

BRIEF UPDATE

FROM THE EMPLOYMENT LAW DIVISION



Working Time Regulations Offshore Update—Supreme Court Decision Out!

The long awaited outcome in the industry sample cases concerning the application of the Working Time Regulations (WTR) to the Offshore Sector has come to a conclusion today with the release of the judgement from the Supreme Court in the case of *Russell and others v Transocean and others*. Paul & Williamson have been representing the Respondent employers from the outset of the litigation, as part of a legal team and we are delighted to announce that the outcome has been a complete success for the employer's side. The Supreme Court held that workers in the offshore sector could be directed to take their annual leave from time which was already scheduled time off within their rota (i.e. workers can be directed to take annual leave during their scheduled field break) and that paid annual leave under the WTR does not require as a matter of law to come from time when a worker would otherwise be working. The Supreme Court also ruled that the matter should not be referred to Europe, which means the arguments pursued to the Supreme Court are now at an end.

These cases have a long background having commenced their journey on the question of a number of legal principles before the

Employment Tribunal in October 2007. By the time the cases came before the Supreme Court for a hearing in October 2011, a number of those issues had either been resolved through earlier stages of appeal or agreed between the trade unions and employers. The "Jaeger" argument which had been put forward by OILC/RMT during the initial stages of the litigation (which was to the effect that all time spent working offshore including time off shift was working time) had been rejected by the Employment Tribunal and was effectively given up at the stage of the Employment Appeal Tribunal. The Tribunal's finding that travel from home to heliport and from heliport to offshore installation was not working time for the purposes of the WTR was also not subject to further appeal. Finally, it had been agreed between the parties that the correct basis of the calculation of the days of annual leave was on a pro rata basis having regard to the overall work pattern. That means that for offshore workers engaged on an equal time rotation 4 weeks of paid annual leave equates to 14 or 15 days (depending upon when the leave is taken) and 5.6 weeks of paid annual leave equates to 20 or 22 days (depending upon when the leave is taken).

At the Supreme Court, there was one important issue of principle left in dispute which was the timing of leave ie could the entitlement to paid annual leave be discharged through normal field break/work rotations or alternatively as the unions argued, does the leave have to come from time that would otherwise be working time ie offshore time? The issue is significant for the industry as a whole and has wider implications. If the union arguments were correct, it would mean that in practice, an equal time rotation would require to be reduced by 21 days (having regard to the way in which working patterns operate in practice) meaning that an offshore worker contracted to work 182 days offshore could only be required to work 161 days as the entitlement to annual leave would require to come from offshore time. That in turn has wide ranging implications for the economics of field developments/exploration and the requirement for further labour in a market which is becoming tighter and skills in high demand.

The decision of the Court was issued at 9.45am this morning with the leading judgement being given by Lord Hope. The judgement emphatically rules in favour of the employers position and furthermore has refused union arguments for the matter to be referred to the Court of Justice of the European Union (CJEU).

Having reviewed the background to the introduction of the Working Time Directive (WTD) as implemented by the WTR in the UK, the Court accepted that the purpose of the legislation is to lay down minimum periods of rest and maximum hours of work. The Court rejected the argument put forward by the trade unions that there is a “qualitative requirement” to the definition of leave under the legislation. This was an important foundation to the trade unions arguments that for leave to be real, it needed to come from time when an employee would otherwise be obliged to work. The Court accepted the argument put forward on behalf of the employers that in terms of the classification of time under the legislation, there is either “working time” or a “rest period” and that annual leave is simply a sub category of rest period. In determining whether a period of time is a rest period, the court/tribunal should not engage in an assessment of the quality of that time.

Finally, the Court accepted the anomalies which would arise from giving effect to the trade unions arguments in particular implications for school teachers and other workers who are engaged in working patterns driven by the nature of the particular industry eg tourism. The key finding of the court is summarised by Lord Hope as follows:-

“I would hold that the respondents (employers) are entitled to insist that the appellants (workers) must take their paid annual leave during periods when they are onshore on field break. In my opinion, this is permitted by Regulation 13 of the WTR, read in conformity with Article 7 of the WTD”.

