Introduction

The essay sets out to analyse the impact of the Working Time Regulations (1998) and its impact on UK employment practices. We shall look at what the Regulations sought to achieve in terms of holiday provisions and work time restrictions and how, 12 years on, this has evolved through case law to shape our current working environment.

Background

The Working Time Regulations (1998) came into force on 1 October 1998. Before this, there had been very little statutory regulation regarding working time in the UK. Any regulations that did exist were confined to specific industries. For example, limits on the working hours of certain drivers, and a statutory rights for bank holidays for financial workers.

The regulations were introduced to implement the EC Working Time Directive (No.93/104) and part of the EC Young Workers Directive (No.94/33). They lay down the minimum conditions relating to weekly working time, rest entitlements and annual leave, and made provisions for working hours and health assessment for night workers. The Regulations have been amended several times, as has the Directive, which was eventually consolidated in 2003 by the EC Working Time Directive (No.2003/88).

The UK Government's implementation was not a smooth process. In November 1993, the Directive was adopted by a majority vote under a health and safety measure, using Article 118a (now Article 138) of the EC Treaty. Under the Article it was to be implemented within three years, however, the then Conservative Government took actions to challenge the legal basis of this implementation. It argued before the European Court of Justice (ECJ) that the Working Time Directive is a social policy, not one of health and safety and, as such, should have been adopted under Article 100 (now Article 94), which requires unanimity rather than a majority vote. However, the ECJ ruled that Article 118a was an appropriate legal basis for implementation. As such the Government was forced to take immediate action to implement to Directive, and the Regulations were swiftly enforced..

The original aims of the WTR (1998)

The list below outlines the aims of the WTR (1998):

- Maximum weekly working time, UK opt-out clause
- Length of night work
- Health assessment and transfer of night workers to day work
- Patterns of work
- Records
- Daily rest
- Weekly rest
- Rest breaks
- Entitlement to annual leave
- Compensation related to entitlement to leave

- Dates on which leave is taken
- Payment in respect of periods of leave

We shall now consider these aims and analyse their implementation. But first we shall outline who is covered by the WTR.

Who is covered by WTR?

Whether an individual is covered by the WTR depends on his/her worker status. To understand the scope of the WTR we shall discuss who is covered by the Regulations. We shall discuss how such status is defined and how this can impact individuals' rights under WTR. A worker can be defined as someone who has entered:

- a contract of employment (limb a);

- any other contract, whether express or implied and (if express) whether oral or in writing, whereby the individual undertakes to perform, personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried out by the individual (limb b).

To fall within Limb b, the individual must show:

- a contract;
- that s/he is to personally undertake the task for the third party;
- that the third party is not a client or customer.

Personal Service

A personal service is a hallmark of a contract of employment and that any power to delegate can be fatal to employment status. Indeed, employers have been shown to place clauses in contracts to show that employees can substitute in another person, attempting to remove the "personal service" and hence side-step employer status[1].

[1] *Autoclenz Ltd v Belcher* [2009] IRLR 70

Moreover, the ability the delegate the service can have a direct impact on an individual's WTR rights as seen in *Bacica v Muir*[2]. In this case the EAT upheld an appeal from *Bacica* because the tribunal has erred in finding that Muir was a worker by placing too much weight on the fact his service was personal. By upholding the appeal, the EAT showed that Muir was self-employed and did not have the right to statutory holiday.

Mutuality of obligation

One of the key factors in establishing a workers' status is "mutuality of obligation". This essentially asks the question of what either party was expected to fulfil in the working arrangement – i.e. "whether or not the worker was under an obligation to work when called upon to do so by the putative employer"[3]. In turn the putative employer is obliged to provide remuneration. If no such obligation exists, then the worker will not be classified as worker (limb b)[4].

