



## **XpertHR Weekly Podcast**

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- Susan Dennehy: Hello and welcome to XpertHR Weekly with me, Susan Dennehy. The question of what counts as working time under the Working Time Regulations has recently hit the headlines following a decision of the European Court of Justice (ECJ) concerning mobile workers. The case has widely been reported as having far-reaching implications for employers in terms of both working time and pay rates, but is this in fact the case?
- To discuss the case and explore the practical implications with me this week, I'm joined by employment law editor, Laura Merrylees. Good morning, Laura.
- Laura Merrylees: Hi Sue.
- Susan Dennehy: Can you tell us firstly how this case arose? [0:00:39.3]
- Laura Merrylees: Yes, sure. Proceedings were brought in the Spanish courts by a group of mobile workers who were employed by a firm called Tyco, which installs and maintains security systems in both domestic and commercial premises throughout Spain. The workers were assigned particular regions and their day involved travelling between home and customer appointments to carry out the installation and maintenance work.
- Susan Dennehy: And these workers did not have a fixed office or habitual place of work? [0:01:02.1]
- Laura Merrylees: That's right and it's a key point. The workers were supplied with a company car and were required to travel to and from their own homes at the start and end of each day. This could involve covering distances up to 100km per day visiting customer sites.
- Susan Dennehy: So 100km, that's about 62 miles. And the workers, they didn't set their own itinerary for the day? [0:01:20.4]
- Laura Merrylees: No, this was provided to them the night before by their employer, so they were following a schedule of appointments at different locations determined by Tyco.
- Susan Dennehy: So the worker could spend quite a bit of time on the road travelling from their home to the first and last appointment and also between customer appointments. How was this travelling time regarded by Tyco? [0:01:38.1]

Laura Merrylees: Well Tyco classified the time spent travelling between customer appointments as working time, but not the time spent travelling between home and customer appointments. This was classified as rest time, and as such, it didn't count towards their total working time.

Susan Dennehy: The ECJ were concerned that the distinction would distort the concept of rest time and jeopardise the health and safety of workers. Now might be a good time just to remind our listeners about what counts as working time under the Working Time Directive, which was implemented by the Working Time Regulations. Can you just remind us, what is working time? [0:02:07.2]

Laura Merrylees: Of course. The Working Time Directive defines working time as any period during which the worker is working at the employer's disposal and carrying out the employer's activity or duties. So any period that is not working time is regarded as a rest period and the two definitions are mutually exclusive. There's no halfway house between the two. And I think it's important to highlight here that the Working Time Directive is first and foremost a health and safety measure and this really underpins the context of these proceedings.

Susan Dennehy: So what was an issue here was whether leaving home to travel to the first customer appointment and from the last customer appointment to home, time when the workers were at Tyco's disposal and carrying out the activities and duties of their job because the employer set the order of appointments, was working time or rest time? [0:02:48.6]

Laura Merrylees: Yes, that's right.

Susan Dennehy: So the case went to the European Court of Justice. What did the court decide? [0:02:53.6]

Laura Merrylees: Well the court found that the time spent by the mobile workers travelling between home and their first and last assignment of each day counts as working time. The court found that this travelling time is an integral part of being a worker without a fixed or habitual place of work and this is not affected by the fact that workers begin and finish these journeys at their homes.

Susan Dennehy: And the fact that these workers could choose the routes that they took to get to and from their home and the first and last appointments, that didn't make a difference? [0:03:18.8]

Laura Merrylees: No. It was a point that the court considered but ultimately it was satisfied that this was still time at which the worker was at their employer's disposal. In practical terms, there will always be a period of necessary travelling time to get to and from the first and last appointments of the day, which generally can't be shortened.

Susan Dennehy: You can see how there could be a concern that this might be open to abuse. [0:03:37.0]

Laura Merrylees: Absolutely but if an employer believes that time is being abused by a worker to conduct their personal business, then an employer would need to put in place appropriate measures, such as monitoring procedures. Lots of mobile workers already have vehicles tracking devices, tachographs or have a fuel account which shows what's

incurred on customer trips. So all of these measures could help to highlight any potential issues.

