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**The Working Time Regulations 1998:**  
*The impact on provision of care*



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1. The Working Time Regulations (WTR) 1998 implement the Working Time Directive of 23<sup>rd</sup> November 1993 (93/104/EC) which has itself been replaced by the Working Time Directive 2003 (2003/88/EC).
2. As will be seen from the Working Time Directive and its replacement the provisions of this Directive are intended to lay down minimum "safety and health requirements" for the organisation of working time.
3. The Regulations require that workers be afforded minimum periods of daily rest, weekly rest and annual leave, together with minimum breaks and maximum weekly working hours.
4. As is reasonably well known the maximum hours which may be worked in a week by most workers is 48<sup>1</sup>. The worker concerned may opt out of this. The "opt-out" provision is a concession which the United Kingdom have taken advantage of in terms of implementation of the directive (see article 22 of the directive 2003/88/EC).

**The Regulations**

5. The WTR came into effect on the 1<sup>st</sup> October 1998 and apply to "**workers**". A **worker** is defined as an individual who has entered into or works under a contract of employment or any other contract, whether express or implied, whereby the individual undertakes to perform or to do personally any work or services for another party<sup>2</sup>.

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<sup>1</sup> Regulation 25A allows for 52 hours:

(a) in the case of doctors in training who are employed in an employment falling within Table 1 of Schedule 2A, with effect from 1st August 2009 until 31st July 2011; and

(b) in the case of doctors in training who are employed in an employment falling within Table 2 of Schedule 2A, with effect from 2nd November 2009 until 31st July 2011.

<sup>2</sup>For the full definition see Reg 2 of the Regulations

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**Working time** means:

- (a) any time during which the individual is working at his employers disposal and carrying out his activity or duties;
- (b) any period during which he is receiving relevant training; and
- (c) any additional period which is to be treated as working time for the purposes of these Regulations.

6. The above Regulations have certain effects in relation to care regimes; however they are operated, where individual workers provide care to or for the benefit of an injured person or any other person requiring care.

7. The following particular aspects should be noted:

(a) **Maximum weekly working time**

Unless the worker's agreement in writing has been obtained prior to any such work being performed, a worker's working time, including overtime, in any particular reference period shall not exceed an average of 48 hours for each 7 days. The reference period over which this average should be calculated is 17 weeks either on a successive basis where that is provided for or any period if it is not provided (see Regulation 4(3)).

(b) **Daily rest**

During any period of 24 hours during which someone is employed by an employer a worker is entitled to a rest period of not less than 11 consecutive hours. This is not calculated over a reference period as in the previous paragraph but applies to each period of 24 hours.

(c) **Weekly rest period**

In accordance with Regulation 11 every worker is entitled to an **uninterrupted** rest period of **not less than 24 hours** in each **7 day**

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**period** during which he works for his employer. As an alternative an employer may determine that a worker shall receive two uninterrupted rest periods each of not less than 24 hours in each 14 day period during which they worked for the employer or one uninterrupted rest period of not less than 48 hours in each such 14 day period. In general a week starts at midnight between Sunday and Monday.

(d) **Rest breaks**

Where a worker's daily working time is more than 6 hours he is entitled to a rest break. That must be an uninterrupted period of not less than 20 minutes (Regulation 12(1) and (3)). This entitlement is to one break only in accordance with the EAT in *Hughes v Corps of Commissionaires Management Ltd* [2009] I.C.R. 345; [2009] I.R.L.R. 122.

(e) **Annual Leave**

A worker is entitled to 4 weeks annual leave in each leave year. In a leave year beginning on or after of 1<sup>st</sup> April 2009<sup>3</sup> a worker is entitled to an additional 1.6 weeks annual leave each year; totalling 28 days annual leave.

## Application

8. There are certain excluded sectors within the regulations, which would not generally include the care sector. Likewise some of the Regulations are inapplicable to a worker employed as a domestic servant in a private household. I do not believe that care workers would be classified in this way. There are also provisions under which workers work on "*unmeasured working time*" and in these circumstances the Regulations dealing with maximum weekly working time, length of night work, daily rest and weekly rest will not apply<sup>4</sup>. Those

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<sup>3</sup> Working Time (Amendment) Regulations 2007/2079 Reg 2

<sup>4</sup> *Corbett v South Yorkshire SHA*[2007] LS Law Medical 430 for a discussion of this topic and the decision of HH Judge Bullimore

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include, for instance, “*family workers*” – however again I do not believe that care workers will be regarded as “*family workers*” although I have been unable to find any definition of “*family worker*”<sup>5</sup>.

