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BEERG - Europe:

European Court: Employers could be taken for a ride

In last week's issue we reported on an opinion from the Advocate General of the Court of Justice of the European Union (CJEU) that, for workers with no fixed place of work, time spent travelling to their first assignment of the day should count as working time.

Since we published that piece a number of you have been in contact to ask, if the opinion is endorsed by the CJEU in its judgement, due in several months, will it:

- ***...be retrospective and for how long?***
- ***...how far can an employee live from their area of work?***
- ***...what impact would counting travelling time as working time have on break schedules?***



Vince Toman of Lewis Silkin has been looking at some of these issues. He writes: Many people hate their daily commute from home to work each morning, lost time before work actually begins. But for some, such a journey may be about to become profitable and could actually shorten their working day. But at a potentially significant cost to their employer.

According to the CJEU Advocate General, if you have no fixed place of work, you are working as soon as the car backs out of the garage and therefore earning between home and your first job (***see BEERG Global Labor Newsletter Issue 20***). This opinion of the Advocate General could have major cost consequences for businesses that pay

by the hour and have home based workers that travel to other locations to perform their duties.

That “escape to the country” in search of a different lifestyle, which until now simply lengthened the daily commute, may now make no difference to an employee’s working day. Once you are in the car, you are on the clock. It will, of course, have an effect on an employer’s profitability but that does not appear to be a consideration the ECJ have taken into account.

What is more concerning is that there is no guidance in the opinion as to whether this rule would be backdated. Another issue which clearly is not foreseen in this opinion is that it will force employers to give careful consideration to employing workers whose home location would involve a considerable drive before they commence “real work”, if the legal definition of “work” just means crossing the front door threshold. It is time for employers to look at how they manage such home-based workforces.

If the opinion is upheld by the CJEU it will certainly prompt retrospective claims against employers given that tribunals can waive the three month time bar that usually blocks a claim. Employers in the construction industry should take note of this opinion as it could result in additional costs related to travelling time to the site (double time on Sundays).



Finally, could employers circumvent this ruling by ordering employees to report to a depot each morning – and only then to customer locations? Would this depot count as a ‘fixed establishment’ at which the working day begins?

Legal bit.

Both the EU’s Working Time Directive and the UK’s Working Time Regulations are silent on whether travel to or from a place of work, or between places of work, count as ‘working time’. In Spanish national law, time spent travelling between a worker’s home and workplace is excluded from this category. However, when Spanish workers brought claims against two companies who had assigned them to Madrid and refused to pay them to travel from home to and from client assignments in the regions, the Spanish court referred a question to the CJEU to check whether national law was in compliance with the Directive.

Ahead of the CJEU judgment itself, the CJUE’s Advocate General Bot has given his opinion. The CJEU is not bound by such opinions, but usually follow them nonetheless. Bot notes that if workers spend time: 1) at the workplace; 2) at the employer’s disposal; and 3) are carrying out their activity or duties, their time is ‘working time’.



Bot held that travelling to locations designated by the employer is an inherent part of a peripatetic worker’s activities and counts as being ‘at work’ and ‘carrying out their activities and duties.’ Bot also believes that such employees are at their employer’s disposal during these journeys since the employer still has authority to change the order of customers or cancel and add appointments. It follows that this time counts towards the 48-hour working time limit.

An ECJ judgment agreeing with the AG’s opinion could have significant cost implications for employers and have other unexpected effects.

You can contact Vince at: Vince.Toman@lewissilkin.com

EU: Commission scraps Maternity Leave Directive revision

The EU Commission has dropped proposals to update the twenty-year old law on maternity leave, after nearly seven years of deadlock between the European Parliament and the Council of Ministers. The Commission has said it will table a ‘roadmap’ to reform maternity leave

provisions in its Work Programme for 2016, in a bid to "make a clear break from the current stalemate".



In a statement on Wednesday (1 July), the Commission said that with "no prospect of progress", the bill would now have been withdrawn along with 73 other draft laws on which no agreement was reached by the end of the last 2009-14 legislature.

