Organisation of Working Time Act – Opinion of the Advocate General *

In Case C-266-14 the Advocate General issued an important decision relating to peripatetic workers. That is to say workers who are not assigned to a fixed or habitual place of work. The Advocate General has held in the opinion that time spent travelling by an employee from home to the first customer designated by their employer and from the last customer designated by their employer to their home constitutes "working time" for the purposes of the EU Directive being Directive 2003/88/EC.

In the particular case technicians were employed by two undertakings to install and maintain security equipment in homes and in industrial and commercial premises located within an area assigned to them. These workers use a company vehicle in which they travel every day from their homes to the place where they are to carry out the installation or maintenance of security systems so as that they use the same vehicle to return home at the end of the day. The technicians are also required to travel at least once a week to the offices of a transport logistics company near where they live to pick up equipment, parts and material needed for their work.

The Advocate General has stated at paragraph 31;

"The definition of "Working Time" for the purposes of point (1) of Article 2 of Directive 2003/88 is based on three criteria which in light of the case law of the Court it appears necessary to regard as cumulative
(i) a spatial criterion (to be at the workplace);
(ii) an authority criteria (to be at the disposal of the employer); and
(iii) A professional criterion (to be carrying out his activity of duties)."

The Advocate General has stated

"To my mind, the failure to take into account as "Working Time", within the meaning of point 1(1) of Article 2 of Directive 2003/88, the time which peripatetic workers spend travelling from home to the first customer designated by their employer and from the last customer designated by their employer to their home is contrary to that Directive, in so far as, in the case of that category of worker the three criteria referred to in the definition laid down in that provision are met".

[The Advocate General stated at paragraph 41

"Being at the disposal of one's employer is to be in a legal situation characterised by the fact that the worker is subject to the instruction and organisational power of the employer, irrespective of where the worker is. In other words it is a question of the time during which the worker is legally obliged to obey the instructions of his employer and carry out his activity for that employer."

The Advocate General went on to state:

"Where peripatetic workers travel from home to their first customer and from their last customer to their homes they are not outside the scope of their employer's management powers. The travelling is done in the context of the hierarchical relationship which links them to their employer." An interesting issue was raised in the case, namely that fear was expressed that workers would take advantage of the journey at the beginning and the end of the day to carry out their personal business. The Advocate General stated that this fear is not sufficient to alter the legal nature of the journey time. The Advocate General stated it is up to the employer to put in place the necessary monitoring procedures to avoid any abuse. The Advocate General stated that whatever the administrative burden the operation of such monitoring involved for the employer is, it is the counterpart of the latter's choice to abolish a fixed place of work.

This is an extremely important opinion of the Advocate General. The full decision of the Court must be awaited but it is unusual that the Court would not follow the Decision of the Advocate General.

On the assumption that the ECJ will follow the view expressed by the Advocate General then this ruling will have a significant impact on the working hours of employees. For example: a van driver who will load his or her vehicle in the evening and will travel home with the vehicle so as to depart in the morning to the first delivery point, will now be held to be working during the travel-time home in the evening and the travel-time from home to their first delivery point in the morning. This is because the employer will determine that this is how the work is to be organised and that while the employee is travelling home in the evening the employer will thus in effect be able to stipulate that the employee must do so by the most direct route, thus it is not time that the employee can dispose of as they wish.

The ruling will have a significant impact on those who are sales persons travelling from their homes to the first customer in the morning and back home in the evening.

It will be interesting to see how this decision will be squared with the National Minimum Wage Act. Section 8 of the National Minimum Wage Act excludes from the calculation of working time any time spent travelling from a residence to a workplace. There are two ways in which this can be dealt with.

The first is that Section 8 of the National Minimum Wage Act will be construed as applying where an employee travels from their residence to a fixed place of work only. The second is that it will apply in a situation covered by the recent opinion of the Advocate General in which case for those of us dealing with employment law we could have a situation where an employee, for the purposes of a claim under the Organisation of Working Time Act, is working over 48 hours a week but, for the purposes of the National Minimum Wage Act could be working less than 48 hours per week. Clearly this is an issue which is going to be litigated upon at some stage and it will be interesting to see how these cases develop.

***In contentious cases a Solicitor may not charge fees or expenses as a percentage or proportion of any award or settlement.**