

Travel time as working time: *Tyco*, the unitary model and the route to casualization

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1. Introduction

As casualization strategies have proliferated in the wake of the global crisis, techniques to exclude discrete time-periods from the working day are increasingly being devised. Vulnerable periods are targeted and configured as regulatory no-man's lands that encircle disjointed episodes of protected work. Travel time is one such disputed site. These periods are especially fraught at the lower end of the labour market, perhaps most prominently in the signs of unacceptably widespread non-payment of travel time in the home care sector.¹

Such temporal fragmentation strategies are beginning to be tested before the courts.² In the recent *Tyco* judgment, the Court of Justice of the European Union (CJEU) for the first time addressed the status of travel time under the Working Time Directive (WTD).³ In doing so, the Court reasserted a unitary model of working time and stressed that this model can embrace travel periods. It also identified remuneration as the plane on which temporal fragmentation of jobs can be reconciled with the EU legal order. The judgement in *Tyco* therefore offers an opportunity to reflect on the evolving role of legal regulation in structuring the temporal dimension of casualization.

2. Home-client travel of peripatetic workers and the WTD

*Tyco (Federación de Servicios Privados del sindicato Comisiones obreras (CC.OO.) v Tyco Integrated Security SL)*⁴ concerned the travel time of peripatetic workers, with no fixed or habitual workplace. At issue were the periods in which these workers travelled between their homes and their first and last clients of the day. The workers – employed by two related Spanish security firms – installed and maintained domestic and commercial security systems. Their journeys were within assigned geographical areas that consisted of all or part of a province, sometimes more than one. The technicians used a company vehicle to travel from their homes to the premises of their first and last clients each day. The distances varied but were often substantial, sometimes more than 100 km.

Tyco had closed its regional offices in 2011 and attached all of its employees to the central office in Madrid. Prior to the centralisation, the company had regarded as working time travel from a regional office to the first and last customers of the day. Subsequently, travel between clients during the working day was recognised as working time while home-client travel was not. These arrangements

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¹ See, for example, Her Majesty's Revenue and Customs (UK) *National Minimum Wage Compliance in the Social Care Sector* (November 2013) available at <https://www.gov.uk/government/publications/national-minimum-wage-compliance-in-the-social-care-sector> (accessed 2 November 2015). See also Committee of Public Accounts *Adult Social Care in England* (HC 2014-15, 518) 15; National Audit Office *Adult Social Care in England: Overview* (HC 2013-14, 1102) 42. On the legal regulation of working conditions in care work more broadly, see Sara Charlesworth 'Decent Working Conditions for Care Workers? The Intersections of Employment Regulation, the Funding Market and Gender Norms' (2012) 25 *Australian Journal of Labour Law* 107-129.

² e.g. *Whittlestone v BJP Home Support Ltd* [2014] ICR 275.

³ Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time [2003] OJ L299/9.

⁴ Case C-266/14, Judgment of 10 September 2015, nyr.

were adjudged by the referring court, the *Audiencia Nacional* (National High Court), to be consistent with the Spanish *Workers' Statute*.⁵

The question referred to the CJEU was whether the bookend travel periods of these peripatetic workers qualified as “working time” within the definition of Article 2(1) of the WTD: “any period during which the worker is working, at the employer’s disposal and carrying out his activity or duties, in accordance with national laws and/or practice.” If so, the travel periods would count towards the Directive’s mandates on weekly hours,⁶ daily⁷ and weekly⁸ rest periods, rest breaks⁹ and night work.¹⁰ If not, they would be categorised as an element of the Directive’s only other temporal category, the ‘rest period,’ defined as ‘any period which is not working time.’¹¹

3. ‘Working time’ in *Tyco*: the unitary model sustained

Tyco is the sequel to the protracted skirmish over the legal classification of working hours in on-call work that began at the turn of the century.¹² In this line of cases – *SIMAP* (2000),¹³ *Jaeger* (2003),¹⁴ *Dellas* (2005),¹⁵ *Vorel* (2007)¹⁶ and *Grigore* (2011)¹⁷ – the CJEU encountered the repeated contention that on-call hours should be excluded from the WTD’s definition. In response, the Court upheld a unitary conception of working time. This model embraces the expanse of activities that comprise any job, periods of activity and also episodes of availability during which the employee is at the disposal of the employer, such as on-call hours spent at the workplace.¹⁸

In *Tyco*, the Court extended this analysis into the novel terrain of travel time. It held that the travel periods at issue met the three criteria of the WTD’s conception of working time. In doing so, the

⁵ Royal Legislative Decree No 1/1995 approving the amended text of the Law on the Workers’ Statute (*Real Decreto Legislativo 1/1995, por el que se aprueba el texto refundido de la Ley del Estatuto de los Trabajadores*) of 24 March 1995 (BOE No. 75 of 29 March 1995, p. 965), Article 34.