Young workers

Most of the entitlement of the WTR covers young workers; there are some provisions that apply solely to young workers. The EC Young Workers Directive (No.94/33), concern maximum daily, weekly working time restrictions. These will be discussed later. It should noted that in the case of *Ashby v Addison (t/a Brayton News)*[5] the EAT deemed a 15 year old paper boy to be outside the remit of the WTR definition of a worker, but was covered by the 1933 Children and Young Persons Act.

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[2] *Bacica v Muir* [2005] IRLR 35
[3] *Consistent Group Ltd v Kalwak & Anr* [2008] EWCA 1553.
[4] *Carmichael v National Power Plc* [2000] IRLR 43, HL.
[5] *Ashby v Addision (t/a Brayton News)* [2003] IRLR 211

Maximum Weekly Working Time

One of the central features of the WTR is the 48 hour maximum working week. The Regulation is derived from Article 6 of the EC WTD, which provides that Member states should take measures to ensure that the weekly working time is limited and that the average working time for each seven day period does not include 48 hours, including over time.

The employer has a duty to take all reasonable steps to ensure that workers comply with the working limits.

Undoubtedly, this has provided protection for many employees. For example, in the service industry, the classic scenario was the employer placing pressure on employees to work long hours. With the introduction of the 48 hour week, applying such pressure is more complex and this has led to a change in the industry's culture.

UK opt-out

However, in the UK, the Government has permitted individuals to opt-out of the 48 hour week, and this has proven to be one of the more controversial aspects of the WTR. The fact that the opt-out exists really undermines to whole legislation. If 48 hours has been deemed to be the maximum time that it is safe to work for, how can we allow individuals to opt-out of this safety legislation and work without a limit?

The Governments stance on this is that an individual should be allowed the choice to work longer hours on the provision that the work is properly regulated from a health and safety viewpoint.

Whilst both views can be appreciated, it is interesting to highlight the protection of workers who wish not to sign the opt-out. Workers who choose not to sign the opt-out have the right not to suffer detriment or be dismissed. However, it should be noted that at present there is not protection for individuals who are denied employment because they refuse to sign the opt-out, this is an area where the system is open to abuse by employers who can quite simply ask the potential employees attitude towards the opt-out at interview.

EU Advantage?

Let us look briefly at how the opt-out was legislated. It should be noted that the original provision [Article 21 (1)] was included in the Directive at the request of the UK Conservative government at the time. However, the Article required the European Council to review the opt-out on the basis of a proposal from the Commission. This proposal for a new Working Time Directive was published by the Commission in May 2005, which stated that the opt-out would only be available for three years from the date of the new directive, unless the member state was using an opt-out when the new Directive was published. In this case, the member state could request to extend its use of the opt-out for 'reasons relating to the labour market arrangements'.

At present, this has left the UK with an advantage in the EU, with 15 member states taking up the opt-out clause. However, there has been some movement to abolish the opt-out agreements completely but this has, to date, shown be inconclusive with MEP's and EU Ministers failing to agree in European Parliament[6].

Entitlement to annual leave

One of the most prominent features of the WTR is the right to paid leave. Whilst the Directive (SI 2001/3256) states a statute of four weeks paid holiday, in the UK we enjoy an additional eight days bank holiday.

The Directive also states that the statutory holiday leave cannot be carried over to the next year and that the statutory holiday cannot be purchased back by the company, except where the contract in terminated.

The introduction of the statutory holidays has undoubtedly had a huge impact on our work-life balance and also the way UK organisations practice. Let us look at some of the features of the paid leave regulations and case law.

Employer control of annual leave

The employer has the right to control when an employer takes their paid leave and can refuse holiday requests. However, it is the employee's statutory right to take paid leave within that holiday year and, as such, repeated refusals cannot be construed to force an employee out of their holiday right.

