EELC 2018/45 The limits to checking emails out of business hours (IR)

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Summary

In a recent decision, the Labour Court awarded an employee € 7,500 for working in excess of 48 hours a week, contrary to working time legislation. The complainant allegedly regularly checked and responded to emails outside of business hours, occasionally after midnight. The Labour Court reiterated it is the employer's responsibility to ensure that employees are not permitted to work beyond the statutory maximum period and that if an employer is aware that an employee is working excessive hours, must take steps to curtail this.

Background

The complainant, Ms O'Hara, joined Kepak (the respondent), a leading food processing company, in July 2016 as a business development executive. Ms O'Hara was expected to work, per her contract of employment, for 40 hours per week over a five day period.

A significant part of Ms O'Hara's working week was spent out of the primary base visiting with customers, clients, suppliers and distributors of Kepak.

Ms O'Hara's employment ended on the 14 of April 2017. She brought a claim to the Workplace Relations Commission ('WRC') under the Organisation of Working Time Act 1997 (the 'Act'). Ms O'Hara's claim was that she worked well in excess of her contracted 40 hours per week and well in excess of the maximum weekly working hours permitted under the Act.

The law

Sections 15 and 16 of the Act implement Article 6 of Council Directive 93/104/EC and provide that an employer shall not permit an employee to work for more than 48 hours a week. The averaging period, which should only take account of time spent carrying on the activities of work, is:

i. two months for employees who are night workers;
ii. four months for most employees;
iii. six months for certain activities and employments, such as agriculture and tourism; or
iv. up to 12 months for employees covered by a collective agreement approved by the Labour Court.

Section 25 (1) of the Act states:

> *"An employer shall keep, at the premises or place where his or her employee works or, if the employee works at two or more premises or places, the premises or place from which the activities that the employee is employed to carry on are principally directed or controlled, such records, in such form, if any, as may be prescribed, as will show whether the provisions of this Act are being complied with in relation to the employee and those records shall be retained by the employer for at least 3 years from the date of their making."*

Section 25(4) states:

> *"…where an employer fails to keep records under subsection (1) in respect of his or her compliance with a particular provision of this Act in relation to an employee, the onus of proving, in proceedings before a rights commissioner or the Labour Court, that the said provision was complied with in relation to the employee, shall lie on the employer."*

Under section 27 (3) of the Act, a decision of an adjudication officer in relation to a complaint of a contravention of a relevant provision of the Act (which includes sections 15 and 16) shall do one or more of the following:

a. "declare that the complaint was or, as the case may be, was not well founded,
b. require the employer to comply with the relevant provision,
c. require the employer to pay to the employee compensation of such amount (if any) as is just and equitable having regard to all the circumstan-

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ces, but not exceeding 2 years remuneration in respect of the employee's employment."

Under section 28 of the Act, a *"decision of the Labour Court…on appeal from a decision of an adjudication officer…shall affirm, vary or set aside the decision of the adjudication officer."*

WRC hearing and decision

At the WRC, Ms O'Hara gave evidence of her weekly working hours. She outlined that she was expected to make up to five site visits a day in various locations for the purpose of promoting, demonstrating and selling merchandise to end users.

Ms O'Hara was given training on the use of a company computer and tablet for the purpose of inputting work information into a bespoke computerised programme. However, she ultimately became overwhelmed by the process. The feedback from Ms O'Hara's weekly reviews was that she always seemed to be behind her targets and was over complicating matters for herself by being too detailed in summarising site visits and being tardy with weekly reporting.

Ms O'Hara explained that she felt obliged to catch up and the only time to do this was in her own time and increasingly she would come home and work late into the evenings, over the weekends or get up early to complete her tasks. Ms O'Hara gave evidence that she would work as many as sixty hours a week to try and keep up. Ms O'Hara provided the WRC with a voluminous number of screen shots which detailed the times she was sending work related emails. The times were noted to range from anywhere from 8pm to 11pm and into the small hours of the morning. Ms O'Hara stated that each email would be preceded by a significant amount of time spent working to get them ready.

Ms O'Hara said that she did not document or complain about the amount of hours she had to put into the job as she was trying to get the work done. Ms O'Hara believed that Kepak knew or ought to have known that she was working well beyond the eight-hour day that she was expected to work.

