

BRIEF UPDATE

FROM THE EMPLOYMENT DIVISION



Working Time Regulations Offshore - Introduction

This Update focuses on a key decision regarding the statutory right to annual leave provided for under the Working Time Regulations (WTR) for offshore workers. The WTR were extended to the offshore sector effective 1 August 2003. This extension included the right to 4 weeks paid annual leave which was increased to 4.8 weeks effective 1 October 2007 and will increase 5.6 weeks effective 1 April 2009. A major issue which is unresolved in the wording of the WTR is whether the statutory right to paid annual leave can be discharged through normal field break/rotational work cycles in the offshore sector or whether it must come from what would otherwise be scheduled offshore working time. This and a number of other key issues have been the subject matter of an ongoing litigation which commenced in the Employment Tribunal in Aberdeen in October 2007 and then proceeded to the Employment Appeal Tribunal (EAT) in December 2008. Paul and Williamsons has been one of three firms representing the employers throughout these

proceedings. The Decision of the EAT has now been delivered and the issues decided in the case together with its implications are set out in this update.

Background

The background to the litigations involved sample cases from the catering and drilling sectors. In each sample case, the offshore worker was assigned to a regular work pattern/rotation being equal time either 2 on/2 off or 3 on/3 off. All of the Claimants submitted requests to take annual leave from scheduled offshore working time. In each case, the employer responded rejecting the request and in some cases, stated that all annual leave had to be taken during the field break.

The Claimants' side was represented by two trade unions being Amicus/Unite and OILC. Because of the way in which the union arguments were presented, a number of distinct issues were raised in the course of the litigation. These are set out below.

Working Time

The OILC argued before the Employment Tribunal that all time spent offshore including off shift time is working time. They further argued that, as a consequence, this meant that all of the ensuing field break was taken up with accumulated daily and weekly compensatory rest leaving no time for annual leave. As a result of this, they argued that annual leave had to be taken from scheduled offshore working time. This became known as the "Jaeger" argument because of a European Court of Justice decision of that name in which it had been decided that time spent on-call by German doctors was "working time".

From the employers' side, there were two main issues of concern arising from this argument. The first was that the basis of calculation of accumulated compensatory rest, even assuming that the argument is correct, was never clear. Secondly, if the argument was correct, it would have a very unfortunate consequence which is unrelated to annual leave being the statutory limitation on maximum weekly working time. The WTR provide that a worker's maximum weekly working time cannot (in the absence of an opt-out) exceed 48 hours over an averaging period which for offshore workers is 52 weeks. Unless there is an opt out, the consequence of the OILC argument

would be that to achieve the 48 hour average, offshore working rotations would need to change to a pattern of one week on, followed by 3 weeks off – something which would be totally uneconomic, particularly in the current environment.

The Employment Tribunal sitting in Aberdeen rejected the argument that off shift time was working time in each of the sample cases. Before the EAT, the OILC conceded that even if their arguments were correct, there would still be sufficient time in the field break to take annual leave after taking account of all accumulated compensatory rest, medicals and training. For that reason, the EAT decided that it was unnecessary and inappropriate to deal with the argument that all time offshore including off shift time is working time. This means that in effect, the “Jaeger” argument is now at an end which is a significant issue for the industry to have clarified.

Can WTR annual leave rights be discharged through normal field break/work cycle arrangements?

The argument put forward by Amicus/Unite was that annual leave must come from time which would otherwise be working time using the analogy of a Monday to Friday worker. In that situation, they argued that it would be contrary to the purpose of the Regulations if an employer could direct that annual leave is taken on Saturdays or Sundays. This argument succeeded before the Employment Tribunal in Aberdeen. The EAT however overturned the Tribunal Decision and has firmly decided that there is no reason in law why annual leave under WTR must come from working time. The EAT regarded the position of an offshore worker working a regular cycle as being very different factually to a Monday to Friday worker and indicated that in the latter situation, it is likely to be a “sham” arrangement, challengeable under the WTR if an employer directed that annual leave must be taken on Saturdays or Sundays. The traditional “equal time” offshore rotation is structured to allow a continual operation and for the offshore worker to have rest and leave from work. Indeed, the EAT noted that if “field break” was known as “field leave”, the issue may never have arisen. The upshot of all of this is that an equal time rotation is compliant with WTR so far as the timing of annual leave is concerned.

Gifted Leave

A further issue was whether in order to count towards annual leave under WTR, the entitlement must be given by way of a contractual grant as opposed to discretionary leave, which may be provided by, for example, an operator to contractor personnel whilst they work on a particular asset. Originally, the trade unions argued that such non-contractual leave did not count. During the course of the appeal however, this point was conceded ie WTR does not require annual leave to be given as a contractual right and the concession has been recorded in the EAT Decision. In light of the finding however that

annual leave can be discharged during the field break, this point has become of academic interest.

What is the calculation of a week for an offshore worker?