In 2007, an interesting case involving the BBC occurred in *Sumsion v BBC (Scotland)* [7]. Sumison was employed as a standby carpenter working on production set. He had a fixed-term contract working six days a week for a total period of 24 weeks. Under the terms of the contract he was entitled to six days holiday, which must be taken on every sixth non-production day in a week, i.e. a Saturday where no work was actually available, which in practice was every other Saturday. The Tribunal and EAT found that the WTR did not stipulate when annual leave should be taken provided that the holidays taken were days when the employer was supposed to be working as per the contract. The case raises an interesting angle on the WTR and how organisations are working to sidestep the statutory requirements. The extent of these BBC-style tactics is unknown, however, presumably its has increased in uptake since the delivery of the *Sumsion v BBC (Scotland)* judgement.

[6] www.europarl.europa.eu
[7] *Sumsion v BBC (Scotland)* [2007] IRLR 678

Rolled up holidays

It is not uncommon for employers to make 'rolled-up' payments to employers on weekly or hourly basis, to cover holiday pay. The amount of rolled-up holiday pay is clearly stated in the contract of employment and also places the onus on the employee to ensure s/he has funds available when holiday is taken. Employers argue that with reference to Reg 16 (5), the rolled-up payments discharge them from their liability to pay holiday pay under Reg 16(1).

The lawfulness of rolled-up holiday payments has been to focus of much debate. The Scottish Court of Session takes the opinion that rolled-up holiday is unlawful, as evidenced by the *MPB Structures Ltd v Munro* case [8]. *Munro's* contract stated that 8 per cent of his hourly pay was rolled up holiday pay. Whilst the Court accepted that the employers had not intentionally attempted to avoid liability, it cited Article 7 of the Directive as the leave and associated pay to be single entity; inferring a 'close association'. The court felt that rolled-up holiday pay was not a close association and that it could discourage employees from taking holiday, which was not purpose of the Directive.

In England and Wales and more lenient view of rolled-up holiday pay has been taken, however, more recent judgments have slightly moved against this. The case of *Robinson-Steele v RD Retail Services Ltd*, saw the ECJ rule that holiday payments should be made in close proximity (i.e. not rolled-up) to the leave in order for the normal payments pattern to be maintained [9].

Employers have also been shown to attempt to sidestep Reg 16 of the WTR by calculating the average weekly pay for weeks worked (48 weeks) and then dividing the pay over 52 weeks to give consolidated rate of shift pay. Whilst the employee argued that resulted in reduced element of shift pay, the Court of Appeal upheld the EAT decision stating that the scheme did not act as a disincentive to the employee [10]. The case highlights organisations' motivation and ability to work around the WTR for the benefit of the employer.

Stringer/Ainsworth cases

The cases of *Stringer*[11] and *Ainsworth*[12] (which started out as the same case) provided a one of the biggest shake ups in Employment Law in recent years. The judgement on the *Stringer* case by the ECJ showed that an employee who had been on sick leave, and therefore was unable to take paid leave, was entitled to accumulate his/her paid leave until a return to work and carry over this leave into subsequent years. The Ainsworth case provided evidence that on termination of the contract, non-payment of the accrued holiday constituted unlawful deductions [13].

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[8] *MPB Structures Ltd v Munro* [2003] IRLR 350, Ct Session (Inner House)
[9] *Robinson-Steele v RD Retail Services Ltd* [2006] ICR 386
[10] *British Airways Plc v Noble* [2006] ICR 1227
[11] *Stringer v Revenue and Customs Commissioners* [2009] ICR 677 HL; IRLR 214 ECJ
[12] *Commissioners of Inland Revenue v Ainsworth* [2009] IRLR 465 HL

In practical terms, this affected every organisation in the UK. There are organisation that have employees on medical suspension that are now able to claim years of holiday paid leave. The writer's own experience as a Employment Law consultant has shown that this has motivated employers to either get the employees back to work or terminate the contact. Where neither of these options can be achieved, commonly because of fear of disability discrimination, some employers have adopted strategy of paying out on holiday entitlement as it accrues rather than allowing it build up and have to pay out a large sum on the employees' termination of contract. At the time of writing the new sick note scheme is infantile, launched on 6 April 2010. The impact of the sick note on this strategy is yet to be seen, however, with the increased focus on sick employees' returning to work it is thought that this will dampen down the afore mentioned strategy.

