

Employment focus: Give me a break

What is the statutory minimum entitlement to rest breaks during working hours in Gibraltar?

The issue is not as trivial as it might initially seem. Private-sector employers in Gibraltar are occasionally faced with assertions from employees that a certain number or pattern of breaks is a legal requirement, most likely because the workforce agreements and practices of the public sector are so deeply embedded in the popular consciousness. Rest breaks can be a delicate matter of industrial relations.

What does statute say about rest breaks?

The only statutory provision for rest breaks during working hours (which include lunch, dinner, tea and smoking breaks) is section 10 of the Working Time Ordinance ("WTO"). As the name

suggests, this implements the EC Working Time Directive in Gibraltar.

How many breaks am I required to give my employees?

Workers aged 18 and over are entitled to a rest break if their daily working time is more than six hours. Employees who are younger than that are entitled to a rest if they work more than four hours. In either case, then, the minimum entitlement is to one rest break during working hours.

Naturally, an employer can allow employees to take more than one break - but here we are talking about the minimum entitlement under statute. The contract of employment and collective or workforce agreements can be more generous.

How long must that break be?

In the absence of a collective or workforce agreement which stipulates the details of the rest period, the rest break must be for an uninterrupted period of at least 20 minutes. Employees aged under 18 get a minimum of 30 minutes. If there is a collective or workforce agreement, then the break should be for whatever length was agreed.

What about tea breaks, smoking breaks and so on?

Unless the contract of employment or a collective or workforce agreement makes provision for these, there is no obligation on Gibraltar employers to allow these types of break provided that the minimum rest break is permitted.

In other words, the absolute minimum is one 20-minute break (30, for those aged under 18) during a normal working day: and that's it.

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Advantages of mediation

Mediation is fast becoming the most exciting and effective means of resolving disputes out of court and achieving a settlement in disputes. Alternative Dispute Resolution (ADR) must now, more than ever, be considered by parties before embarking on litigation. The Civil Procedure Rules 41st amendment (April 2006) states as follows:

"The Courts take the view that litigation should be a last resort, and that claims should not be issued prematurely when a settlement is still being actively explored. Parties are warned that if the protocol is not followed (including this paragraph) then the Court must have regard to such conduct when determining costs"

There are many advantages to mediation over litigation. Exploring a settlement through mediation should be seen as an opportunity, rather than an obligation. The following list sets out some of those advantages:

1. Mediation provides an opportunity for the parties to have input in the final result. This should be contrasted with litigation, where the judge makes the final decision.
2. Any decision emerging from mediation and reached by participation is likelier to be more durable than one which is imposed.
3. Mediation meetings provide a less formal atmosphere and more of a chance for the parties to speak freely to each other. In litigation, parties are only able to answer questions that are put to them whereas in mediation, parties are able to have a frank discussion usually enabling parties to better understand the other person's point of view.
4. Saving on time and money. Even successful litigants often feel aggrieved about the cost of litigation and the amount of time which

needs to be spent preparing for a case.

5. Achieving a settlement often leads to a preservation of a relationship. This is usually not possible after litigation where parties usually end up resentful, bitter and angry. In some cases, disputants in a mediation are not only able to find a solution to the problem before them but are able to identify ways of improving their relationship, either commercially or personally.
6. Producing a "win-win" solution rather than having a situation imposed on them where there is a winner and loser.
7. Mediation provides confidentiality. With litigation, parties usually have to "air their dirty laundry" in public.
8. Parties are able to choose their own mediator.

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New partner in litigation team

Nicholas Howard who joined Hassans' Litigation Department in February 2003 was made a partner in July 2006.

Nicholas qualified in 1998 and enjoys a varied litigation practice. He has extensive experience in international commercial litigation and arbitration, general company/commercial disputes and contentious shareholder disputes including minority shareholders' rights.



