EELA EUROPEAN EMPLOYMENT LAWYERS ASSOCIATION

SUMMARY

2012/12: Offshore workers can be required to take annual leave during onshore field breaks (UK)

<p>Offshore workers in the oil and gas industry brought an action claiming that, in not being allowed to take annual leave during periods when they were rostered for offshore work, they were being denied their entitlement to annual leave under the Working Time Regulations 1998 (the “WTR”). The WTR implement the Working Time Directive 93/104/EC (now consolidated as Directive 2003/88/EC, the “WTD”). The Supreme Court rejected the employees’ argument and held that onshore field breaks could be used for statutory holiday entitlement. It also refused a request for a reference to the ECJ for a decision on the meaning of “annual leave” under the WTD.</p>

Summary

Offshore workers in the oil and gas industry brought an action claiming that, in not being allowed to take annual leave during periods when they were rostered for offshore work, they were being denied their entitlement to annual leave under the Working Time Regulations 1998 (the "WTR"). The WTR implement the Working Time Directive 93/104/EC (now consolidated as Directive 2003/88/EC, the "WTD"). The Supreme Court rejected the employees' argument and held that onshore field breaks could be used for statutory holiday entitlement. It also refused a request for a reference to the ECJ for a decision on the meaning of "annual leave" under the WTD.

Facts

Offshore workers in the oil and gas industry typically work a two week offshore, two week onshore shift pattern and are required to take their annual leave whilst rostered onshore. A number of employees working in the industry (for different employers) brought claims alleging that, in not being allowed to take annual leave during periods where they were rostered for offshore work, they were being denied their entitlement to annual leave under the WTR.

Of the pool of claims, seven test cases were identified on the basis that the relevant claimants were representative of the main offshore work patterns. Most of the relevant employees were engaged on a two weeks on, two weeks off shift pattern under which they worked two weeks of daily 12 hour shifts offshore, followed by two weeks of "field break" onshore. Whilst the employees were expected to attend training, appraisals and medical appointments during the field breaks, the overall time taken up with these work-related commitments was minimal.

The contracts of employment of the relevant employees specified the working arrangements or restrictions on when annual leave could be taken. The employees had each sought, and been refused, periods of annual leave which fell during periods when the employee was rostered to be offshore. Regulation 15 of the WTR provides that an employee wishing to take annual leave must give notice to his employer specifying the days on which the leave is to be taken. The employer can respond to the request with a notice of its own refusing the request. Independently, or in connection with a refusal, an employer can give notice to an employee that leave must be taken at a particular time or times. Regulation 13 of the WTR sets out the entitlement to annual leave which, at the relevant time, was four weeks per year.

Judgment

The claimants issued proceedings in the Employment Tribunal (the "ET") claiming that under the WTR their employers were obliged to give them four weeks' holiday from what would otherwise be working time and so their refusal to grant annual leave during offshore periods amounted to a breach of the WTR.

The ET determined that annual leave for the purposes of regulation 13 of the WTR "Ôinvolved a release from what would otherwise have been an obligation to work, or at least to be

available for work or otherwise in some way on call". So, it held that field breaks could not be used for annual leave and leave could only be taken during periods when the employee was rostered for offshore work.

The employers appealed to the Employment Appeal Tribunal (the "EAT").

In determining whether employees had been denied their annual leave entitlements, the EAT was asked to consider:

whether the employers had given valid regulation 15 notices which effectively countered the employees' leave requests; and
whether annual leave could be taken during field breaks.

Noting that regulation 15 did not require notices to be given in a particular form or at a particular time, the EAT, by a majority, determined that the provisions in the relevant employees' contracts which stated when leave could and could not be taken constituted effective notices for the purposes of regulation 15. In addition to this, the employers had given valid regulation 15 notices directly refusing the employees' requests for leave. Accordingly, the employers had not wrongly refused the employees' annual leave.

On the second question, the EAT, again by majority, concluded that annual leave could be taken during field breaks. The EAT looked to the ordinary meaning of annual leave, as annual leave is not defined in the WTD or WTR, and concluded that annual leave was a period where the employee was free from work commitments. The provision of annual leave during field breaks was consistent with this definition and as such was acceptable.

The employees appealed to the Inner House of the Court of Session in Scotland.

In determining the appeal, the Court of Session was met with an additional argument that the

WTD was intended to improve workers' rights and provide something over and above a worker's ordinary terms and conditions. The Court of Session rejected this argument and said that the WTD simply sought to impose minimum standards. The Court of Session said that the annual leave provisions in Article 7 were designed to place a cap on the number of weeks in which an employee was required to work. An employer will have complied with its obligations if the employee is given the opportunity to take four weeks of paid annual leave each year in which they are not required for work. Using the two weeks on, two weeks off shift pattern, the employees were not required to work more than 48 weeks per year.

The Court of Session dismissed the appeal and the employees appealed to the Supreme Court of the United Kingdom.

In the appeal to the Supreme Court the employees argued:

annual leave required a release from an obligation to work. During field breaks the employees were not required to work, so there could be no release from that obligation;
field breaks lacked the "qualitative dimension" required of annual leave Ð that a minimum period of rest is not sufficient, the rest must have a certain condition or quality that met the health and safety purpose of the legislation; and
"annual leave" was not defined in the WTD, so its meaning was uncertain. To clear up the uncertainty, the matter should be referred to the ECJ.

