



Do flexible working arrangements breach Working Time Regulations?

By **Dónall Breen** - 30 August 2018

The short answer is no, but the catchy title merits a closer look at this topical issue.

In a widely reported case last month, an Irish employment tribunal fined an employer €7,500 for breaches of Ireland's Organisation of Working Time Act (broadly similar to the UK's Working Time Regulations). Briefly, the Irish legislation defines a rest period as any time that the employee is not working. Mandatory rest periods mean employees are entitled to 11 consecutive hours rest in any period of 24 hours (as is required here in the UK too).

The lady who brought the case was a business executive for a major Irish company. She claimed she was regularly required to check work emails outside of business hours, often after midnight and on weekends. Over the relevant reference period, the Workplace Relations Commission (the Irish equivalent of the Employment Tribunal) found she was not getting her required rest periods and was also working in excess of the maximum 48 hour working week. A key factor in the case was the employer's lack of adequate time records to refute the clear evidence of the employee.

This Irish employee's case is not an unusual one for many businesses. Although sometimes the reason for unusual working hours is down to sheer volume of work, more often companies simply don't care when employees are working as long as they hit deadlines. Early birds and night owls both get to have their way. Work can be paused until the children are in bed and resumed when the house is quiet. It's flexible working and it's here to stay. With only 6% of UK workers now clocking in for a '9-to-5', the popularity with both employers and employees is clear.

However, this case from Ireland is not an isolated incident of flexible working clashing head on with working time rules. A French company was ordered to pay a former employee €60,000 for failing to respect his right to 'switch off' after work (brought under the country's new right to disconnect law). In that case, although the company did not consider the employee contactable afterhours, the court ruled that the employee was on call because his contact details were listed as someone to be contacted in an emergency.

Here in the UK, a recent survey revealed that a third of employees were feeling that they could not switch off in their personal time with 40% checking their work mobile or emails at least five times a day outside of work hours. With these figures highlighting the scale of employee engagement outside of traditional office hours, it is only a matter of time before similar cases come to the UK courts.

So, what can employers do? There is no masking the tension between strict working time rules and increasingly flexible work practices. Can you have a flexible working arrangement and not fall foul of the law? The answer is certainly a yes, but some foresight and procedure is required.

Unusual behaviour should be monitored. Even as flexible working blurs the line between personal and work time, managers should watch for 'red flags' such as calls/emails at unusual hours or the early signs of burnout. Usually these types of cases only arise after an employee falls ill due to overwork. Dealing with the underlying cause will be more effective than treating the symptoms.

Although the UK doesn't have a 'right to switch off' law like France, managers should consider reminding employees that they are entitled to their down time. In turn, employers should be aware of their working time obligations and facilitate compliance with them, such as permitting employees fixed 'uncontactable' hours. Flexible working should also mean employees can maintain normal working hours if they please.

The thought of rolling back on flexible working is unpalatable for most. From a commercial perspective, the advantages of workers being able to flexibly respond to the company's needs far outweighs the risk of breaching rules on working time. Therefore HR departments need to carefully consider what they can do to monitor and respond to overworked employees rather than throwing the baby out with the bathwater.