Pereda

The Pereda case followed up that of the Stringer and Ainsworth cases and pushed the WTR further forward. Pereda had booked time of work for holidays when he fell ill and was unable to take the holiday. His employer did not allow him to reschedule his paid leave. The ECJ found this contravened the Working Time Directive, and, moreover, that any period of sickness that coincides with the holiday period will make the latter void and could be rescheduled [13].

In the UK, this has impacted organisation working practices significantly. Not only are companies starting to adhere to the Pereda ruling by rescheduling holiday periods, but polices are being put into place to ensure that any sickness whilst away can be evidenced; for example a prescription note. However, this is proving to be somewhat difficult to regulate as the first seven days sickness absence in the UK is self-certified. At the time of writing organisations are still getting to grips with the new ruling and as such it's progression will be one of interest over the forthcoming months.

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[13] *Pereda v* Madrid Movilidad SA [2009] IRLR 595

Rest breaks / maximum work periods

Another key feature of the WTR 1998 is the statutory requirement for rest periods and the limits of maximum working hours. We shall look at the statutory requirement and then analyse their impact on UK working schedules.

Workers are entitled to a minimum of 11 consecutive hours rest per day. Workers are also entitled to 24 consecutive hours rest in any given week, which may be given as two 24-hour breaks or one 48-hour break per fortnight. There are special rules for young workers.

During the day, workers whose working tome is more than six hours are entitled to a break of 20 minutes without any interruption and away from their workstation. It should be noted that this break is not every six hours[14]. A period of downtime whereby the employee must stay in contact and possible return to work is not classified as a rest break. We shall look into to the concept of downtime, as it provides good example of how UK organisations have had to change their policies to fit the WTR.

'Downtime'

An interesting and landmark case in the development of the WTR and rest periods is that of *Gallagher v Alpha Catering Services* (2004)[15]. Gallagher was regularly required to spend time at airports waiting for aircraft to service, with only basic facilities were available to them. This was known as 'downtime'. However, whilst on downtime they were required to be available to service the aircraft at any moment. The EAT found that where 20mins has passed uninterrupted, this could not retrospectively be classed as a break. In addition, the tribunal stated that when Gallagher was required to work, this did not constitute a 'surge in activity' [as permitted by Reg. 21 (d)]. The court defined a surge in activity as 'an exceptional level of activity beyond the usual fluctuations experienced in the working day or week.

Rest periods 'on call'

Over recent years, the question of what constitutes working time has been scrutinised by tribunals. A key breakthrough came with the case of the union of primary care doctors in Valencia who brought proceedings against the local Ministry of Health on the basis that the regional regulations did not provide for any limit on the doctors' working time[16]. The European Court of Justice (ECJ) found that the activity of the doctors fell within the scope of the Council Directive 89/391 and Working Time Directive 93/104. Amongst its findings the ECJ found that when the doctors were on call, this constituted working time.

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[14] *Corps of Commissionaires Management Ltd v Hughes* [2009] ORLR 122

[15] *Gallagher v Alpha Catering Services* [2004] ICR 673

[16] *Sindicato de Medicos de Asistencia Publica (SIMAP) v Conselleria de Sanidad y Consumo de la Generalidad Valenciana* [2000] CMLR 42

This case has had a significant impact on the working practices of hospitals and care home in the UK. For example, it is common for nurses and doctors to live on site at a hospital and be on call and, following the instant case, this time constitutes working time. As such, working practice has had to change to ensure that these workers enjoy their statutory rest periods.

