Working holidays: who should pick up the tab?

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Litigation at the European and domestic level has focused on the quantative aspects of calculating the remuneration payable to workers taking paid leave, but with the growth of smartphones and tablets, many workers never manage to switch off from work while on leave. Does the Working Time Directive provide any qualitative safeguards against 'working holidays'? Is there any effective remedy that a disgruntled worker could pursue?

The purpose and scope of the WTD are identified in Article 1, which lays down minimum health and safety requirements for the organisation of working time. This applies to daily, weekly and annual periods of rest.

It has been asserted in a number of cases by the ECJ (see for example, *Pereda*) that 'the purpose of the entitlement to paid annual leave is to enable the worker to rest and to enjoy a period of relaxation and leisure'. Indeed, it is for this reason that it is only in instances where the employment relationship ends that Article 7 of the WTD permits an allowance to be paid in lieu of accrued but untaken leave.

The effect of the case law goes further, as it now clarifies (see *Plumb*) that while it is preferable that holidays should be taken during the holiday year in which they fall, in cases where a worker is unable or unwilling to take annual leave because they were on sick leave, the worker must be permitted to take this annual leave within 18 months of the end of the leave year in which it accrued, it being recognised that an individual may not be able to enjoy a period of rest and relaxation for reasons of health and safety if they are at the same time recovering from illness.

Interrupting a period of annual leave

Given that the ECJ has repeatedly made clear the purpose of the entitlement to annual leave, it is surprising that there has not been more litigation in relation to the 'qualitative aspects' of taking paid annual leave, ie is a worker still enjoying a holiday if, at the same time, they are interrupted as a result of carrying out work-related activities?

In the 2011 Supreme Court decision in *Russell*, a case which considered how the statutory right to *paid* annual leave under the WTR is to be applied in the case of offshore workers, the Supreme Court held that: 'Article 7 (annual leave entitlement in the WTD) does not require that the week of annual leave cannot be interrupted. A qualitative requirement, as an additional test of whether a given period can be accounted as rest within the cycles of time that are identified, is not to be found in the wording of the Directive. It is true that the safety and health of workers lies at the heart of the rules that it lays down. But there is no indication anywhere that it was concerned about the quality of the minimum periods of rest, other than to make it clear in the definition of "rest period" that it means a period which is not working time.'

So an interruption by one's employer during a holiday does not of itself appear to transform annual leave into working time. However, the key question is whether and if so at what point may leave become or be treated as a period of working time?

The concept of 'leave'

At the heart of this issue is getting to grips with the concept of 'leave' within the context of the WTD and understanding how it is distinct from 'working time'. This is easier said than done, as the word 'leave' is defined in neither the WTD nor the WTR. However, in short, leave is interpreted as an annual period of rest. A rest period is a period which is not a period of working time. Working time and leave are therefore mutually exclusive.

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In Article 2(2) of the WTD, working time is defined as 'any period during which a worker is working, at his employer's disposal *and* carrying out his activity or duties'.

Can leave become working time?

It appears, in so far as the ECJ is concerned (see *Pereda*), that when a worker who is taking annual holiday falls ill, they should be able to treat that day as one of sick leave and reclaim their annual leave subsequently. Given that the overriding purpose of annual leave is to enjoy a period of rest, relaxation and leisure, it seems logical to assume that a period set aside for annual leave can in certain circumstances cease to be annual leave and instead be treated as in fact having been working time, so that the lost annual leave day may be reclaimed or in certain instances be compensated for.

The fact that a worker may be undertaking work from an exotic location would not in this modern age of communication preclude the time being treated as working time. The real question is at what point does this metamorphosis occur, bearing in mind that there is no intermediate category between working time and rest periods?

Being at the employer's disposal

In order to get to first base with an argument that leave should be treated as being a period of working time, the worker needs to demonstrate that they were working at their employer's disposal.

The meaning of being at the 'employer's disposal' has been the subject of some recent cases. The EAT in *Edwards* considered whether time spent at a meeting in a trade union capacity is capable of amounting to 'working time' for the purpose of the WTR. The EAT held that it was sufficient that the 'employer has required the employees to be in a specific place and to hold themselves ready to work to the employer's benefit … the claimants were at the employer's disposal' (para 61, p.535).

The issue was also considered by the ECJ, following a request from the Spanish court (see *Tyco*), which had to determine whether time spent by mobile workers travelling from their homes to customers' premises has to be regarded as working time. It was held that they were at the employer's disposal while making these journeys, rejecting the argument that the workers were not at their disposal, as they could plan their itinerary for getting to these appointments as they wished. During this travelling time the workers were not able to pursue their own interests and consequently they were at their employer's disposal.