Susan Dennehy: The decision's about mobile workers who do not have a fixed or habitual place of work. Most workers are going to have an office or centre they work out of. So in practice Laura, which workers are likely to be affected by this decision? [0:04:09.7]

Laura Merrylees: Well, as you say, the decision affects mobile workers who do not have a fixed or habitual place of work. So looking at the type of role that might be affected, this could capture thousands of mobile workers. We're looking, for example, at field sales forces, care workers, field technicians, gas fitters. Any employer who employs mobile workers will need to look at the implications of this decision for their business.

Susan Dennehy: And can you take us through those practical consequences? [0:04:32.3]

Laura Merrylees: Yeah, of course. Well, the first one centres around what time currently counts as working time for mobile workers. On the back of this decision, employers will need to check that they're classifying this time correctly, so that they comply with the limits on working time in the Regulations.

Susan Dennehy: And just to remind our listeners, what are those limits? [0:04:48.1]

Laura Merrylees: Okay, so there are two key features. Firstly, the 48-hour average working week and secondly rest breaks. So looking at the 48-hour average working week, employers will need to be sure that this is not now exceeded and if it is exceeded, or looks likely to be so, employers will need to use opt-out agreements if these aren't already in place. But it's important to remember that opt-outs are voluntary, so if a worker doesn't want to enter into one, they don't have to. And if that's the case, it's down to the employer to ensure that the 48-hour average is not exceeded.

Susan Dennehy: Well you mentioned two key features there. What about the second feature you mentioned about rest breaks? How will this decision impact on rest breaks? [0:05:23.2]

Laura Merrylees: Well there are a number of rest periods under the Regulations. In a nutshell; a daily rest period of eleven hours; a weekly break of 24 hours; and during the course of a working day, a twenty-minute rest period after six hours. So employers will need to check that these breaks will now operate as they should, bearing in mind that time starts to count when a mobile worker leaves and arrives home each day.

Susan Dennehy: So to try and limit the impact of this decision, the first thing employers might want to consider doing is scheduling the first and last appointments of the day as close to the worker's home as possible to cut down on working time? [0:05:51.5]

Laura Merrylees: Yeah, that's right.

Susan Dennehy: And what about pay, Laura? What is the effect on pay as a result of this decision? [0:05:56.4]

Laura Merrylees: Well it's important to remember that this case was not about pay, and the court made it clear that pay was a position for the national courts. So in terms of the UK's legislation, there is in fact no connection between the national minimum wage legislation and the Working Time Regulations. It's important to remember that under the National Minimum Wage Regulations, time which is spent travelling between home and a worker's place of work or (and this is absolutely crucial here) any place where an assignment is carried out, does not count as what's known as 'time work' for the purposes of the national minimum wage.

Susan Dennehy: So this case was about working time and not pay under the national minimum wage legislation? [0:06:31.9]

Laura Merrylees: Absolutely.

Susan Dennehy: We have lots of resources on our website on working time, including a law report on the actual case. Can you point us to some of the other key resources that we have? [0:06:39.7]

Laura Merrylees: Sure. If you think you may need to approach your workers about an opt-out agreement, we have a how-to guide taking you through that process and also a sample opt-out agreement in our policies and documents section. If you're at all unsure about what parts of the day or role count as working time, our quick reference guide has a useful table on what does and doesn't count. And if you want a more in-depth view, well you can find this in our employment law manual on the topic of working time.

Susan Dennehy: Thank you very much for that, Laura.

Laura Merrylees: Thank you.

Susan Dennehy: That wraps up our look at working time for this week and that brings us to the end of this week's XpertHR Weekly, which you've been listening to with me, Susan Dennehy. We're back again next Friday but until then it's goodbye from us.