9. I should also note that, whilst it might appear from the Court of Appeal Decision in *Walton v Independent Living* [2003] EWCA 199 that care workers such as residential workers work “*unmeasured time*”, that decision concerned the National Minimum Wage Regulations, those regulations are, of course, purely domestic law. The decision of the Court of Appeal also pre-dates the decisions of the ECJ in *Jaeger* and *Dellas* (see below) and, in my view, were the Court to consider the application of the Working Time Regulations a different result would follow<sup>6</sup>.
  
10. The case of *Miles v Linkage Community Trust Limited* [2008] IRLR 602 involving a care worker sheds some light on the difficulties presented. This case involved a worker in a care home whose activities required continuous service around the clock. This triggered the rules in the WTR that allow “compensatory rest” because the worker could not take the required rest period of 11 hours in every 24 hour period. The trust conceded that it had not complied with reg 10(1) of the Regulations at the tribunal, mainly because it had not understood them. It was held that with regard to compensation for the breach, an award was not required as the Claimant had no pecuniary loss and it was accepted that there is no scope in the Regulations for injury to feelings.
  
11. Firstly because the trust was not culpable as they had taken legal advice which was incorrect and had not lacked good faith or goodwill by flagrantly imposing excessive hours or acting in flagrant disregard of the legal advice. Secondly, the date that the grievance had been presented meant the default was only for a period of approximately 8 months. On appeal, the EAT dismissed the appeal,

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<sup>5</sup>Eurostat the statistical office of the European Union has provided a definition of “family worker” which has been adopted by the EU. “*Family workers are persons who help another member of the family to run a farm or other business, provided they are not classed as employees*”. Reference has been made in **European Union Preparatory Acts, Commission staff working document, Youth: Investing and Empowering 2009**.

<sup>6</sup> See also the recent National Minimum Wages decision at paragraph 35.

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adding the tribunal cannot consider any time period before the worker has raised a grievance. Therefore, the right to compensation only arises once the worker has complained about his treatment and the employer has refused him the time off.

12. A further analysis of “compensatory rest” has taken place in the case of *Hughes v The Corps of Commissionaires Management Ltd* [2011] I.R.L.R. 100; [2011] I.C.R. D2. Following the decision of the EAT identified in paragraph 7 (d) above the case was remitted to the ET whose decision was appealed by Mr Hughes. This EAT discussed how compensatory rest under reg 24(a)<sup>7</sup> could be provided to workers, and when the provisions of reg 24(b) would apply. This case involved a security guard whose duties required him to be continuously available during a twelve hour shift. He was able to take breaks during the shift at his own discretion; however he remained on call during his rest break period. If his break was interrupted he was allowed to take his break again. It was not possible for his shift to be arranged to allow him to take an uninterrupted rest break period.
13. The Tribunal held that the breaks did not amount to compensatory rest within reg 24(a) but Mr Hughes had been given appropriate protection under reg 24(b) by offering him breaks, even though he was on call during these breaks. Mr Hughes appealed this decision and the EAT dismissed his appeal. The EAT found that under reg 21 there are special cases where the worker was not entitled to a rest break during his shift. In such circumstances the employer was obliged wherever possible to allow the worker to take an “equivalent period of compensatory rest” under reg 24(a).
14. The rest actually afforded to Mr Hughes amounted to an “equivalent period of compensatory rest”. He was freed from all aspects of his work apart from the

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<sup>7</sup> **24. Compensatory rest**

Where the application of any provision of these Regulations is excluded by regulation 21 or 22, or is modified or excluded by means of a collective agreement or a workforce agreement under regulation 23(a), and a worker is accordingly required by his employer to work during a period which would otherwise be a rest period or rest break—

(a) his employer shall wherever possible allow him to take an equivalent period of compensatory rest, and

(b) in exceptional cases in which it is not possible, for objective reasons, to grant such a period of rest, his employer shall afford him such protection as may be appropriate in order to safeguard the worker's health and safety.

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need to remain on the premises (which can be a feature of a “*Gallagher*”<sup>8</sup> rest break), and to be on call. He was in principle allowed a 20 minute break. He was compensated for the fact that he might be interrupted, and for actual interruption, by being allowed to choose when to have his break and starting his break again if interruption occurred. This satisfied the EAT of the requirements of equivalence and compensation. The rest actually afforded to him amounted to an equivalent period of compensatory rest. The EAT found also that the Claimant has been paid for his shift and is not entitled to extra payment because he has not received the “*Gallagher*” rest breaks as was his contention.