Judiciary 2006

Supreme Court

Chief Justice
Additional Judge

The Hon. Mr Justice Schofield
The Hon. Mr Justice Dudley

Court of Appeal

President
Justices of Appeal

Sir Christopher Staughton, JA
Sir Murray Stuart Smith
Sir Philip Otton
Sir William Aldous
Sir Paul Kennedy, JJA

Magistrates Court

Stipendiary Magistrate & Coroner Mr Charles Pitto

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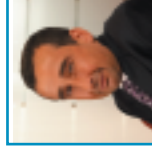
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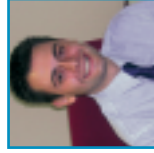
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Developments in Insolvency Law

Following the invitation to join the **International Insolvency Institute**, David Dumas QC, our senior litigation partner and head of the insolvency team, travelled to New York last month to attend the Institute's Sixth Annual Conference. As the name suggests, the **III** is a worldwide organisation the aims of which are to enhance and promote fair and effective international insolvency systems and procedures. It has a limited membership comprised of leading insolvency professionals, judges, academics and insolvency regulators from over 50 different countries.

The Conference covered a very wide range of topics, from contributions on developments and trends in Asian insolvencies and presentations on new Mexican insolvency laws through to the annual review of transnational insolvency cases and an appraisal of an all-encompassing assessment aptly entitled "The Changing Landscape of European Insolvency".

Of all the topics covered, perhaps the most significant ones were those concerning the continuing developments that are taking place, both statutorily and on a case-by-case basis, in the sphere of cross-border insolvencies. These developments can be said to have been spearheaded by the work carried out by the United Nations Commission on International Trade Law and INSOL International which resulted in the UNCITRAL

Model Law on Cross-border Insolvency, adopted in 1997. The intention was to provide a harmonised approach towards cross-border insolvencies, given growing markets with no frontiers. It was also felt necessary for courts and officeholders in the different jurisdictions to co-operate and mutually recognise judgments of each other's courts.

Within the European Union (excluding Denmark) much the same objectives gave birth to **Council Regulation (EC) No. 1346/2000 on Insolvency Proceedings**.

The Regulation covers individual and corporate insolvency and has been part of Gibraltar law since UK adopted it in April 2005. It should be of great interest to those local enterprises who transact business in Europe regularly, especially in Spain, which is only next door and is also subject to the Regulation. The UK enacted the Model Law as part of the Cross-Border Insolvency Regulations 2006 with effect from 4th April 2006. No steps have been taken locally to adopt the Model Law but this article addresses its aims and some of its provisions because of their affinity to the Regulation.

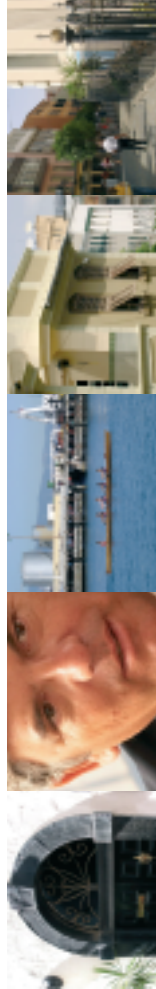
For its part, the US has its own cross-border code built on practically the same principles and containing

similar provisions, in the form of Chapter 15.

The common aim of these enactments, therefore, has been to provide universal rules to be applied where insolvencies have arisen which may involve assets or creditors, as well as



location of debtor's interests, in more than one state. By providing for harmonisation in the key ways described below, it is far more likely that enterprises and their creditors can transact with a greater degree of clarity as to their legal rights in the event of insolvency. It has even been said that this would result in greater market stability, a stronger global economy with stronger companies and more jobs being saved.



The underlying principles are those of unity and universality. Therefore the Model Law and the Regulation provide for the bringing of main proceedings in the country where the company's centre of main interests, the "COMI", (basically, where it conducts its administration from) is situated and for the law of that country to apply to the liquidation and for that liquidator to have the overall control of the insolvency process. Earlier on this year, the ECJ ruled on the COMI of Eurofood, Parmalat's Irish unit. It was held that the liquidation of Eurofood should be carried out under Irish law, despite the fact that the parent company was based in Italy.