⁶ Article 6.

⁷ Article 3.

⁸ Article 5.

⁹ Article 4.

¹⁰ Articles 8-12.

¹¹ Article 2(2).

¹² See J. Fairhurst ‘SIMAP- Interpreting the Working Time Directive’ (2001) 30 *Industrial Law Journal* 236-243; J. Kenner ‘Re-evaluating the Concept of Working Time: An Analysis of Recent Case Law’ (2004) 35 *Industrial Relations Journal* 588-602; D. McCann ‘The Role of Work/Family Discourse in Strengthening Traditional Working Time Laws: Some Lessons From the On-Call Work Debate’ (2005) *Law in Context* 127-147; Tobias Nowak ‘The Working Time Directive and the European Court of Justice’ (2008) 15 *Maastricht Journal of European and Comparative Law* 447-471.

¹³ Case C-303/98 *Sindacato de Médicos de Aisstencia Pública (SIMAP) v Conselleria de Sanidad y Consumo de la Generalidad Valenciana* [2000] ECR I-7963.

¹⁴ Case C-151/02 *Landeshauptstadt Kiel v Jaeger* [2003] ECR I-08389.

¹⁵ Case C-14/04 *Dellas and Others v Premier Ministre and Another* [2005] ECR I-10253.

¹⁶ Case C-437/05 *Jan Vorel v Nemocnice Gý Krumlov* [2007] ECR I-00331.

¹⁷ Case C-151/02 *Nicușor Grigore v Regia Națională a Pădurilor Romsilva – Direcția Silvică București* (2011) ECR I-00020.

¹⁸ *SIMAP*, note 13 above, para 52; *Jaeger*, note 14 above, paras 71, 75, 103; *Dellas*, note 15 above, para 46; *Vorel*, note 16 above, para 27; *Grigore*, note 17 above, para 53. On the unitary model, see D. McCann ‘New Frontiers of Regulation: Domestic Work, Working Conditions, and the Holistic Assessment of Nonstandard Work Norms’ (2012) 34 *Comparative Labor Law and Policy Journal* 167-192, 34(1) 167-192, 188; D. McCann and J. Murray ‘Prompting Formalisation Through Labour Market Regulation: A ‘Framed Flexibility’ Model for Domestic Work’ (2014) *Industrial Law Journal* 319-384, 342-343.

Court addressed each strand of the Article 2(1) definition and confirmed that the key tenets from the on-call jurisprudence are applicable to travel time.

With respect to criterion (1) (the worker is working), the Court addressed the distinctive spatial dimension of travel time. It concluded that the workers' place of work could not be reduced to the premises of the customers.¹⁹ Since the closure of Tyco's regional offices, the technicians did not have the ability freely to determine the distance between their homes and the locations at which they would start and finish the working day. In consequence, they should not bear the burden of the employer's reorganisation.²⁰

On (2) (the worker is at the disposal of the employer), the Court cited *Dellas*,²¹ *Vorel*²² and *Grigore*²³ to reiterate the 'decisive factor' that the worker is required to be physically present at a place determined by, and available to, the employer.²⁴ While driving, the technicians were unable to use their time freely or to pursue their own interests.²⁵ The contention by the UK and Spanish governments that the technicians could conduct personal business during travel periods was dismissed as irrelevant to the legal classification of travel time (the employer's interest in preventing any abuse is properly discharged through the use of monitoring procedures).²⁶

On criterion (3) (the worker is carrying out his activity or duties), the Court again rejected the 'productivity regulation' model of working time, which configures time-periods as amenable to regulation only when devoted to tasks deemed core to a job.²⁷ In the on-call cases it was argued that these 'inactive' periods did not constitute working time. In concluding that they did, the Court eschewed a bifurcated model that would permit the excising of on-call periods from the parameters of regulated work. Most emphatically, in *Dellas* the Court was explicit that neither the intensity of work nor the worker's output "are ... among the characteristic elements of the concept of 'working time' within the meaning of [the] Directive".²⁸ The classification as working time "follows solely from [the worker's] obligation to be at his employer's disposal."²⁹

This stance was sustained in *Tyco*. The CJEU dismissed the employer's contention that the technicians were not carrying out their "activity or duties" while travelling.³⁰ Instead, the Court configured travel time as an intrinsic element of the job:

[T]he journeys of the workers....is [sic] a necessary means of providing those workers' technical services to those customers. Not taking those journeys into account would enable an employer....to claim that only the time spent carrying out the activity of installing and maintaining the security systems falls within the concept of 'working time'.... which would distort that concept and jeopardise the objective of protecting the safety and health of workers.³¹

¹⁹ Para 43.