So the question is whether a worker on holiday, waiting for the phone to ring in relation to a work-related call, rather than diving into the swimming pool, is at their employer's disposal and engaged in undertaking working time? Much will turn upon the circumstances in which the worker undertakes the work on holiday. If they are genuinely free to work in the manner of their choosing by, for instance, having a call later in the day, then they will not be at their employer's disposal and accordingly, not be engaged in working time. However, all too often workers feel compelled to work during their vacation and often their time is no longer their own when they attend a conference call or respond to deadlines.

The situation is analogous to 'on-call consultants' providing their services from home. In the case of *Simap* the ECJ held, in the context of determining whether the maximum working time laid down in the WTD had been exceeded, that doctors who were on call in the sense of being contactable without being obliged to be present and available at the workplace, were only engaged in undertaking working time during the time linked to the actual provision of services. During other periods of time when they were obliged to make themselves available to be contacted, and were therefore at their employer's disposal, they were still able to 'manage their time with fewer constraints and pursue their own interests' (para 50, p.851). Thus, hours of actual working could be segregated from other times when they were not performing work.

Impact on a worker's period of relaxation

In the context of looking at periods of annual leave, if a worker has undertaken, while at the employer's disposal, a sustained period of work, then perhaps they may be able to reclaim one day's leave or even a half-day's leave. But what if the worker is required to be available and work intermittently over short periods of time? In such a situation, the impact on a worker's period of relaxation and leisure may extend far beyond the actual time spent checking the iPhone or being on that conference call. It is certainly arguable that a worker's entire day can be ruined or disrupted by having to take that call.

If a worker is unable, due to the short, intermittent nature of the disruptions, to argue that a block of leave time should

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be designated as having become working time, what remedy can they pursue, given that they will not in any event have suffered a loss of wages? It may be open to them to argue that what they have lost is not pay, but rather the health and welfare benefits of taking annual leave.

It is similar to the situation of a worker not actually being permitted to take a period of leave. As pointed out recently by the EAT in *Sash Window*, a potential remedy lies with a complaint under Reg 30 WTR for (just and equitable) compensation based on a claim that an employer has not complied with a worker's entitlement to annual leave.

Compensation for non-pecuniary loss

Accordingly, an employer taking advantage of its worker's goodwill (by giving them little choice but to turn their vacation into a working holiday) ought to be aware that it could receive a request to reschedule the leave day and/or be subject to a Reg 30 WTD compensation claim, in effect requiring the employer to pick up the tab for spoiling the worker's holiday. Such losses could extend well beyond the actual time spent in undertaking the work, depending upon the impact this has on the worker's (and arguably their family's) period of relaxation and leisure.

The fact that a spoilt holiday may result in the award of compensation for non-pecuniary loss is not a foreign concept to the English courts and, in fact, there is a discrete old body of common law cases that can be relied on to inform how such compensation may be assessed. *Jackson*, for instance, is an example of the Court of Appeal sanctioning compensation for a ruined holiday resulting from the holiday company's failure to supply the holiday that had been contracted for. Damages were awarded for the entire family's discomfort and distress caused by reason of the breach. It was accepted that the plaintiff felt no benefit from the holiday.

Conclusion

With a few notable exceptions, such as the German car manufacturer Daimler, which actively discourages working during leave, the reality is that many workers are subject to a growing expectation that they will undertake some form of work while they are on holiday. This trend does not sit well alongside the minimum safety and health objectives of the WTD and it may not be too long before this issue reaches the courts.

KEY:

WTD	Working Time Directive 2003/88/EC
Pereda	*Pereda v Madrid Movilidad SA* [2009] IRLR 959
ECJ	European Court of Justice
Plumb	*Plumb v Duncan Print Group Ltd* [2015] IRLR 711
Russell	*Russell & ors v Transocean International Resources Ltd* [2012] IRLR 149
WTR	Working Time Regulations 1998
Edwards	*Edwards & anor v Encirc Ltd* [2015] IRLR 528
Tyco	*Federación de Servicios Privados del Sindicato Comisiones Obreras v Tyco Integrated Security SL* and *Tyco Integrated Fire & Security Corporation Servicios SA* Case C-266/14 [2015] All ER (D) 55 (Sep)
Simap	*Sindicato de Médicos de Asistencia Pública (Simap) v Conselleria de Sanidad y Consumo de la Generalidad Valenciana* Case C-303/98 [2002] IRLR 845
Sash Window	*The Sash Window Workshop Ltd & anor (appellants) v King (respondent)* [2015] IRLR 348
Jackson	*Jackson v Horizon Holidays Ltd* [1975] 3 All ER 92