Originally tabled by the Barroso Commission in 2008, the revised directive sought to extend paid maternity leave from 14 to 18 weeks, six weeks of which would have been at full pay and the remaining 12 weeks at 85 percent pay. The parliament proposed to extend minimum maternity leave in the EU to 20 weeks with full pay, a position opposed by a handful of governments -

UK, Germany, the Netherlands, Hungary, Sweden, Malta, Latvia, and Ireland - who formed a blocking minority.

The Parliament had also called for six weeks of compulsory leave after childbirth, and at least two weeks of paid paternity leave for fathers.

While a number of governments argued that the proposed increase would increase the burden on small businesses, others criticised the legal basis of the Commission proposal, which was restricted to women's health rather than as social protection, meaning that paternity leave fell outside its scope, something the parliament wanted to include.

Strikes: Ryanair want air traffic control strikes outlawed



The Irish-based budget airline, Ryanair, has launched a petition calling for the removal of the right to strike for European air traffic controllers as French controllers call off a planned two-day strike and Spanish controllers threaten several days of disruption in July.

Strikes by French and Spanish controllers in July are now a recurring feature of the summer months. Ryanair said that when the petition - Keep Europe's Skies Open: www.keepeuropesskiesopen.com - reaches 1m signatures it will present it to the European commission and urge it to take action.

A second option proposed by the petition is that controllers from other European countries should be allowed to manage flights over French airspace during strikes to minimise cancellations for travellers crossing France to other countries. The second option may be the more realistic of the two as the European Commission has no legal authority when it comes to the right to strike. The European Treaties explicitly rule out EU legislation on the issue.

Further, Ryanair's campaign will be severely undermined by its reputation across Europe as a robust non-union company. It has fallen foul of the law over its labour practices in several countries, Denmark being the most recent. (*See below*)

Ryanair's chief marketing officer, Kenny Jacobs, said: "It's unacceptable that Europe's consumers repeatedly have their holiday and travel plans disrupted or cancelled by the selfish actions of ATC unions every summer, who use strikes as a first weapon rather than a last resort. If the EU won't listen to the airlines, perhaps they'll listen to Europe's citizens."

The airline proposed that controllers would still be allowed to join unions and to negotiate through mediation or binding arbitration but, like their counterparts in the US, they would not be allowed to strike.

MEANWHILE, a Danish labour court has ruled that Danish unions are entitled to strike Ryanair in order to force the company to sign a collective agreement for staff on airplanes operating out of the company's Copenhagen base, which opened earlier this year. Ryanair

argued that the planes were "Irish territory" and that, as such, workers on board were subject to Irish employment laws. The Danish court rejected the argument and said that the unions were entitled to push for a Danish collective agreement. In response, Ryanair announced the closure of its Danish base and said that flights into and out of Copenhagen would operate from elsewhere.

UK: Cameron kicks-off EU renegotiation but still won't say what he wants



Thursday night last, June 25, UK Prime Minister, David Cameron, finally got the opportunity to raise with other EU government leaders his proposal to renegotiate the terms of the UK's membership of the European Union.

In between two very tense debates, one on the migration crisis in the Mediterranean, the other on Greece, Cameron was given 10 minutes to make his pitch. However, we still don't know what he is looking for.

He raised four headline issues: cutting the phrase "ever-closer Union" from the treaty; making the single market more competitive; protecting the UK, which isn't part of the Eurozone, from decisions by the euro group; and curbing welfare for EU nationals who move to Britain. What these demands mean in practice and whether they entail a new opt-out for the UK from EU employment and social legislation is unclear.

One thing is certain. There will be no treaty change before the UK votes in a referendum on EU membership in 2016 or 2017. Cameron told the press after the EU summit in Brussels on Friday (26 June) there won't be time for 28 governments to ratify a new treaty before the in/out referendum deadline of end-2017. But he said it's normal to make big decisions on the basis of partly-ratified texts, citing the Irish referendum on the Lisbon Treaty as an example.