Hand in hand with the above principles goes the concept of non-discrimination of foreign creditors to be treated as local creditors since all the company's assets are to be brought together within a single liquidation.

However, the opposite principle to universality, that of territoriality, has not been lost altogether. It is expressed through the concept of territorial proceedings which may be independent, if started before the main proceedings, or secondary, if after. Essentially these can only be started if the company has an establishment there (a "non-transitory economic activity with human means and goods") under the Regulation or, under the Model Law, if it has assets there. In either case, the

proceedings will be limited to the assets within that country. There are requirements for officeholders in both countries to cooperate with each other and exchange information to assist each other.

The key universalist elements are:

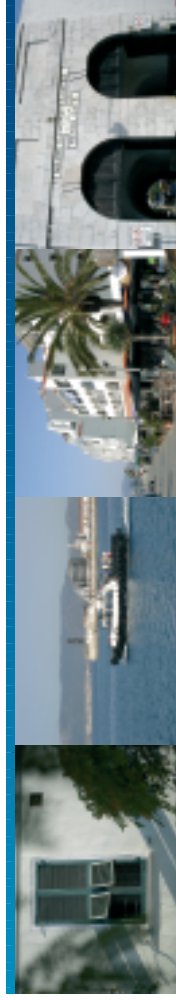
1. The concept of main proceedings taking place in the country where the company has its COMI.
2. The application of the law of that country to govern the effects of the opening of those proceedings.
3. Recognition in other countries of the judgments of the court where the main proceedings were opened.
4. Overall control of the insolvency process by the liquidator in the main proceedings.
5. Treating all the debtors' assets worldwide as comprising the assets under the control of and to be disposed of by the liquidator.
6. Local courts to assist in the recov-

ery of assets and pursuit of claims.

The Regulation sets out the exceptional grounds on which a member state shall be entitled to disregard a judgment of a court of another member state. It can do so where the latter has assumed jurisdiction despite an express finding that the debtor's COMI is not situate within that state. Also, a member state can refuse to recognise insolvency proceedings opened in another member state or enforce a judgment of that other state if the recognition or enforcement would be contrary to its public policy or principles or constitutional rights and the liberties of an individual. This latter ground for refusal also exists in the Model Law. An example of this can be where an interested party was not given notice of the proceedings or was otherwise prevented from taking part in them.

Finally, banks and other lending institutions will be pleased to learn that, where loans are made to and security taken from companies doing business within the EU, the opening of insolvency proceedings to which the Regulation apply shall not affect rights in rem of creditors in respect of company's assets in other member states. This covers rights created by fixed charges and mortgages. The definition is drafted in terms that could be interpreted more liberally insofar as it is subject to the applicable law. There are, however, a number of other aspects of financial and security transactions (as well as difficulties regarding due diligence) which are likely to be affected by the Regulation and which financial institutions would be well advised to consider carefully. That is a development that is certainly worth keeping track of and no doubt decisions of the ECJ will provide further clarity.

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Should fiduciaries disgorge all profits made in breach of fiduciary duty?

In 1997, Mr Al-Saraj convinced Aysha and Layla Murad to enter into a joint venture under which a hotel would be bought and run. The hotel was owned through a Gibraltar company, Danescroft Properties Limited, which was represented by Hassans. Mr Al-Saraj represented to the Murads that he would contribute £500,000 towards the hotel's purchase price. This was not in fact the case and the £500,000 which he purported to contribute was largely made up of a secret commission that the hotel's vendor agreed to pay him.

The hotel was later sold at a profit and the parties disagreed as to how the proceeds should be distributed. The Murads sued Mr Al-Saraj for breach of fiduciary duty.

Applying what has been the policy of the courts of equity for centuries, the Court of Appeal (Murad v Al-Saraj [2005] EWCA Civ 959) held that Mr

Al-Saraj was not entitled to a share of the venture's profits. Further, an allowance which had been granted to him at first instance by Mr Justice Etherton was held to be too generous.