15. *In Hughes v The Corps of Commissionaires Management Ltd* the Court of Appeal<sup>9</sup> has recently upheld the EAT's decision that compensatory rest need not meet all the requirements laid down by the Court of Appeal in *Gallagher* but should come as close to meeting these requirements as possible.
  
16. The likely approach of the Courts (particularly the ECJ) to attempts to avoid the impact of the WTR is illustrated by the decision of the ECJ in the 2006 case of *Commission v United Kingdom* (Case C-484/04) which dealt with defective implementation of the Directive. It also led to criticism of the DTI guidance as to the interpretation of the legislation and emphasised that these rights were entitlements of workers. The detail of the case is outside the ambit of this note but the case is useful in emphasising that the directive imposes “*clear and precise obligations on the Member States as to the result to be achieved by such entitlement to rest*”
  
17. In accordance with Regulation 21 there are other special cases in which the Regulations may not apply in quite the same way. Again I do not believe these would apply to care regimes operated in private homes but in any event by Regulation 24 compensatory rest is required to be provided. This view is

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<sup>8</sup> *Gallagher v Alpha Catering Services Ltd (t/a Alpha Flight Services)* [2004] EWCA Civ 1559, [2005] I.C.R. 673

<sup>9</sup> *Hughes v The Corps of Commissionaires Management Ltd* [2011] EWCA Civ 1061

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supported by the judgment of HH Judge Bullimore given in May 2007 in *Corbett v South Yorkshire SHA* [2007] LS Law Medical 430.

**Opt-Out Provisions**

18. There may be some fairly widespread belief that care workers can opt-out of the Working Time Regulations as a whole. This is not the case. Whilst they can opt-out of the maximum 48 hours working week any attempt to opt-out of any other provision is void – see **Regulation 35(1)** of the Regulations.
  
19. All those working in this field should be aware of the case of *Jaeger* (Case C-151/02), which is a decision of the European Court of Justice in September 2003. This concerns doctors working on call in a hospital. As a result of that case it is in my view plain that time "on call" at an employer's home will be regarded as working time. My view of the effect of that case is that in instances where someone is required to sleep on the premises of an employer so that they may be "on call" for the employer in relation to any disturbances during the night then it will not be possible for the same person to carry out both daytime duty and night-time duty. This is in view of the fact that they will not be able to get either the daily rest or the weekly rest they are entitled to.
  
20. It may just be possible to argue that in cases where there is little or no likelihood of the individual being disturbed and the only reason why they sleep on the premises is an absolute long stop against the individual concerned either requiring assistance or being at risk during the night, then it may be that the time spent asleep could be counted as a rest period. However this would have to amount to at least 11 hours out of the 24 hour period if it was to comply with the Directive.
  
21. The Northern Ireland Court of Appeal recently ruled that interrupted rest breaks do not amount to 'on-call' time in the case of *Martin v Southern Health and Social Care Trust* [2010] IRLR 1048. The Court held that a nurse was not on call during her rest breaks even though the employer could not guarantee that her breaks would be uninterrupted. Whilst it is possible that this could be applied to



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the 11 hour rest period under the Directive, this would not appear to be the case if the effect of the same is that the employee is “on call” throughout the period of rest. It is plain that it was not intended that it should cover “on call” periods, as per Lord Justice Coghlin at paragraph 23:

*“In our view the provision of such breaks is conceptually quite distinct from 'on call' duty in the course of which the employee remains 'at the disposal of' the employer.”*

22. The decision of the EAT in *Vasquez-Guirado v Wigmore* UKEAT/0033/05/RN (transcript available on *Lawtel*) suggests that in this situation the time “on call” would be counted as “working time”. Further, domestic support for this approach is provided by *MacCartney v Oversley House Management* [2006] ICR 510 – EAT and *Anderson v Jarvis* (EAT SC – *Lawtel* 22nd August 2006). In relation to domiciliary care workers the case of *Corbett* referred to above is also supportive of the view that this would be working time.

