in lieu of accrued but untaken statutory holiday up to the termination point. The payment in lieu of accrued holiday must be a payment equivalent to their "normal remuneration."

This judgement has direct, and therefore immediate, effect on public authorities but will only apply to private employers after the House of Lords rules on the case referred back from the ECJ. The right to carry over annual leave will require a change to the UK legislation which at present provides that leave can only be taken in the year in which it accrues.

How far back an individual will be able to claim untaken paid leave remains to be seen. This point was not referred to the ECJ and we will therefore have to await the Law Lords ruling.

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## **Action for Branches**

Clearly, annual leave policies that remove or limit the ability to carry over annual leave entitlement or that prevent annual leave accruing during long term sick leave must now be revisited. Organising staff and branches should review existing policies with a view to renegotiating any provisions which fail to comply with this ruling.

If an individual member's employment is terminated and the employer refuses to make payment in lieu of holidays accrued while on sick leave, cases should be referred under the standard legal protocol within 3 months of termination. Likewise if a member considers they have leave remaining in the current holiday year but the employer refuses a request for that leave, a referral should be made under the CASE system within 3 months of the refusal.