"This is the usual way to proceed. What matters is the substance. What matters is the deal. What matters is what we get", he said. Having outlined the four demands detailed above he added: "Our membership of the Union will, once again, have the common market at its heart. We'll have gotten off the treadmill of ever-closer Union ... it will be a new and different membership".

Cameron's position was somewhat undermined, however, by a leak to The Guardian (here: <http://goo.gl/S6EdV0>) the previous day, however. The British daily published excerpts from a diplomatic note summarising one of his bilateral EU meetings. The note says Cameron told his interlocutor his "firm aim was to keep the UK in the EU" and that "people will ultimately vote for the status quo if the alternatives can be made to appear risky". It adds that, short of treaty change, he'd settle for a protocol "to change the treaties in due course".

AMEERG - Middle-East and Africa

Africa: Some headlines from the global union websites

Barclays

A meeting of the UNI Barclays Alliance took place in Dar Es Salaam, Tanzania from the 23rd to the 25th of June 2015, bring together union leaders from Italy, South Africa, Zimbabwe, Botswana, Nigeria, Ghana, Tanzania as well as UNI Global Union Finance and UNI Africa.

One year after the kick-off meeting in Ghana, the core group of the Alliance took stock of the progress made so



far and developed new plans for the Alliance and the countries in the second part of the LO-TCO funded initiative.

The Alliance plans to ask Barclays Africa CEO Maria Ramos to issue a "neutrality" letter allowing all the employees working for Barclays in Africa to join freely a union without fear of victimization. It is also developing a country by country organizing plans and a global plan for the Alliance to strengthen the exchange of information between workers across borders and run joint campaigns.

The Alliance is also calling for the renewal of negotiation of a Global Framework Agreement with the company to "raise the bar across the board."

East African unions join forces to tackle common issues

IndustriALL Global reports that East African unions have joined together to "build stronger trade unions, fight against precarious work and advocate for better occupational health and safety in the region." On 5 June, the IndustriALL East Africa union building project, funded by Danish central organization LO-FTF, was launched in Tanzania.



The project aims to make trade unions in the manufacturing and mining industries in Kenya, Tanzania, and Uganda stronger through national and international cooperation. "Stronger unions can better defend their members, improving working conditions and health and safety at the workplace", says IndustriALL

IndustriALL Global Union affiliates in Kenya, Tanzania and Uganda call on their governments, employers, workers and all other stakeholders to cooperate with trade unions in dealing with the explosion in precarious work, as well as to work towards minimizing diseases and accidents in the workplace. This should be done through legislation and collective bargaining.

The specific objectives of the East African union building project include:

- Organizing and recruiting workers into trade unions, after which the employers also need to recognize the unions
- Eliminating precarious work and short term contracts
- Reducing health and safety related risks and incidences at work

Hotels



The IUF says that union leaders from seven French-speaking West African countries came together in Cotonou, Bénin for an IUF sub-regional seminar to develop common strategies for organizing and bargaining within transnational hotel chains.

Participants from Bénin, Burkina Faso, Guinea, Ivory Coast, Mali, Niger and Senegal met from June 25 to 27 at the Cotonou Novotel - where the union last year secured a first collective agreement after a long struggle.

The IUF says that "...despite the importance of tourism in each of these countries' economies, none have specific legislation in place to protect tourism workers.

Participants discussed the potential uses of International instruments such as ILO Convention 172 on working conditions in hotels and restaurants and the OECD Guidelines

<http://goo.gl/42sm0f> to support organizing, combating sexual harassment in tourism and the IUF global housekeeper initiative and developed a two-year work plan including an organizing focus on hotel chains, negotiating national sectoral agreements and pressuring governments to ratify Convention 172."

GLOBAL:

Malaysia: "God only knows"



Faced with the necessity to cut jobs, most executives will cite competitive pressures, the need to reduce costs, technological change or adverse market conditions.

However, when commenting on Malaysia Airlines (MAS) rescue plan, which sees 6,000 jobs go, University of Malaysia academic, Prof Datuk Dr Zainal Kling, came up with a new wrinkle. He said the jobs cuts resulted from 'divine will and decree'.