The majority of the Court of Appeal took an orthodox approach and held that a fiduciary who makes a profit as a result of a breach of his fiduciary duties must disgorge the entirety of that profit save for a modest allowance. Interesting, though, comments were also made to the effect that a less inflexible rule might sometimes be appropriate. Arden LJ said:

"It may be that the time has come when the court should revisit the operation of the inflexible rule of equity in harsh circumstances, as where the trustee has acted in perfectly good faith and without any deception or concealment, and in the best interests of the beneficiary. I need say only this: it would not be in

the least impossible for a court in a future case, to determine as a question of fact whether the beneficiary would not have wanted to exploit the profit himself, or would have wanted the trustee to have acted other than in the way that the trustee in fact did act."



It will be interesting to see how this area of the law develops and whether the no-profit rule is in fact relaxed in due course.

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Constitutional changes

There are currently political negotiations regarding the possibility of a new Constitution for Gibraltar. The draft Constitution which is currently posted on the Government's website includes the following section which is absent from the current Constitution:

Protection for privacy of home and other property
7.-(1) Every person has the right to respect for his private and family life, his home and his correspondence.

The inclusion of this subsection could have a significant impact on Gibraltar law, in much the same way as a simi-

larly worded section in the Human Rights Act 1998 has had on English law. For example, shortly after the Human Rights Act came into force in England & Wales, the English courts held that a gay man had the same rights as a spouse or a cohabitee of the opposite sex to a take over a dead partner's tenancy.

The inclusion of this right will not only impose negative duties (to refrain from interfering with private and family life), but also positive duties, i.e. encouraging and promoting an individual's private and family life.

There have been at least 2 signifi-

cant decisions concerning this right in the English courts this year. In one, it was held that to take action that threatened to prevent a homosexual person from leading a normal life would plainly fail to respect his or her private life. In another, a local authority was allowed to repossess a defendant's home, despite the defendant's insistence that this would involve a breach of his right to respect for his home.

It will be very interesting to see how Gibraltar law will develop as a result of the intended addition to our Constitution.

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Landmark ruling in divorce case

The recent House of Lord's decision of Miller v Miller [2006] UKHL 24 is the latest to deal with the division of financial assets when parties divorce. The case concerned the divorce of millionaire fund manager Alan Miller and the basis on which his £17 million-plus fortune should be divided after the marriage with ex-wife Melissa broke down after less than 3 years. Although the case involved the distribution of large

this in mind the judgement in Miller made several observations, which can be highlighted as follows:

- No discrimination should be made between the parties because of the roles they adopted during the marriage nor between the respective roles of money earner v home maker/child carer;



assets, it highlighted several general principles which the court should take into account in the distribution of assets in divorce cases.

When dividing assets in matrimonial cases the courts strive to achieve fairness between the parties. Fairness does not necessarily mean a 50/50 division and the courts must try to reach a decision that is fair in all the circumstances by looking to the facts of each particular case and applying the factors set down by statute. With

seen as a whole but this does not prevent a judge from treating different property in a different way and so the source of the property may be a factor that plays in its division. However, as time passes and interdependence grows it becomes harder to disentangle where assets came from;

- Conduct should only be taken into account where it is obvious and gross. The husband's conduct in leaving the wife for his new partner was not in this case sufficiently gross to be taken into account;
- Periodical payments need not only be used for maintenance but could also provide the compensation element where there is not enough capital to do so. Where this is done an order lasting for joint lives is more appropriate to place the burden on the payer to apply and prove that they should stop paying;
- Where one of the parties receives financial relief in the form of periodical payments they are expected to use the maintenance part sensibly. However, if part of the award is for compensation they can use this as they wish.

The impact of Miller will be mainly in cases involving large assets. It is believed that as a result of this case, couples will consider entering into pre-nuptial and even post-nuptial agreements. Although these are not binding on the courts in either the UK or in Gibraltar, they show the intentions of the parties and may be highly persuasive, especially in cases where there are no children.

- The parties' financial resources are

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