The adjudicator considered the schedule set and considered it to be tight. The adjudicator found that Ms O'Hara was allowed about four hours face-to-face time with five separate clients spread out over a wide geographic area and was allowed a further 1.5 hours to input detail concerning what had happened at the meetings. At a minimum, Ms O'Hara must have been on the road for 2.5 hour per day. This amounted to an eight hour day with no apparent breaks and no time allowed for traffic delays, client delays, parking issues and the time taken to bring product to and from each client's door.

The adjudicator considered the case of *IBM Ireland – v – Svobdoa DWT 08/2008* where the Labour Court considered section 15 of the Act and placed emphasis on the obligation on the employer not to permit an employee to work excessive hours. The obligation created in the legislation was directed at preventing an employee from working excessive hours and not merely at prohibiting an employer from instructing or requiring an employee to work more than the permitted hours. The Court indicated that the section imposes a form of strict liability on the employer. Consequently, it is not a defence for an employer to say that it did not know that the employee was working excessive hours.

On balance, the adjudicator believed that Kepak knew or ought to have known that Ms O'Hara, in an attempt to secure this employment, worked more than her contracted hours and more than the hours allowed under the Act. Accordingly, the adjudicator found the complaint to be well founded and awarded Ms O'Hara €6,240 as compensation.

Appeal to the Labour Court

Kepak appealed against the decision in its entirety. Ms O'Hara appealed against the level of compensation awarded by the adjudicator.

Kepak told the Labour Court that it did not keep records in the format required by section 25(1) of the Act. Accordingly, the Court found that it carried the onus of proving compliance with the Act. In that regard, Kepak gave evidence of its analysis of Ms O'Hara's workload and its associated administrative requirements. Based on that analysis, it submitted that Ms O'Hara's claims were not credible and should be rejected by the Court.

The Court did not accept that this evidence was sufficient to overcome the evidence adduced by Ms O'Hara. It stated that the operative words in section 15(1) of the Act are that an employer shall not "*permit*" and employee to work in excess of 48 hours in the relevant statutory time period.

While the evidence adduced by Kepak may demonstrate that the work assigned to Ms O'Hara did not require her to work excessive hours, it did not address the question as to whether she worked them in the relevant period.

In support of her contention that she did work excessive hours, Ms O'Hara produced copies of emails to and from Kepak that were sent on a regular basis after 5pm and up to midnight. She also produced copies of emails sent after midnight and before normal starting time. She further contended that a full review of her email history with Kepak would demonstrate that this was a daily pattern of which Kepak was necessarily aware.

Kepak did not produce a full file of Ms O'Hara's emails and offered no evidence to contradict her evidence in this regard.

On the basis of the evidence before it, the Court found that Ms O'Hara's evidence was supported by the documents she adduced and nothing was produced by the other side to contradict it.

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Accordingly the Court found that Kepak was, through Ms O'Hara's operation of its software and through the emails she sent it, aware of the hours Ms O'Hara was working and took no steps to curtail the time she spent working. Accordingly the Court found that Kepak, being aware of Ms O'Hara's working pattern, and by its failure to monitor and curtail it and by its failure to keep proper records of her hours of work within the meaning of section 15(1) of the Act 'permitted' her, to work in excess of the statutory maximum hours of work in the relevant period.

Having considered the case in its entirety, the Court increased the level of compensation to Ms O'Hara to € 7,500.

Commentary

This decision illustrates the risk for an employer where its employee is found to have worked excessive hours.

It can be contrasted with the outcome of the IBM case referred to above. In that case, IBM had, on a number of occasions, taken steps to dissuade the employee from working excessive hours. It was held that the employer *"did not willingly breach the Act as the claimant greatly contributed to the situation"*. The Court found that the employer *"made a bona fide effort to bring about a state of affairs in which the claimant would cease working in excess of the permitted hours"*. In such circumstances the Court was satisfied that the breach was *"technical and non-culpable in nature and that the claimant was herself primarily responsible for what occurred"*. It made no award to the employee.

The Kepak decision perhaps illustrates a more recent shift in culture which is being seen in other jurisdictions in relation to the 'right to disconnect'.