Unfortunately, Kling did not explain how he knew this nor did he outline the correct procedure to be followed when an executive needs to consult the "divine will" as to whether or not proposed job cuts are justified.

This makes it unlikely that submissions to European labour courts that collective redundancies are underwritten by the "divine will" will be entertained. Still, it could be worth a try. Maybe some of our friends in the IT sector could let us know if it is possible to "reach out" to the "divine will" through cloud computing, as our illustration suggest.

Kling also said that in the airline industry, it was "difficult for the players to predict the future." Presumably by this he means that the airline industry is an exception and that "the players" in every other industry have no difficulties with such predictions.

China: Foxconn to replace 30% of workforce with robots



Foxconn chairman Terry Gou said he planned to replace 30% of the workers on the production lines with robots in five years' time.

Gou said he wants to cut the number of staff in the repetitive, monotonous work of putting together mobile gadgets including Apple's iPhones, and he plans to shift that 30% of workers to sales and software design positions.

"I am not replacing jobs with robots," Gou said during the annual shareholders meeting on June 25. "I am having workers do work that require thinking."

Gou's statement came as the tech giant has been developing robotics technology for automated production, an area the executive has identified to be the company's core businesses in the future. His comments were also a response to continuing criticism by labor rights groups that working conditions for the one million workers at the company's facilities in China remain harsh.

Concerns about conditions at Foxconn's factories first came to light in 2010 when a string of suicides occurred on its Shenzhen campus in south-eastern China. Labor rights groups attributed the suicides to less-than-ideal conditions within the facilities, including military style management, low wages and long overtime hours. Apple, Foxconn's major customer, engaged the Fair Labor Association to audit the facilities and since then the company has been working to upgrade conditions.

China: Supreme People's Court issues draft meeting minutes on labor issues



The China team at Baker & McKenzie report: In April 2015, the PRC Supreme People's Court issued draft Meeting Minutes regarding civil cases ("Draft Minutes") for public comment; the Draft Minutes provide guidance on several labor issues.

The Draft Minutes provide two contrasting opinions regarding remedies for employees when the employer fails to sign an open-term contract as required by law: one opinion is that when an employee is entitled to and demands an open-term employment contract and the employer refuses to sign such a contract, the employer should be deemed to have entered into an open-term contract.

The other opinion under the Draft Minutes is that the employee could sue for financial remedies for wrongful termination (i.e., double statutory severance). The Draft Minutes did not indicate which position the Supreme People's Court is more inclined to take. Its position on this issue would likely have a significant impact on local practices which are currently varied.

The Draft Minutes also provide that unless otherwise agreed in the employment contract, the court would support the employees' wrongful termination claims where the company terminates the employees under a "forced ranking" system (i.e. terminating an employee if an employee's performance ranking is the lowest in a group).

Under PRC law, to terminate an employee based on the grounds of "incompetence," the employer has the burden of proof to demonstrate that the employee is incompetent (with objective evidence), and that after training or changing roles, the employee remains incompetent.

Many local judges have questioned the forced ranking system since employees at the bottom of a group are not necessarily objectively incompetent. However, the Draft Minutes appear to suggest that such terminations would otherwise be upheld if the employee's employment contract specifically provides for a forced ranking system.

In addition, the Draft Minutes provide that if the employer has enrolled the employees in the social insurance scheme, the court would dismiss an employees' social insurance claims regarding the employer's failure to pay social insurance, or in relation to incorrect contribution amounts. Instead, such claims should be brought before the labor administration bureau. However, the Draft Minutes are unclear as to whether the courts should accept employee claims for damages / losses as a result of under-payments (such as loss of pension or out-of-pocket medical expenses, etc.).

Key take-away points

The Draft Minutes may provide clearer guidance on important labor controversies that often appear before the courts. However, no clear indication has been given regarding when the finalized meeting minutes will be issued.