It is an example of how poorly drafted the Regulations are, that there is a serious debate as to what a “week” actually means for an offshore worker. The Tribunal in Aberdeen decided that a week is averaged as between the working and non-working part of the cycle. Therefore, for an equal time rotation, a week would equate to 3.5 days. This basis of calculation was conceded by the trade unions as being correct before the EAT. Therefore, when the entitlement was 4 weeks, this resulted in the Tribunal’s reasoning to 14 days annual leave. With the increase to 5.6 weeks, taking the same basis of calculation, and assuming equal time rotation and no other work, the entitlement would be 19.6 days. The exact calculation will depend upon the number of days worked which includes matters such as training and medicals. It is also possible to put forward further arguments which could result in a higher calculation in terms of days equivalent but given that this matter was recorded as a concession, it is hoped that the trade unions will not seek to re-open the matter. It should also be noted that WTR provides a statutory cap on the number of days entitlement at 28. Given that the EAT decided that whatever the calculation, annual leave can be discharged from the field break, this point becomes academic so far as the timing of leave is concerned, but may be of more importance when it comes to the calculation of pay during leave, on which see further below.

Travel Time

For reasons that relate to the calculation of leave entitlement, an issue arose before the Employment Tribunal as to whether travel time from home to embarkation point and then to the installation is working time and equally whether travel time to training courses is working time. The Employment Tribunal decided that all such travel time including from embarkation point to the offshore installation was not working time and was a form of travel to work. Time actually attending training or medicals was working time which was not seriously disputed. Because the EAT decided that annual leave under the WTR can be discharged from field break arrangements, it felt it was unnecessary to deal with this point. Therefore, the Tribunal decision stands that such travel time is not working time.

Notification of annual leave periods

As mentioned in the introduction, in all of the sample cases, the offshore worker made a request to their employer to take annual leave during offshore working time. In each case, the employer responded by rejecting the request and in two of the sample cases, the employer further stated that any annual leave under WTR had to be taken during the field break. The EAT decided that it is lawful for

an employer simply to reject such a request without saying more but they also suggested that it was “good industrial practice” for offshore employers to make their position clear at the outset in contracts, policies or handbooks. This could be a straightforward statement that annual leave entitlement under the WTR must be taken during the field break and that any requests for annual leave under the WTR must be made during that time or alternatively, the employer can nominate particular weeks in the field break which would be required to be taken as annual leave. It should be noted however that there is nothing in law which prevents an employer adopting a policy of waiting to respond to requests for annual leave during offshore time from its workers as opposed to making a policy statement, as indeed happened in all of the sample cases which were dismissed by the EAT.

Appeal

There has been some press comment from both unions that they intend to appeal the Decision of the EAT but at the time of writing, no appeal has actually been lodged. If they wish to do so, they must seek leave to appeal from the EAT within 6 weeks, ie 16th April. The next level of appeal is to the Court of Session being the highest court in Scotland. A hearing before the Court of Session would be unlikely to take place for at least 12-18 months. There are significant cost implications for the trade unions in taking that step. We will circulate a further update once the position is known.

Implications of the EAT Decision

Clearly, the outcome at this stage is very favourable to offshore employers in terms of both the definitions of working time and when annual leave under the WTR may be taken. However, it is important to note some matters which are not dealt with in the decision which employers will still require to review and take account of in their working arrangements. Firstly, the sample cases were all concerned with when annual leave can be taken. They did not deal with the question of the calculation of pay during leave. The right under the WTR is to receive paid annual leave. There are complex provisions on the correct calculation of pay for these purposes. Employers who operate rolled up holiday pay arrangements or arrangements whereby workers receive increased allowances when offshore need to take advice as to whether their pay arrangements are compliant with the WTR, as the focus may now be on field break pay arrangements, if the decision of the EAT is not appealed further.

Secondly, it is important to remember that the decision of the EAT deals with statutory annual leave entitlement. There is nothing in the WTR which prevents an employer from contractually agreeing to arrangements which are more favourable. Indeed, many onshore workers receive under their contracts of employment annual leave arrangements which are more generous than those under the WTR ie leave in excess of the statutory maximum of 28 days. An employee has

a choice of either pursuing annual leave rights under the WTR or alternatively under the contract and, normally, the employee would choose that which has the greater entitlement. The Decision of the EAT does not affect that choice. Therefore, if an employer has for example agreed contractually that an employee has an entitlement to a certain number of annual leave days from what would otherwise be an equal time rotation eg 14 or 28 days, those contractual arrangements remain. Equally, if there are contractual arrangements which provide for particular rotations which are more generous than equal time eg 2 weeks on/3 week off, then unless the employer has reserved the right to change the rotation by increasing the number of days that can be worked offshore they will equally remain in place.

What should employers do now?

Whilst the EAT Decision is clearly favourable, given the complexity of the issues raised, it is advisable that offshore employers have their existing working, leave and pay arrangements reviewed to ensure compliance with the WTR and that contractual undertakings are being met.

If anybody has any questions regarding this update, please contact a member of our Employment Division, whose contact details are:-

Sean Saluja (SASaluja@paul-williamsons.co.uk)
Margaret Gibson (MMGibson@paul-williamsons.co.uk)
Geoff Clark (GXClark@paul-williamsons.co.uk)
Stuart Robertson (SRobertson@paul-williamsons.co.uk)
Jennifer Gardner (JAGardner@paul-williamsons.co.uk)
Linda Beedie (LAJBeedie@paul-williamsons.co.uk)