The court further rejected tenacious arguments put forward by the trade union that the matter should be referred to the CJEU for a preliminary ruling. It became clear at the Supreme Court hearing that a reference to Europe was essentially what the trade unions were hoping to achieve. From the employer’s perspective, whilst retaining a confident position that the CJEU would adopt a similar interpretation to the Supreme Court, it is notoriously a more unpredictable and political forum in which to litigate and therefore one to be avoided if possible. The request for a reference was refused on the basis that the relevant wording within the Directive was not open to reasonable argument. That is a crucial finding for the employers in the litigation as there is no independent right of appeal to the CJEU. This means that the matter has now been brought to a final conclusion and that as a matter of law, employers in the offshore sector can insist that annual leave is taken during normal field break/rotational work patterns.

There are some points of caution however that employers should be aware of. Firstly there was in the sample cases an agreement reached on an important fact that *“for the most part, the appellants (workers) were free from work related obligations during the entire period of their field breaks. They could spend their time as they chose.”* Where employers are reserving the right to call upon offshore workers to carry out anything beyond minimal activities during the field break it

will be important to have a clearly stated policy on exactly how annual leave is to be taken. This could, for example, involve the employee making requests that particular parts of the field break is allocated as annual leave and once approved that time cannot be used by the employer for any form of work activity.

The second note of caution is that this litigation ultimately was determining **when** an employer could insist that annual leave is taken. It was agreed between the parties that the question of pay during leave should be determined as a separate matter. In a series of decisions that have come from the CJEU in recent times, it has been emphasised that pay and leave are important aspects of the same right. Employers are now essentially clear that they can insist that annual leave is taken during the field break. However, the next issue which is likely to attract union attention is what are the pay arrangements **during** field break. Offshore employers should now very carefully examine their pay arrangements. It is not unusual for example for there to be differentials in pay, with offshore and shift allowances resulting in different rates of pay for time spent working offshore, as compared to rates of pay for time during the field break. The CJEU in a case relating to a different sector (*BA v Williams*) has laid down a general proposition that workers should enjoy the same rates of pay during annual leave as compared to when they are working. This general principle is subject to a number of clarifications and points of detail regarding the particular aspects of pay. Employers are likely to have a limited window of opportunity to address their pay arrangements before trade unions likely embark upon further challenges regarding those matters, and with attention going forward likely being focused on the pay arrangements during field break.

Finally, the Supreme Court recognised that there were aspects of this litigation which had implications for workers outwith the offshore sector and in particular those working part time. The unions argued that if the Respondent’s submissions were taken literally, it would mean that unscrupulous employers could insist that annual leave entitlement was taken during days which would not otherwise be working time for part time workers or indeed allocate Saturdays as annual leave for those working a standard Monday to Friday pattern. The Supreme Court accepted the arguments put forward that as a matter of fact, those circumstances did not arise in this case. Separately, the Court, without finally deciding on the matter, agreed that there was attraction in the employers alternative argument that it is essentially a worker’s right to insist at their choice to take their annual leave in blocks of a whole week should the employee wish to do so. It should be noted that these issues are restricted to the base right of 4 weeks annual leave derived from the WTD. The additional 1.6 weeks of annual leave was introduced in the UK to give effect to a social policy to incorporate public and bank holidays as part of the minimum legislative entitlement. Employers would continue to retain

a right to insist that the days which incorporate the 1.6 weeks of additional annual leave can be allocated by the employer in one day or in less than one week periods having regard to the needs of the business eg office closures over Christmas and New Year.

Paul & Williamsons is very well placed to advise employers regarding the implications of this decision having been part of the legal team that represented the industry throughout the litigation and at the Supreme Court. If you have any questions or queries regarding this matter, or would like a full copy of the decision, please do not hesitate to contact any member of the Employment Team whose details are:-

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