Employers must ensure that employees do not work excessive hours. This is a mandatory obligation imposed under working time legislation. Fundamentally, it is a health and safety measure. This decision serves as an important reminder to employers to monitor working hours and to take active steps to curtail excessive working hours.

It is also a good reminder for employers to keep proper records in accordance with working time legislation. It is almost impossible to defend working time claims without records. Failing to keep proper records is also an offence.

Comments from other jurisdictions

United Kingdom (*Bethan Carney, Lewis Silkin LLP*): This is a very interesting case, which could not have arisen in the UK. The Working Time Regulations 1998 (WTR) implement the Working Time Directive (No. 93/104) into UK law. Under regulation 4(1) WTR a worker's average working time (including overtime and time spent working for others) must not exceed 48 hours per week (although it is possible for workers to opt out of this maximum by entering into an agreement). The WTR differ from their Irish counterpart, in that they do not contain any mechanism for an individual to bring a tribunal claim against an employer to try to enforce this limit or to get compensation for a breach.

It would appear that the only remedy available in the employment tribunal to a worker for breach of regulation 4 is an action for detriment or unfair dismissal if he or she is penalised for complaining about the hours or for refusing to work in excess of the 48-hour average. The High Court held in *Sayers – v – Cambridgeshire County Council [2006] EWHC 2029* that a breach of the employer's duty in regulation 4(2) did not give rise to a cause of action in the civil courts for breach of statutory duty. And another High Court decision, *Barber – v – RJB Mining UK Ltd [1999] IRLR 308*, held that, although there would be a potential breach of contract claim where a worker has been required to work in excess of the maximum, this did not provide an additional cause of action. The court held that a term in a contract requiring an employee to work in excess of the working time limit will, as a matter of law, be unenforceable. However, it declined to grant an injunction restraining the employer from requiring the workers to work additional hours. The court held that the workers had an adequate remedy under the WTR if they were subject to detriment or dismissal for refusing to work.

An employer will be guilty of a criminal offence if it fails to take reasonable steps to comply with the limits on working time or the record-keeping requirements under the WTR. It is also possible for local authority or Health and Safety Executive inspectors to issue 'prohibition' or 'improvement' notices to compel employers to comply. We are not aware of many criminal proceedings being taken against employers or many prohibition or improvement notices being issued in practice.

Germany (*Paul Schreiner and David Meyer, Luther Rechtsanwaltsgesellschaft mbH*): German employment law makes a distinction between 'working time' with the meaning of (1) health and safety protection for employees, (2) compensation and (3) co-determination by the works council. The last meaning of working time (3) is not relevant here.

Germany has similar provisions to the Irish ones concerning working time that originate from the Working Time Directive (93/104/EC), in the form of the Working Hours Act (*Arbeitszeitgesetz*, the 'ArbZG'). These provisions aim to protect employees from working more than 48 hours a week over a reference period of 24 weeks. The definition of 'working time' is different as regards compensation, as the EU lacks the competence to regulate compensation (Article 153(5) TFEU). The directive and its implementation acts do not necessarily determine whether an employee is entitled to overtime pay.

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If Ms O'Hara had been filing an action at a German labour court she would have had to show a *prima facie* case for, and possibly also evidence to back up her claim. An employee claiming overtime pay needs to prove that either s/he was requested by the employer to work overtime or that it was necessary to work overtime to manage the workload. The employer may dispute that the employee worked overtime or may dispute the need for the overtime – even if it ought to have known that it was happening. The employee bears the burden of proof, which is usually a significant problem if the employer does not provide time sheets or does not have a time-recording system. Ms O'Hara she might have been alright in this respect because she provided a bunch of emails with timestamps.

In addition, in Germany employees cannot necessarily rely on the ArbZG to solve the issues mentioned above regarding the burden of proof. According to the ArbZG the employer must record the working hours of employees exceeding eight hours per day and the records must be kept for at least two years. However, where there is no technical recording device, they are usually produced by the employee. Even if there is a technical device, in a court procedure the employee will need to produce further evidence that s/he was actually working and the employer wanted him or her to do so, or that the work necessarily needed to be done at that moment. These matters can be easier for to truck drivers for example, because the driving-time logs include data regarding the speed of the truck, breaks and loading time.