The Baker & McKenzie team can be reached through: Jonathan.Isaacs@bakermckenzie.com

US: New overtime pay limits



Dan Yager of HR Policy writes: Though it will not be formally announced by the President until Thursday, the Labor Department has issued the details of the proposed expansion of FLSA overtime, which would increase the minimum salary for a "white collar" exemption from **the current \$455 per week (\$23,660 per year)** to "the standard salary level equal to the 40th percentile of earnings for full-time salaried workers," which will be annually

indexed in the future.

(For more information, see link to DOL website below.) Assuming the final rule is issued sometime in late 2016, DOL estimates this will be **\$970 per week (\$50,440 per year)**.

Notably, the proposed rule does not impose any changes to the "duties" test for the exemption but instead is seeking comments from the public on potential changes. This is a surprise, as it had been expected that the Department would propose establishing a maximum percentage of the amount of time an exempt employee could spend performing non-exempt duties before she or he would lose the exemption.

It is still highly likely that such a requirement could be included in the final rule.

Dol information on proposed rule: www.dol.gov/whd/overtime/NPRM2015/

THE BEERG AGENDA:

Briefing on New Irish Collective Bargaining Law: 0900h on Wednesday July 8th Dublin
BEERG members have been invited to attend a briefing organised by the Dublin office of the Law Firm Byrne Wallace on the proposed new collective bargaining legislation in Ireland. The briefing will run from 0830am to 1130am (Coffee available from 8am) at *ByrneWallace's* offices at Harcourt St, Dublin 2. To book a place email: derek.mooney@beerg.com

BEERG Briefing: Developments in French Labour Law: Sept 25 Jones Day Office, Paris
BEERG in conjunction with our colleagues in Jones Day are holding a Briefing on developments in French labour law at Jones Day's Paris offices at 2 Rue Saint-Florentin, 75001 Paris. Full details will be published shortly. For more information contact: Neville.turner@beerg.com

BEERG MEETING: Bloom Hotel, Rue Royale, Brussels: Oct 7 & 8, 2015
We are now planning our October BEERG meeting, which will be held in Brussels. We hope to have a draft agenda for this meeting before the summer break. We also plan to run a short AMEERG session in tandem with this meeting. To indicate your interest in attending this meeting and to receive a copy of the agenda, email: derek.mooney@beerg.com

BEERG Training Programme: Oct 21-23 Hotel Estela, Sitges, Barcelona, Spain
The BEERG flagship training program: *Managing Labour Relations in Europe* is designed to help labour relations practitioners from BEERG/HR Policy member companies develop an understanding of the "whys and how" of labour relations across Europe.

The number of places is limited to allow for a high level of dialogue and interaction between those attending and the program team. The program is also structured in such a way as to allow time for one-on-one discussions about issues in individual companies. For information or to book a place email: derek.mooney@beerg.com

BEERG Dates for your Diary (contact us for more information):

Date	Event	Venue
July 8th	Briefing on new Irish Collective Redundancy legislation	Byrne Wallace office Harcourt St, Dublin
August 11 & 12 25 & 26	APERG – Certification: <i>Managing Unionized Workforce & Collective Bargaining</i> http://www.aperq.asia/Content/documents/memberonly/MUWCB_2015_brochure.pdf	Honeywell (China) Shanghai, China
August 19 – 21	APERG - Certification: <i>LR Challenges in Asia Pacific</i> http://www.aperq.asia/Content/documents/memberonly/LRAP_2015_brochure.pdf	Raffles Town Club, 1 Plymouth Ave, Singapore
Sept 14 - 16	BEERG training program: <i>Understanding the Global Labor Challenge</i>	Ritz Carlton Hotel, Georgetown, Washington DC
Sept 17	Latin America Network group meeting	Washington DC
Sept 25	3rd Annual BEERG/Jones Day seminar on developments in French labour law	Jones Day Office, Paris
Oct 7 & 8	BEERG Members Meeting (with AMEERG Session on morning of Oct 7th)	Hotel Bloom, Brussels
Oct 21-23	BEERG flagship training program: <i>Managing Labour Relations in Europe</i>	Hotel Estela, Sitges, Barcelona, Spain