The Supreme Court rejected the argument that as field breaks did not constitute working time, they could not be used for annual leave. In rejecting the argument, the Supreme Court focused on the purpose and intent of the WTD, which was to protect the health and safety of workers. Consistent with this, the WTD provided for minimum daily, weekly and annual rest periods. The Court held that a rest period (whether daily or weekly rest, or annual leave) means any period which is not working time but that it does not have to involve a release from what would otherwise be an obligation to work. As field breaks were not working time, the field break could be used for annual leave.

The Court also rejected the argument that the field breaks lacked a "qualitative dimension" required for annual leave, noting that such a dimension was not included within the terms of either the WTD or WTR. The qualitative dimension required of annual leave was simply that during the relevant period the employee was not required to work.

Whilst not relevant to the case at hand, the Court was asked to consider what is known as the "Saturday problem". This is a scenario used to support the argument that employers should not be able to direct employees to take annual leave in time when they would not otherwise be working. In this situation an employer engages an employee to work a normal five day-a-week contract, Sunday is designated the weekly rest break and the employer directs the employee to take annual leave every Saturday, resulting in the employee never having the opportunity for any meaningful annual break. The court decided that the real issue raised by the Saturday problem was not whether an employee can be required to take leave during a period when he or she would not otherwise be working but rather whether an employee can be forced to take annual leave for periods which are shorter than one week. The Court noted that the entitlement to annual leave in Article 7 of the WTD is measured in weeks and not days, and that it thought it arguable that employees can opt to take annual leave in days but employers cannot force them to do so. However, as the Saturday problem did not arise in this case, the Court did not have to reach a conclusion on it.

In a unanimous decision, the Supreme Court dismissed the appeal. The Court did not consider the meaning of annual leave to be unclear, so refused the request to refer the matter to the ECJ.

Commentary

The decision of the Supreme Court will come as a relief to employers working in sectors that require employees to take annual leave at specific times such as schools, football clubs, shipping companies and offshore oil and gas producers.

Employers can lawfully direct their employees to take annual leave during periods where the employees would not ordinarily be working. As long as the employee is accorded the required period of annual rest, the employer will have acted in accordance with the WTR.

The case is of interest also for the Court's answer to the Saturday problem Ð that employers cannot force employees to take annual leave in units of days not weeks, although employees might choose to do so. Although the Court's view on the matter was only obiter dicta, it will be influential if the issue should come before a lower court for consideration.

Comments from other jurisdictions

Czech Republic (Nataa Randlova): We agree that the judgment is of interest not only for offshore workers, but for employees in many other sectors, including schools and shipping companies.

It was considered that field breaks were not working time but that annual leave does not have to involve a release from what would otherwise be an obligation to work. Therefore, field breaks (in the case at hand) could be used for annual leave. The same rule will apply to other periods where employees would not ordinarily be working, in relation, say, to employees in other sectors. Based on this, an employer may require employees to take their annual leave at a particular time, including time which is not ordinary working time.

Czech law gives employers an even stronger position. They have the right (which to my knowledge is not mitigated in any collective agreement) to determine unilaterally when staff take their annual leave. The only requirement is that the employer provides 14 days advance notice, that he respects the employee's legitimate interests (e.g. employees with children have a legitimate interest to take leave during school holidays) and that he does not require the employee to take leave during maternity/paternity leave, sickness, military exercises, etc. So, for example, an employer may in principle obligate an employee to take his 2011 paid leave in the month of November 2011 (as a rule not a time of the year during which employees like to take their leave) merely by informing the employee of this mid-October. There is only one exception to this principle. Since 1 January 2012 the law provides that in the event an employer has not designated any leave period by 30 June of the year after the leave has accrued, the employee is free to determine that period himself. So, for example, if an employee has not been able to take his 2011 leave by 30 June 2012, the employee is free to take that leave (but only the leave accrued in 2011) at any time he wishes as from 1 July 2012, provided he gives the employer two weeks' notice.

In respect of the “Saturday problem”, we can add that annual leave is measured in weeks in the Czech Republic too, but leave can be taken (or be required to be taken) in days, or even in half-days, which is the minimum unit of leave. If the annual leave is not taken all at once, at least part of it must be taken in a block of two weeks. There are no other statutory restrictions on the length of units of annual leave.

Germany (Markus Weber): According to a 2001 judgment of the *Bundesarbeitsgericht* German employers can grant holiday only for times when the employee would otherwise have to work. Due to this case law the case reported above would have been decided differently in Germany. The crucial point here is that the employees were expected to attend training, appraisals and medical appointments during the onshore shifts, but did not have to work apart from that. Hence, if there was no obligation to work, the employer could not release them from any

corresponding obligation by granting holiday.

Moreover, the employer was obliged to grant the field breaks as free time compensation since the employees' daily work exceeded the time limits of the German *Arbeitszeitgesetz* (Working Hours Act) during the previous two weeks offshore, during which time they worked 12 hour shifts. Section 3 of the *Arbeitszeitgesetz* provides that an employee may only work in excess of 8 hours per day if the average of his daily working time during the following six months is 8 hours. Hence, two weeks of 12 hour shifts need to be compensated by free time pursuant to the German working hours legislation. These compensation periods cannot be treated as holiday at the same time according to the said case law.

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