Employment

Confederación Sindical de Comisiones Obreras (CCOO) v Deutsche Bank SAE: practical implications and recording working time

Posted on 28 June, 2019 by | John Platts-Mills

Introduction and substance of the claim

In *Federación de Servicios de Comisiones Obreras (CCOO) v Deutsche Bank SAE (Case C-55/18) EU:C:2019:402*, a group action was brought by a number of trade unions. The aim of the claimants was to obtain a declaration of the existence of an obligation on Deutsche Bank SAE to set up a system which records the actual number of hours worked daily and makes it possible to check that the working times laid down in legislation and collective agreements are properly adhered to.

Deutsche Bank had in place a computer application (absences calendar) which enabled exclusively whole-day absences to be recorded, such as holidays or other leave, without measuring the duration of time worked by each worker or the number of overtime hours worked.

The case raised issues in respect of the provision for minimum periods of daily rest (11 consecutive hours per 24-hour period under Article 3) and of weekly rest (24 hours per period of seven days under Article 5), as well as an upper limit of 48 hours for the average working time for each seven-day period, including overtime (under Article 6(b)).

The ECJ ruled that, in order to ensure the effectiveness of the rights provided for in the Working Time Directive (*2003/88/EC*) and the Charter of Fundamental Rights, member states and employers are obliged to introduce "an objective, reliable and accessible system enabling the duration of time worked each day by each worker to be measured."

The UK Law framework

The UK transposed the Working Time Directive into domestic law in the form of the Working Time Regulations 1998 (*SI 1998/1833*) (WTR). Employers must keep and maintain records which, broadly speaking, adequately show that:

- Working time (including overtime) for all workers who have not opted-out does not exceed 48 hours per week.
- The limits on night work have been complied with.

(*Regulation 9, WTR*.)

Compliance is measured over an average "reference period" of 17 weeks (subject to certain exceptions). Records must be kept for two years. There is no obligation to keep records in relation to rest breaks and rest periods. These rules on recording working hours are enforced by the Health and Safety Executive (HSE). Employers that breach them can be prosecuted and fined by the HSE.

The ECJ's decision suggests that the WTR fails to implement the Working Time Directive. As such, the government may look to amend the WTR so as to eliminate any risk of a claim in respect of their failure to implement. However, whether any such step is taken will depend on the UK's future relationship with the EU. This means there is considerable uncertainty.

Nevertheless, employers should be aware that without an "an objective, reliable and accessible system" providing a record of all hours worked, they may find it harder to defend a claim that working time limits and minimum rest breaks have not been complied with.

Practices which may comply with the decision of the ECJ

In his Opinion, which was followed by the ECJ, Advocate General Pitruzzella set out the following guidance, which was expressed in broad terms. The Working Time Directive "precludes national legislation which fails expressly to require employers to measure in some way or other or to monitor the ordinary working time of workers in general".

A system should be capable of measuring the number and distribution of hours. It ought to provide a basis for ensuring that the time limits are observed and that the rights conveyed on workers can be exercised without hindrance. It should also provide a basis for establishing the times worked objectively and with certainty.

Furthermore, the Opinion of the Advocate General points towards the employer having to be able to provide the responsible authority with "immediate access to registers" of information.

Where the protections afforded are engaged, failing to keep relevant records or making provision for working hours in the contract of employment will not be enough. A wide range of systems for recording working time are available, including: paper records, computer systems and electronic access cards. As noted by the Advocate General, different systems may be used, depending on the characteristics and requirements of individual undertakings.

Any such system will lead to the processing of personal data. The ECJ has already clarified that, while the content of a record of working time may constitute "personal data" for the purposes of EU law, EU law does not preclude national provisions which require that records of working time be made available to the national authority responsible for monitoring working conditions in such a way that they can be consulted immediately. It goes without saying that employers must only use the data available in the record in a lawful manner and must grant access only to persons who have a legitimate interest.

To the extent that new compliant systems have to be identified and implemented, it will come at an economic cost. Recital 4 of the Working Time Directive clearly states that "the improvement of workers' safety, hygiene and health at work is an objective which should not be subordinated to purely economic considerations". Accordingly, it is likely that any attempt to side-step compliance by reference to economic costs or even the protection accorded by EU Law to the freedom to conduct a business will receive short shrift. Note however that in *CCOO,* the defendant did not appear to identify any practical impediment to the conduct of its business, so the door may not necessarily be shut.

As a final point, the case concerned Articles 3, 5 and 6 of the Working Time Directive. Article 4 makes provision for an entitlement to a "rest break" where a working day is longer than six hours. Unlike the other provisions, the length of the rest is not specified, however it is set at 20 minutes by Regulation 12 of the WTR. While the wording differs, it is not difficult to imagine the ECJ extending the obligation to record data to rest breaks.

This blog was first published on 06 June 2019 by Practical Law Company. This can be viewed here.

John Platts-Mills is developing a broad practice in employment law. He advises and appears on behalf of claimants and respondents in preliminary, one-day and multi-day Employment Tribunal hearings, as well as contractual disputes in the civil courts. John is regularly instructed to draft pleadings and witness statements in employment matters.