### **Personal Injury Quantum Cases**

23. Live-in care packages which have been suggested by Defendants have been found to be unlawful in the cases of *Iqbal v Whipps Cross University Hospital NHS Trust* [2007] P.I.Q.R. Q5 and *Corbett*. In *Iqbal* it was found that the agency carer would not receive a rest period of not less than 11 consecutive hours in each 24 hour period as required by regulation 10(1); therefore the night hours would not count towards this rest period as the carer will be on duty. In *A v Powys Local Health Board* [2007] EWHC 2996 (QB), the claimant obtained advice regarding the position in Ireland. The Irish implementation of the Directive only differed slightly from the English Regulations and did not include the opt-out provision. The advice obtained was clear that the regime proposed by the defendant would be in breach of the Regulations.

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24. Whilst the European Commission have proposed alterations to the Directive in order to provide for a new category of “inactive” on-call time<sup>10</sup>. The legislative process has not yet been concluded. At the Meeting of the Council of Ministers in November 2006, proposals made by the Finnish Presidency to resolve the issue were rejected. It seems that the process was stalled by the refusal of some to accept the UK opt-out in relation to maximum working hours being extended. A period of negotiation followed but on 27 April 2009 the negotiations fell. The collapse means that the Directive will for the present remain as it is now; keeping the individual’s right to opt-out.
25. In March 2010, the Commission launched a first-stage consultation with the EU-level Social Partners<sup>11</sup> on certain aspects of the Working Time Directive. There was an overwhelming response to the first consultation and accordingly, in December 2010, the Commission launched a second stage of consultations with the Social Partners, suggesting either a
- (a) ‘focused’ review, limited to the issues of on-call time and compensatory rest, or;
  - (b) a wider-ranging ‘comprehensive’ review. This would cover the two above topics, and also other issues such as:
    - individual opt-out from the directive’s 48-hour maximum working week;
    - greater flexibility in working patterns;
    - work–life balance;
    - autonomous workers;
    - workers with multiple contracts;
    - specific sectoral problems;
    - paid annual leave.

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<sup>10</sup> See the [Department for Business Innovation and Skills](#) website - reference above

<sup>11</sup> Representing business, management and trade unions. Includes BusinessEurope, CEEP and ETUC etc. See: <http://www.eurofound.europa.eu/areas/industrialrelations/dictionary/definitions/EUROPEANSOCIALPARTNERS.htm>

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26. The Social Partners were asked to respond to the second consultation by end February 2011. In responding to the second consultation, the Social Partners notified the Commission that they were interested in trying to negotiate between themselves a suitable revision of the directive, in line with the provisions of Article 155 TFEU, which provides them with such scope.
27. The Commission is thus still waiting to hear from the Social Partners as to whether they intend to initiate the process in Article 155. If the Social partners activate Article 155, they will have 9 months during which to attempt to reach agreement on the review. This may result either in new rules implemented through collective bargaining, or, more likely, the Social Partners would present the Commission with their agreement, which the Commission would then wrap up in a skeleton directive, to be adopted by the Council.
28. The Commission may yet itself launch its own legislative proposal if the Social Partners reject the idea of using Article 155, or if they do activate 155 but only in relation to some of the issues that have been identified as needing review. The Commission may then choose to legislate for the balance.
29. In any event, there would inevitably be some time lag before any amendments worked their way through into domestic legislation. Of course if the Directive were amended there must be a risk, having regard to the views of other member states, that it would only be amended to deal with this issue if the UK opt-out were removed. If the effect were to be that the 48 hour week became a maximum with no opt-out then this would, in itself, have an impact on many care regimes and the way in which they could be staffed.
30. In *Dellas* – Case C-14/04<sup>12</sup> the question of whether “on-call” time might be treated differently than more intensive time worked in residential establishments and the like was considered by the ECJ. Judgment was given in December 2005. The French government had instituted a regime based on “*equivalence*” under which on call time was treated as “*working time*” but on a weighted basis to

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<sup>12</sup> Full judgment available on the ECJ website at [www.curia.eu.int](http://www.curia.eu.int)

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reflect the less intensive nature of such work. For the first 9 hours of such on call duty periods each period of 3 hours was to be treated as 1 hour of *working time* and for each hour thereafter in the same duty period only ½ hour was to be counted as working time. This would of course impact on both daily rest periods and weekly rest periods.