Further clarification on the definition of 'working time' came from Germany. Firstly, with the *Landehauptstadt v Jaeger* [17]. The case was similar to that of the Valencian doctors, whereby a hospital doctor was required to remain on call at his place of work when not working. The case was referred to the ECJ, which found the Law on Working Time 1994 (Germany) was in breach of the Directive 93/104 by allowing Jaeger's collective agreement to offset only active on call time. In 2004, provided further clarification on emergency worker being excluded from Directive 93/104 and that collective agreements would not suffice to exclude workers from the Directive; individual express permission must be granted[18]. Additional case law also came from France in which a national system of night shift equivalence pay (where the first 3 hours of actual work are counted as 3 hours of work, with half an hour of actual time for one hour of call time) was shown not be conducive to the Directive 93/104[18].

The case of *MacCartney v Oversley House Management*[19] provides a good example of the impact the European cases can have on UK organisations. The claimant brought proceedings against the care home on the grounds she had been refused a minimum daily period of rest, a rest break and proper remuneration. MacCartney was a resident manger of a care home; she lived in a flat on site that also contained her office. Under her contract of employment she was required to work four days a week and perform most of her duties between 8am and 6pm, although she was on call 24 hours a day and remain very close to the site. The Employment Tribunal found that she was engaged in 'unmeasured work'; an exception to the WTR where the workers time in not pre-determined or can be determined by the worker. However, the EAT found that the work was not unmeasured and, in fact, the whole shift was classed as working time.

Clearly, this has had a huge impact on care homes across the UK, where a live in manager is a common arrangement. Care homes now have to ensure that managers either leave the site or remain on site but on call, and therefore introduce a shift pattern. Further tribunal has shown that that if the accommodation provided at the place of work is intrinsic to the role, i.e. part of the pay structure, then this strengthens the case for on call time to be classified as work time[20]. This case introduces the theme of employee choice of accommodation and, as yet, there have been no cases to define if a tribunal would view the time a resident is on call as working time. This could prove to be interesting development for the future because care homes could ensure they provide choice of accommodation on their job offer and this may sidestep the requirement to adhere to the WTR.

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[17] *Landehauptstadt v Jaeger* [2003] 3 CMLR 16
*Dellas v Premier Minstre [2005]*2 CMLR 2
[18]*Pfeiffer v Deutsches Rotes Kreuz Kreisverband Waldshut eV ECR I-8835*
[19]*MacCartney v Oversley House Management* [2006] IRLR 514
[20] *Hughes v Mr Graham, Mrs Lynne Jones t/a Graylyns Residential Home* [2008] UKEA/T/0159/08MAA

The other finding of the MacCartney case was that the claimant was due wages for the whole 24 hour shift, and this, in turn, meant that the National Minimum Wage (NMW) had been breached. This finding has raised some work interesting situations that we shall now look into.

Working time and National Minimum Wage (NMW)

As discussed, the definition of ‘working time’ can have cause organisations to unwittingly breach the NMW. Conversely, this can cause the organisation to restructure its workforce in order to comply with the NMW. We shall look at some interesting cases concerning working time and NMW.

An early landmark case in this area was that of *British Nursing Association v Inland Revenue*[21]. The Nursing Association operated a 24 hour service providing emergency nurses. In the daytime, booking were taken from the office, however from 8pm to 9am the calls were redirected to nurses at home. The nurses had to be available to take the calls, although they could undertake other tasks when free to do so. The tribunal and EAT found that the whole shift constituted work time, and not just whilst they were on the phone; as the British Nursing Association argued. The EAT stated that the nurses had no control over when, or how frequently, the phone rang, and as such it would be ‘artificial to state that only time on the telephone’ was relevant.

A year later, the case of *Scottbridge Construction Ltd v Wright* appeared to push the definition of work time even further . Wright had been employed as night watchman and was contracted to attend the offices from 5pm to 7am the following day, seven days a week. A mattress was provided for Wright to sleep on when he was not required to carry work out. An Employment Tribunal found that the working time was classed as the four hours where he was required to carry out work and be awake. However, the EAT overturned this decision to find that the working time was actually the whole 15 hour shift, because he was required to be onsite and the fact that during some of this time there was nothing to do was immaterial; although he was asleep it was still ‘measured work’.

