Editorial News

Working Time Directive – A Storm in a Teacup?

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No one can say that they were surprised by the recent ruling of 12 November 1996 delivered by the European Court of Justice (ECJ) on the United Kingdom's challenge to the legal basis chosen for the adoption of the Working Time Directive. The ECJ decided to follow the Opinion of its Advocate General delivered on 12 March 1996 and dismissed the UK's challenge. The ECJ held that Article 118A EC Treaty, which encourages improvements in the working environment as regards the health and safety of workers and requires a qualified majority vote in the Council of Ministers, was the correct legal base for the adoption of the Directive and that, as a consequence, the organisation of working time is part of the health and safety of workers. The Court did, however, rule that there was no substantiation to the fact that the minimum period of weekly rest should comprise a Sunday and Article 5 of the Directive was annulled by the ECJ as a result.

Since the delivery of the Judgment, much has been said in the press and there has been a series of belligerent statements between the UK and the EC Commission. The UK has threatened to block the European Union's Intergovernmental Conference (IGC) to revise the 1993 Maastricht Treaty until is is agreed to exempt the application of the Working Time Directive to the UK. The UK has also tabled amendments to Article 118A at the forthcoming IGC. The President of the Commission has responded to the UK's position by stating that the Commission stands firmly to its Social Agenda as outlined in its opinion to the IGC and which was adopted last year, and that the UK should hurry up and introduce legislation to implement the Directive which was supposed to have been transposed into national law by 23 November 1996.

That date has now passed and, at the time of writing, the UK has not passed any implementing legislation or published a consultation document for public discussion. The implications of this "no action" is that from 23 November 1996, employees have rights under the Directive and for public sector employees these will be of immediate effect and directly applicable. This is because, as has been established by a long line of ECJ case law, Member States cannot rely on their own wrong in not implementing directives in time and thereby deny rights to individuals who would otherwise have benefited from provisions in directives which give individuals clear, unambiguous and unconditional rights. Many of the provisions of the Working Time Directive are directly effective (minimum rest periods, maximum working week, minimum paid annual holiday, etc) and are now directly applicable to workers in the public sector. The public sector has been broadly defined by ECJ case law to apply to "emanations of the State" which includes bodies such as NHS Trusts, Further and Higher Education bodies and nationalised industries. The UK's two opt-out derogations to disapply:

- a maximum working week to employees who give their consent to work more than 48 hours; and
- the requirement that employees have a minimum of four weeks paid annual leave (but at least three weeks paid annual leave)

can only be triggered once the UK has transposed the Directive into national law and informed the EC Commission of its option to use there derogations. So far these options are not available to the UK since it has not implemented the Directive. Workers can, therefore, only work 48 hours per week and have four weeks paid annual holiday.

What of the rights of private sector workers? They do not enjoy directly applicable rights under the Directive but, like their public sector counterparts, benefit from the principle of Member State liability for infringements of EU law under which Member States must make good any loss or damage caused to individuals (whether from the public or private sectors) for breaches of this law. Under this principle, an action can be brought for damages before the national courts in both cases (public and private sector employees) against the State (private sector employees cannot bring an action against employers in the private sector). Although this principle is new — the implications of state liability for breaches of EU law could potentially be enormous.

Going back to the Working Time Directive, is this not just a "storm in a teacup"? The Directive is so full of opt-outs, derogations and exclusions that one questions its worth. The text has been described by the Confederation of British Industry (CBI) as "gobbledegook" precisely because of the Directive's patchwork text and exclusions and derogations. Good employers will not be affected by the terms of the Directive and bad employers will always be bad. The CBI has also accepted that the new rules will make very little difference to existing working patterns. The UK's objection to the Working Time Directive is more on a point of principle. However, the UK suffered a double defeat at the ECJ because, instead of having a piece of EU social legislation knocked down by the Court, the UK has opened the door for the EC Commission to put forward a raft of fresh legislation. It has also given the Commission the green light to come forward with plans to extend rules on working time to workers excluded from the Directive such as those in the transport sector, doctors in training and employees in prisons and hospitals. The Commission's White Paper on these "Excluded Sectors" is expected to be published in December 1996.

While we agree that the text of the Directive may not have great practical effect and therefore

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commentators who are against the Working Time Directive have a valid argument that there is no point in having worthless legislation; on the other hand it is hard to make strategic sense out of the UK government's crusade against the Directive since domestically it looks like an attack on working people. In the run-up to an election in which the government needs every vote it can get, this must be a self-inflicted wound. In the meantime, the UK should start its consultation with interested parties regarding the contents of its implementing legislation and try to fill the vacuum and clarify the uncertainty which have been left through the lack of implementing legislation. The ECJ decided that the Directive did apply to the UK and until that decision is over-turned by any change to the EC Treaty at the next IGC, the government is stuck with it and should press on with implementing legislation as soon as possible.