Government consults on reforms to working time rules, holiday pay and TUPE

Employment analysis: On 12 May 2023, the government published a consultation paper, setting out its plans regarding the future of retained EU employment law. The consultation paper confirms the government's intention to keep retained EU employment laws in the following areas without any change: family leave rights (maternity, paternity, adoption and parental leave), 'atypical' workers' rights (part-time workers, fixed-term workers and agency workers), and information and consulta-tion rights. However, certain reforms are proposed in the areas of working time, paid holiday rights and rights upon the transfer of a business or an outsourcing. The government says it has identified areas for reform of laws it considers are 'too onerous for business to be used effectively or too complex for workers to know, understand and use'. Amanda Steadman, principal knowledge lawyer at Brahams Dutt Badrick French LLP, sets out the proposed changes in the consultation and the next steps.

This analysis was first published on Lexis®PSL on 25 May 2023 and can be found here (subscription required).

Changes to working time record-keeping requirements

In 2019, the Court of Justice of the European Union (CJEU) in *Federación de Servicios de Comisiones Obreras (CCOO) v Deutsche Bank SAE*, Case C-55/18 ruled that Directive 2003/88/EC, the Working Time Directive (WTD) required employers to have a system in place to measure the daily working time of all workers. Importantly, that system had to go beyond merely recording overtime hours or drawing upon other sources of information which could be pieced together to identify daily working hours. The system of recording daily hours had to be objective, reliable and accessible.

The consultation says the government believes that this requirement is 'disproportionate' and 'damaging to relationships between employers and their workers' (although it is not said exactly how it is damaging). The government wishes to legislate to clarify that businesses do not have to keep a record of daily working hours of their workers.

In fact, the Working Time Regulations 1998 (WTR 1998), SI 1998/1833 (which implement the WTD) only require employers to keep adequate records to show whether the weekly working time limits (and night work limits) are being complied with. Currently, there is no requirement in the WTR 1998 to record daily or weekly rest breaks, or the actual number of hours worked overall each day. Therefore, the proposal does not involve removing anything from the WTR 1998, rather it would mean adding a new provision stating that such records are not required.

Technically speaking, employers should have complied with the daily working time record-keeping obligation following the CJEU's decision. Yet we suspect that many employers would not even have been aware of the CJEU's ruling and, even if they had been, would not have put in place such a system without it being required expressly by the WTR 1998. In conclusion, this reform is unlikely to make much difference in the real world to the way that the majority of employers are managing their working time records.

Creation of a single annual leave entitlement of 5.6 weeks

Currently, the WTR 1998 provides that workers are entitled to 5.6 weeks' annual leave per year. However, this holiday entitlement is split into two allocations:

- four weeks' leave as required by the WTD (known as 'regulation 13 leave')

- 1.6 weeks' leave which was granted by the UK government on top of the minimum WTD requirement (known as 'regulation 13A leave')

Different rules about pay apply to regulation 13 leave and regulation 13A leave. Workers should be paid their 'normal pay' for regulation 13 leave, which may include things like commission, bonuses, allowances and some types of overtime payment. In contrast, workers are only entitled to be paid basic pay for regulation 13A leave.

The consultation says having these two types of leave causes administrative hassle for employers and confusion for workers. The proposal is to replace regulation 13 leave and regulation 13A leave with a new regulation creating a single statutory annual leave entitlement of 5.6 weeks. Therefore, the amount of leave per year will not increase or decrease, rather this is a 'behind the scenes' change to make the management of such leave more straightforward.

In terms of pay for the new single pot of annual leave, the consultation says that the new regulation would set out the minimum rate of holiday pay. The consultation seeks views on what that rate of pay should be. Ultimately, if the government decided that only basic pay should be paid for the whole 5.6 weeks this will represent a cut to the holiday pay of workers who are normally in receipt of additional elements of pay such as commission and overtime.

Additional changes are also proposed in relation to the accrual and carry-over of annual leave.

On the accrual of leave the proposal is that workers should accrue their annual leave entitlement at the end of each 'pay period' (rather than each month as is currently the case) until the end of the first year of their employment. The aim is to provide workers with a steady amount of holiday entitlement as they work and to simplify the calculation of holiday entitlement for employers.

On the carry-over of unused leave the proposal is to remove the regulations which permitted workers to carry over their regulation 13 leave into the following two annual leave years where it was not reasonably practicable to take it during the coronavirus (COVID-19) pandemic. The consultation notes that these regulations are no longer needed. Apart from this change, the rules on carry-over would not change (ie four weeks' annual leave could not be carried over unless the worker was unable to take it in certain scenarios and 1.6 weeks' annual leave could be carried over where there was a written agreement between the worker and employer).

Introduction of rolled-up holiday pay

'Rolled-up' holiday pay is a system where no holiday pay is paid when a worker actually takes annual leave, but, instead, an additional amount of pay is added to their pay for periods of work. In other words, the additional pay represents a payment in lieu of holiday pay. In 2006, the CJEU in *Robinson-Steele v RD Retail Services Ltd ; Clarke v Frank Staddon Ltd; Caulfield and others v Hanson Clay Products Ltd* [2006] IRLR 386 ruled that the practice of rolled-up holiday pay was unlawful and that workers should be paid holiday pay at the time that the annual leave is taken. The UK government did not amend the WTR in line with the CJEU's ruling, however, it updated non-statutory guidance to provide that rolled-up holiday was not permitted.

The consultation proposes that rolled-up holiday pay be introduced as an option for all workers. Employers could choose between paying holiday pay when the worker takes the annual leave or 'rolling up' holiday pay with wages and not paying anything during periods of annual leave. It is said that this system would make life simple for employers as the calculation of holiday pay would be a straightforward enhancement to every pay slip. The consultation proposes that the default enhancement rate is 12.07% of the worker's pay (which is the result of 5.6 weeks' annual leave divided by 46.4 working weeks of the year).

This reform will be welcomed by employers of workers who work irregular hours or part-year arrangements as it will simplify the calculation of holiday pay significantly.

Changes to TUPE consultation requirements

The Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE 2006), SI 2006/246 protect employees' rights when the business or undertaking for which they work transfers to a new employer, either when the business changes owner or a service transfers to a new provider. Currently, before such a transfer, the outgoing employer must inform and consult with representatives of the affected employees. These can be existing representatives (eg trade union representatives) or ones that are elected just for this purpose. However, outgoing employers with up to nine employees may inform and consult with affected employees directly if there are no existing representatives in place.

The consultation proposes that the option of consulting with affected employees directly should be extended to businesses:

- with up to 49 employees, and
- with any number of employees where a transfer of up to nine employees is proposed

However, this option would only be available where there were no existing representatives. The aim is to help businesses avoid the administrative burden of holding elections for employee representatives. This reform will be welcomed by employers—albeit that consulting with, say, 40 employees may be more challenging than consulting with just three or four representatives.

What are the next steps?

The consultation closes on 7 July 2023. The government will need to consider the responses and decide what changes, if any, it wishes to make to the law. Its position will be set out in a response paper, which we would expect to be published by the end of 2023. Legislation will then need to be passed, meaning that the reforms are unlikely to take effect before the latter part of 2024 at the earliest.

This analysis has been republished with the kind permission of the author, Amanda Steadman. The original article can be found on the Lexology website here.

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