The *British Nursing Association* and *Scottbridge Construction Ltd* cases show quite clearly that when work is classified as ‘measured’, in both these cases by time, tribunals have clearly indicated that the WTR will interpret this has ‘working time’. So how has this impacted the working policies of UK companies? Well, in both the cases, it can be seen that organisations may well rethink redirecting call away from a call centre to homes; why not just keep the call centre open? Indeed, where a night watchman may cost four times in wages; is there a cheaper alternative? For example, improved security systems or an external security company employed to make checks throughout the night. There is however, another angle to this. Both the cases discussed were concluded on the fact that the work was ‘measured’(in both cases by time). But what if work is ‘unmeasured’? Can contracts be setup to spin measured work to unmeasured work?

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[21]*British Nursing Association v Inland Revenue (National Minimum Wage Compliance Team)* [2001] IRLR 659
[22]*Scottbridge Construction Ltd v Wright* [2002] IRLR 21

The case of *Walton v Independent Living Organisation Ltd* is a good example of how tribunals view unmeasured work and how this fits in with the definition of working time [23]. Walton was a carer, employed to care for people due to their age or disability in their own home. Walton had to be on hand 24 hours a day, but had previously agreed with the Inland Revenue that the time actually undertaking tasks was six hours and fifty minutes. In assessing whether the work was time measured or unmeasured, the tribunal found that payment was made in reference to tasks, not by time. Hence, the tribunal found that Walton was not working for the 24 hour period whilst on call, but only for the six hours and fifty minutes. This highlights the opportunity for organisations, particularly in the care industry, to setup contracts on employment that are task based and not time based. This is a critical angle that can be worked by businesses in order not to fall foul of the WTR and National Minimum Wage 1999 Reg 3 and reduce their payroll.

Enforcement of WTR

A key area that has impacted UK organisation since the introduction of WTR is their regulations and enforcement and the records that the employer has to keep. The employer must keep up to date records of workers who have agreed to work longer than the 48 hour week plus records which show that the 48 hour week and night time works limits have been adhered to. The records must be kept for two year. Hence, the WTR has placed a considerable administrative burden on the UK employer.

Conclusion

In answering the original question; “Do you agree the WTR 1998 have only had a marginal impact on the employment practices of organisations”, we shall first recap on some central evidence.

The 48 hour week is undoubtedly one of the central features of the WTR. The UK is one of 15 EU countries that have implemented an opt-out clause for employees to sign that enables them to work over and above this limit. So, if one can sign out of the regulation so easily; what’s the purpose? Well, employees are protected so not to suffer any detriment if they do not wish to sign the opt-out. In some industries there has traditionally been a culture of long hours, for example the bar and restaurant trade. It is in these areas where employees have been most impacted by the 48 hour limit because it protects their rights to work less hours and has altered the industries culture. Moreover, it has expanded the culture of flexible working, making it easier for workers to pick up part time hours and shift work.

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[23] *Walton v Independent Living Organisation Ltd* [2003] ICR 688

The WTR rest periods certainly caused much controversy in certain industries, notably that of care homes and hospitals. The evolution of case studies to define downtime and on-call practice certainly caused a substantial change in organisations' shift patterns, residential setups and personnel requirements.

The implementation of statutory annual leave has also had a substantial impact on the work-life balance of the UK employee. What about the impact on organisations' practices? Certainly, the statutory holiday entitlement has impacted business' by way of how to minimise the impact of the regulations, as shown by use of rolled up holiday and later, for example, companies like British Airways Plc consolidating shift pay. The impact of the Stringer and Ainsworth cases had a high impact on company practice; notably in terms of making further efforts to bring people back into work from long-term sick absence rather than allowing holiday to accrue. It could be argued that with change in culture was only brought forward several months because the introduction of the fit note has sought to have a similar impact.

Without a doubt the WTR have had more than a marginal impact on organisations' practices. However, it can seen from case studies that businesses and employees alike are continually testing the parameters of the regulations and this has had both a negative and positive impact on the way the WTR function.

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