²⁰ Para 44.

²¹ N. 15 above, para 48.

²² N. 16 above, para 28.

²³ N. 17 above, para 63.

²⁴ Para 35.

²⁵ Paras 37, 39, citing *SIMAP*, note 13 above, para 50.

²⁶ Para 40.

²⁷ See further McCann and Murray, note 18 above, 340-344.

²⁸ Para 43.

²⁹ Para 58.

³⁰ Para 31.

³¹ Para 32.

The *Tyco* decision therefore clarified the classification of travel periods under the WTD. Home/client travel of peripatetic workers will generally be counted as working time. The Court's analysis can also be presumed to embrace most travel between assignments. The Court again confirmed that EU labour law hosts a health and safety model of working time regulation³² in which limits and rest periods are fundamental (and therefore universal) protections.³³ The *Tyco* judgment is therefore of immediate significance to European employers. It will prompt firms and organisations that employ peripatetic workers to ensure that their practices on home/client travel comply with the WTD. Travel that is poorly organised on the basis of risk-shifting to employees will be open to challenge. The decision therefore holds promise for workers in sectors - such as home care - in which travel time is contested (albeit that the decision's effects can be weakened in States and sectors, the UK among them, in which the weekly limit can be displaced by 'individual opt-out' agreements³⁴).

On broader trends towards temporal fragmentation and the feasible regulatory responses, the Court's robust elaboration of the unitary model's embrace of travel time, and in particular its expansive rendition of the components of a job, can be deployed in other contexts.³⁵ The rich conception of working time from the on-call cases can sustain a work/family-oriented conception of working time in which waged labour is regulated in part to curtail absence from family life.³⁶ The decision also signals how conventional labour law regimes can evolve to incorporate novel aspects of the contemporary realignment of employment, and in particular the transfer of elements of waged labour to the private sphere (the technicians in *Tyco* were sent their daily itineraries during evenings to an application installed on their phones).

4. Wage regulation: the boundary of the unitary model

In cementing the unitary model in European working time regulation, however, the CJEU simultaneously highlighted an alternative path towards casualization. In response to the contention of the UK government that to regulate home/client travel would inevitably increase costs, the Court reiterated its customary stance that the objectives of the WTD cannot be subordinated to purely economic considerations.³⁷ The Court observed, however, that "*Tyco* remains free to determine the remuneration for the time spent travelling between home and customers."³⁸ It further stressed that – with the exception of Article 7(1) on paid annual leave - the Directive regulates working time. Remuneration is the province of Member State law.³⁹

The Court was evoking a limit on the EU's competence: the exclusion of pay by Article 153(5) of the *Treaty on the Functioning of the European Union*. As the CJEU noted, this exclusion was alluded to in

³² *Tyco*, note 4 above, para 22, citing Case C-173/99 *R v Secretary of State for Trade and Industry, ex parte Broadcasting, Entertainment, Cinematographic and Theatre Union (BECTU)* [2001] ECR I-04881, paras 37-38; *Jaeger*, note 14 above, para 46; *Grigore*, note 17 above, para 40.

³³ *Tyco*, note 4 above, para 24, citing *Dellas*, note 15 above, para 49 and the case-law cited therein; *Grigore*, note 17 above, para 41.

³⁴ Working Time Directive, note 3 above, Article 22(1). It is also worth noting that workers in sectors in which travel time is contentious may be subject to the derogations permitted by Article 17.

³⁵ See also the Advocate General's valuable analysis of criterion (2) of Article 2(1) (the worker is at the disposal of the employer) as denoting a worker subordinate to the employer and subject to its instructions and organisational power, Opinion of AG Bot, paras 40-44, drawing on C Vigneau 'EuGH, 9.9.2003 (Fall *Jäger*) - Der Bereitschaftsdienst eines Arztes in einem Krankenhaus - Arbeitszeit oder Ruhezeit im Rahmen der Richtlinie 93/104/EG? French Case Note' (2005) 13(2) *European Review of Private Law* 219-224, in particular p 220.

³⁶ *Jaeger*, note 14 above, para 65. See further McCann 2005, note 12 above.

³⁷ Paras 40-41, recalling WTD, note 2 above, recital 4.

³⁸ *Tyco*, note 4 above, para 47.

