West Midlands employers
PEOPLE & LEADERSHIP SOLUTIONS

HR Bulletin

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It is fantastic to see so many of you turning up to our annual knowledge shot from our resident Barrister, Darren Newman. Darren in this edition gives an update on the impact of the case of *Federación de Servicios Privados del sindicato Comisiones obreras v Tyco Integrated Security SL* and the implications for the working time regulations and peripatetic workers.

More than 15 years after the Working Time Regulations implemented the Working Time Directive, we have still not completely figured out just what working time actually is. It's an easy enough concept for factory workers or those whose work is confined to an office – but what about workers who are on the move? Does their time spent travelling count towards their overall total?

The definition in the Directive (copied out in the Regulations) says that working time is any time when the worker is 'working' – a helpful start – 'at the employer's disposal' and 'carrying out his [or her] activity or duties'. All three of these elements must be present for working time to count.

So if we look at time spent travelling, one question we might ask is whether the travel is something the employee is required to do as part of his or her job. If the employer requires the travelling to be done then it would seem that it is one of the employee's duties and that the employee is at the employer's disposal when carrying it out.

So it makes sense that time spent travelling during the working day – to a meeting, for example, or a particular site – would count as working time. But travelling from home to work is surely different.

The employer requires the employee to turn up to work at a certain time, but has no particular interest in how the employee achieves that. The employee may choose to live right next to the workplace and spend five minutes walking to work - or may choose to live in a different town entirely and have to commute for an hour or more.

I think it is clear that time spent travelling to work – and back home again is not 'working time' that needs to be counted under the Regulations. But we now have an important qualification to add where the employee has no fixed place of work and the first journey of the day is to visit a customer or site specified by the employer.

Landmark Case

In *Federación de Servicios Privados del sindicato Comisiones obreras v Tyco Integrated Security SL* – lets just call it the 'Tyco' case – Tyco employed technicians across Spain whose job was to install security systems in private houses. Each of them had a company car, which they used to take them from their homes to the various customers houses through the day.

None of them had a central office that they had to report to – although once a week they had to visit the office of a logistics company in order to pick up supplies.

Their work was controlled by an app on their phone which set them each day's timetable of visits and which they used to plan their own routes. Tyco treated the time that the workers spent travelling from one client to another as working time, but the time spent travelling from home to the first assignment of the day – and from the last assignment of the day back to the worker's home – was treated as a rest period. The European Court of Justice has now held that this was wrong.

The ECJ

The Court held that by choosing not to have a fixed place of work the employer had removed the choice from the employee over how far to travel at the start and end of the working day. By sending instructions to the worker the night before, the employer was instructing them to carry out a particular journey and they were therefore performing their duties and acting at the employer's disposal when they did so. It followed that they were 'working' and the time spent doing so could not count as a rest break.

Implications for Local Authorities

For local authorities, the obvious impact of this case will be on mobile care workers visiting service users in their home. It seems clear that such workers will have to be regarded as working not only when they are actually providing care, but also when they are travelling to a service users home. Where the first assignment of the day is not fixed, then time spent travelling to that assignment from home must also count – and the same with the journey home after the last assignment. It could still be argued – just – that where the first assignment of the day is always the same, the journey to that assignment is a matter for the employee and does not count as working time but I don't think it is really worth trying to insist on that point.

We need to remember that this case is about working time in the context of Working Time Regulations. It applies when counting up a worker's total working time and in determining whether they have been given adequate rest breaks. There is nothing in this case that affects how much workers should be paid for the time that they spend travelling – or even whether they should be paid at all. The Court could not have been clearer about this. It expressly says (paragraph 49 if you're keen) that the 'method of remunerating workers' is a matter for national law.

National Legal Position

In the UK, that method is set out in the newly consolidated National Minimum Wage Regulations 2015. These provide that travel time should generally be counted as working time unless it is time spent travelling between the home and the workplace or the first and last assignment of the day. That initial and final journey is clearly envisaged as not being time that must be paid at the NMW rate.

Even with travel between assignments the right to pay is limited. The Regulations do not provide that travel time should be remunerated at the normal contractual rate. What matters is that if you add all of the workers pay in the relevant period and divide it by the number of working hours, then the amount you get should at least be the National Minimum Wage. This means that if the normal working hours are paid at above the NMW rate then it will be possible to pay less that the NMW for travel time – because the one compensates for the other.

Finally, don't forget to visit the XpertHR stand for more information on the services offered.