31. Despite the fact that the Advocate General ( a member of the Court who produces an opinion before the Full Court makes its determination) had argued for a relaxation of the definition of *working time* – particularly having regard to the moves referred to at para 23 above- the Court refused to relax the definition.
32. In my view the decision in *Dellas* reinforces the proposition that time spent on call in an employer’s home ( for instance) will be regarded as *working time* within the meaning of the directive and the Working Time Regulations.
33. Perhaps the most important paragraphs of the judgment are as follows:

*43. The conclusion must be in this context, first that Directive 93/104 does not provide for any intermediate category between working time and rest periods and, second, that the intensity of the work done by the employee and his output are not among the characteristic elements of the concept of ‘working time’ within the meaning of the directive.....*

*46. ....it is settled case-law that on-call duty performed by a worker where he is required to be physically present on the employer’s premises must be regarded in its entirety as working time within the meaning of Directive 93/104..*

*47. The fact that on-call duty includes some periods of inactivity is thus completely irrelevant in this connection.*

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34. The case of **Jan Vorel** [Case no. 437/05] reinforces the views expressed in **Jaeger** and **Dellas**. Interestingly however the Court also observed that the directives do not:

*‘prevent a Member State from applying legislation on the remuneration of workers and concerning on-call duties performed by them at the workplace which makes a distinction between the treatment of periods in the course of which work is actually done and those during which no actual work is done, provided that such a system wholly guarantees the practical effect of the rights conferred on workers by the said directives in order to ensure the effective protection of their health and safety’*

The above citation may give some comfort to those who argue that the interpretation of the National Minimum Wage Regulations should proceed, primarily, on the basis of interpretation of domestic law. A recent interpretation of the domestic National Minimum Wage Regulations came in the EAT of **South Manchester Abbeyfield Society v Hopkins & Ors**. In reversing the decision of the Tribunal, the EAT held that not all of the hours spent on call could be taken into account for the purposes of a claim in contract under the National Minimum Wage Act. Under the Regulations there would only be a claim for the hours that they were awake for the purpose of working.

35. The recent case of **Baxter v Titan Aviation Ltd** in which Judgment was handed down by the EAT on 30<sup>th</sup> August 2011, highlighted the fact that the definition of time spent “at work” differs in the two pieces of legislation and has emphasised the potential risk in confusing 'work' for minimum wage purposes with 'working time' under the Working Time Regulations.
36. The effect of all the above is that, in my view, the concept of a "resident care worker" who is expected to work during the day and be on call in the night (particularly in circumstances where there is any real likelihood of being required at some stage during the night) is one that is quite unlikely to fit within the Regulations.

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**Annual Leave**

37. The regulations used to provide that every employee shall be entitled to 20 days paid holiday per year<sup>13</sup> (or pro rata for part time workers since the entitlement is expressed in weeks rather than days). The regulations have now been amended and from April 2008 a further 4 days (.8 of a week) was provided for with a further 4 days from 1<sup>st</sup> April 2009 so that thereafter every *worker* will be entitled to 28 days paid holiday per year. In effect this means that cover will have to be provided for employees on holiday for an extra 1.6 weeks per annum.
38. Recent decisions of the ECJ in *Stringer v HMRC; Schultz Hoff v Deutsche Rentenversicherung Bund* joined cases C-520/06 and C-350/06 [2009] IRLR 214 and *Pereda v Madrid SA* C-277/08 have discussed annual leave entitlements. *Stringer* laid emphasis on the importance of the right to paid annual leave and confirmed the right of employees to paid annual leave even when on sick leave, providing authority for the proposition that both kinds of annual leave can take place during the same time period. However, *Pereda* referring to Regulation 13(9) (a) which prevents carry over of annual leave stated that if the worker “*does not wish to take annual leave during a period of sick leave, annual leave must be granted to him for a different period.*” Therefore when an employee argues he could not take leave because he/she was ill and seeks to carry that leave over to a subsequent year, the employer is presented with a difficult situation whereby he cannot refuse the request even though regulation 13(9)(a) prevents carry over. This approach, by extension seems troublesome because it raises the possibility of a worker phoning in sick whilst on annual leave claiming an entitlement to reschedule.
39. Regulation 16 allows for a worker to be paid in respect of any period of annual leave to which he is entitled under regulation 13 (and regulation 13A) at the rate of a week's pay in respect of each week of leave. s222 of the Employment Rights Act 1996 defines the calculation of this entitlement. In accordance with the Act,

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the amount of a week's pay is the amount of pay for the average number of weekly normal working hours at the average hourly rate of remuneration. This could be interpreted to include any weekend enhancement.

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**7<sup>th</sup> September 2011**

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<sup>13</sup> See WTR reg13