³⁹ *Ibid.*, paras 48-49, citing *Dellas*, note 15 above, para 38; *Vorel* note 16 above, para 32; *Grigore* note 17 above, paras 81, 83.

the on-call decisions. Yet the regulatory strategy suggested in *Tyco* is of a different tenor. The most detailed treatment of wages in the on-call jurisprudence – in *Vorel* - invoked the limited scope of the WTD to envisage different wage rates for on-call and call-out periods⁴⁰:

[The Directive] does not prevent a Member State applying legislation on the remuneration of workers and concerning on-call duties performed by them at the workplace which makes a distinction between the treatment of periods in the course of which work is actually done and those during which no actual work is done, provided that such a system wholly guarantees the practical effect of the rights conferred on workers by the said directives in order to ensure the effective protection of the health and safety.⁴¹

In both *Tyco* and *Vorel*, then, the Court contemplated lower wage-rates for periods that met all of the conventional criteria of working time. Yet In *Vorel*, the goal was to distinguish episodes of inactivity (a strategy that is questionable in conception and tricky in design⁴²). In *Tyco*, in contrast, the Court had concluded that the travel period was not inactive: driving was among the workers' "activity or duties."⁴³ The CJEU was therefore envisaging lower wage-rates for wholly active periods of work. Further, the Court's analysis – albeit truncated – offered no principled justification that lower-wages should be confined to home-client travel, rather than to extend to all travel periods.

Narrowly, then, the Court signalled to domestic wage regimes that home/client travel time can be either unpaid, as is permitted under the UK National Minimum Wage framework,⁴⁴ or paid at a lower rate. More broadly, the Court highlighted that temporal bifurcation in wage regulation is a path to fragmentation that is compatible with the EU legal order.

The Court was indicating a brand of fragmentation increasingly familiar from a range of techniques that drain waged-time from the working day: 'zero hours' contracts, highly fragmented schedules,⁴⁵ non-compliance with legal requirements on travel time etc.⁴⁶ Given these trends, a better approach is to sustain the unitary model through regulatory frameworks that count working hours as working time for all purposes, including remuneration.⁴⁷ This 'reconstructive labour law' strategy mitigates against spiralling fragmentation by configuring the role of contemporary legal regulation as sustaining and constructing coherent and protective working relationships.⁴⁸ It also regulates for

⁴⁰ Para 35. See also *Grigore* note 17 above, paras 80-84.

⁴¹ Para 35.

⁴² On the complexities of classifying active and inactive time, see N. Le Feuvre (2000) *Employment, Family and Community Activities: A New Balance for Men and Women; Summary of the French National Report* (Dublin: European Foundation for the Improvement of Living and Working Conditions, 2000), 59-60.

⁴³ Paras 33-34.

⁴⁴ National Minimum Wage Regulations 2015, SI 2015/261, reg 34 (1). On working time under the UK National Minimum Wage regime, see L Rodgers 'The Notion of Working Time' (2009) 38(1) *Industrial Law Journal* 80-88.

⁴⁵ On casualization as both temporal and contractual, see Murray and McCann, note 18 above, 348. See also B Burchell and A Wood 'Zero Hours Employment: A New Temporality of Capitalism?' (16 September 2015) available at <http://councilforeuropeanstudies.org/critcom/zero-hours-employment-a-new-temporality-of-capitalism/> (accessed 2 November 2015).

⁴⁶ On strategies to eliminate 'slack time' from the working day, see further H. Beynon, D. Grimshaw, J. Rubery and K. Ward *Managing Employment Change: The New Realities of Work* Oxford: Oxford University Press 219-222..

⁴⁷ For a model, see McCann and Murray, note 18 above, and the *Model Law on Working Time in Domestic Work* available at <https://www.dur.ac.uk/resources/law/ModelLawonWorkingTimeinDomesticWorkRev.pdf> (accessed 2 November 2015).

⁴⁸ On reconstructive labour law, see McCann and Murray, note 18 above, 348.

work/family by constraining and appropriately remunerating periods that workers spend apart from their families or from other dimensions of their lives.⁴⁹

5. Conclusion

Travel time has become an increasingly contested site of contemporary working life, most prominently in vulnerable segments of the labour market. In *Tyco*, the CJEU clarified that the home/client travel time of peripatetic workers, and by extension most travel periods, constitutes working time under the EU Working Time Directive. It thereby further entrenched the unitary model of working time that was refined in the line of on-call work cases triggered by the Court's 2000 *SIMAP* judgment. While staunchly upholding unitary regulation in working time, however, the Court highlighted that bifurcation of working hours in wage regulation is reconcilable with EU law. This stance aligns with a range of related and evolving strategies in the temporal organization of work in European economies, all of which tend towards excising elements of the remunerated working day. In contrast, regulatory models that embed an expansive conception of working hours across both working time and wage regimes are a crucial element of broader strategies to constrain temporal fragmentation.

⁴⁹ McCann 2005, note 12 above.