

#67 HR Newsletter

Sept 2015: Travelling time

European Court of Justice Ruling on Travelling time

The ruling by the Court of Justice of the European Union (CJEU) in a Spanish case, brought by a group of technicians employed by Tyco to install and maintain security equipment at the premises of the firm's customers, will have implications for employers with mobile or peripatetic workforces - for example, field engineers, field sales forces and care workers. However, its impact is not as dramatic as suggested by some press reports as the Working Time Directive (WTD), to which the ruling applies, has no bearing on employee pay.

What has the CJEU decided?

The CJEU ruled that the time spent by mobile workers - that is, those who have no fixed place of work - travelling between home and their first and last place of work each day counts as 'working time' under the WTD.

Tyco's technicians in this case had no office base or fixed location. They travelled to and from home each day to whichever customer they were allocated, a distance that could be as much as 100km. The CJEU ruled that all of this travelling time should be classed as 'working time'.

Does this entitle mobile workers to be paid for time spent travelling between home and the places where they work?

No: the decision is only about what counts as working time under the WTD and the WTR, which gives effect to the WTD in the UK. This legislation does not govern pay. Rather, it is concerned with the organisation of working time including average weekly working time, rest periods and rest breaks and minimum periods of paid holiday and this working time will now count towards time under the 48 hour maximum working week.

The Working Time legislation does not require working time to be paid. This is an entirely separate issue which is governed by the contract of employment and national legislation - including, in the UK, the National Minimum Wage (NMW) legislation. Indeed, the CJEU expressly stated in its decision that it is for national legislation to determine whether or not this travelling time - or, indeed, any other category of working time - is paid or unpaid.

Under the UK's National Minimum Wage Act and Regulations, the general position is that travel time between home and a place of work is excluded from the obligation to pay the NMW, including for mobile workers. This has also been backed up by case law.

The only exception to this rule is for workers who do "unmeasured" work. These are workers who are not paid by reference to the hours that they work, do not have set hours, are not paid an annual salary or are not paid by reference to their outputs. This is a 'catch-all' category which will not typically apply to mobile workers.

Will this decision mean that the NMW has to be interpreted differently?

No. There is no connection between the WTD and the NMW legislation. The NMW is unaffected by this decision. Where the NMW legislation expressly excludes travel time between home and places of work from the minimum wage, these exclusions still apply and are unaffected by this case. In short, if this time is currently unpaid under the NMW legislation, it will remain unpaid.

Are there any other implications?

As this travelling time has to be counted as 'working time', the other main issue is whether your current working patterns comply with the rules under the WTR.

For example, if you are not using opt-outs from the average weekly working time limit of 48 hours per week, does this decision mean that you have workers who are exceeding this limit? Does it mean that workers are not getting a daily rest period of 11 hours between the end of one day's working time, calculated as the time of arrival back home, and the start of the next working day, when they set out from home? Does it mean that workers are not getting weekly rest periods of 24 hours consecutive non-working time? Does it mean that the timing of breaks after six hours of work has to be changed?

If current working patterns are not compatible with working time limits, you will need to consider whether and how these have to be adapted following this decision