Although these evidential hurdles make it hard for employees to claim overtime pay in Germany, the employee in the Irish case might have had a reasonable chance in a similar case. If she had been successful, she would have been entitled to compensation based on the number of working hours proven.

Greece (*Elena Schiza, KG Law Firm*): The decision of the Irish Labour Court highlights the impact of new technology on working time and raises the issue of the 'employee's right to disconnect', which arises from an expanded use of smart devices by employees over and above their statutory working hours. Notably, the Irish decision was in line with new French legislation on the right to disconnect.

As the court in the case at hand found, Ms O'Hara worked more than the hours allowed under the Organisation of Working Time Act 1997, being occasionally on duty even in the small hours. The employer is under a duty to ensure its employees are aligned with any working time regulations.

The Greek Courts would have ruled in favour of Ms O'Hara in a similar case, given that the burden of the proof that the obligations set by Directive 93/104/EC, as implemented in Greece, (i.e. for an average 48-hour work week, including overtime and a minimum daily rest of 11 consecutive hours every 24 hours), lies with the employer. To this effect, recent Greek labour law strictly regulates the monitoring of working hours by means of an official notification system, whereby the employer must notify the authorities about overtime and changes to working hours on the date and hour of the change at the latest or, in any event, before the work starts. There are serious fines for breach of these rules.

There have been no cases as yet in Greece in which employees give evidence based on email correspondence after hours, but new technology presents many new challenges and employers may increasingly be faced with practical difficulties in ensuring that the statutory working hours are respected by employees.

Denmark (*Christian K. Clasen, Norrbom Vinding*): The ruling of the Irish Labour Court raises the question of what factors the national courts should take into account when determining the level of compensation for breach of national rules implementing Directive 97/104/EC on working time.

Recently, the Danish Supreme Court made its very first statement regarding the level of compensation to be awarded for breach of the Danish rules on the maximum average weekly working hours. The case concerned a truck driver who had willingly worked excessive hours.

The Supreme Court stated that compensation for breach of the rules pertains to workload and not to financial loss. The Court noted that neither Directive 97/104/EC nor the Danish Act implementing the Directive provides any guidance on how to set compensation for breach of the rules on the maximum average weekly working hours – and this was what made the Court's guidance interesting.

The Court found that as a default position, compensation should generally be DKK 25,000, unless there are specific reasons for either increasing or decreasing this amount. The Court then provided detailed guidance as to when the compensation should vary from the standard level. It specified that trivial, one-off and excusable situations might result in lower compensation. If, on the other hand, the maximum weekly working hours are significantly or repeatedly exceeded, the compensation may be increased. Another circumstance that may lead to increased compensation is if the employee has not been paid for the overtime hours. The Court stressed that the compensation should only be higher than DKK 50,000 in exceptional cases, for example, if there are a number of aggravating circumstances.

In the Danish case, the Court fixed the compensation at DKK 50,000, as the maximum average weekly working hours had been extensively and repeatedly exceeded. It is notable that the Court did not seem to attach any significance to the fact that the truck driver had willingly worked overtime at the time.

Thus, the compensation awarded in the Danish case approximates to that awarded in the Irish case, where the hours also appear to have been excessive.

Belgium (*Peter Pecinovsky, Van Olmen & Wynant*): Overtime is in principle prohibited by Belgian law, but there are multitude exceptions to this principle. The starting point is that the employer must respect the maximum working hours, otherwise criminal sanctions

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could apply. But failing that, it should follow the procedure that allows it to benefit from the lawful exceptions to the general prohibition. If there is overtime, the employer is obliged to pay in principle 50% more. It is up to the employee to prove overtime if s/he wants to claim overtime pay. Proof by the employee can be difficult as the labour courts are not eager to accept unilateral time registers or time sheets. The employee will must also prove that the overtime was worked at the request of the employer, though in practice, the labour courts often accept that the employer did not protest as proof of the employer's to let its employee work overtime. Therefore, it is advisable for employers to monitor overtime strictly if they do not want to bear the financial consequences.

Subject: Working time

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